

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS  
OPERATIONS, INC.

Respondent,

-and-

Docket No. CO-H-90-159

NEW JERSEY STATE COUNCIL,  
AMALGAMATED TRANSIT UNION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the New Jersey State Council, Amalgamated Transit Union against New Jersey Transit Bus Operations, Inc. The charge alleged that NJ Transit violated the New Jersey Employer-Employee Relations Act by adopting a drug testing policy without first negotiating with the ATU. The Commission finds that given the Legislature's intention that NJ Transit secure federal funding, and given the substantial amount of funding involved, NJ Transit's decision to comply with Federal regulations in implementing random and unannounced drug testing for safety-sensitive employees was not mandatorily negotiable and did not violate the Act. Loss of federal funding would have significantly interfered with the determination of governmental policy.

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NEW JERSEY STATE COUNCIL,  
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Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General  
(David S. Griffiths, Deputy Attorney General)

For the Charging Party, Weitzman & Weitzman, P.A., attorneys  
(Richard P. Weitzman, of counsel)

DECISION AND ORDER

On December 5, 1989, the New Jersey State Council, Amalgamated Transit Union ("ATU") filed an unfair practice charge against New Jersey Transit Bus Operations, Inc. ("NJ Transit"). The charge alleges that on or about November 28, 1989, NJ Transit violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), and (5), <sup>1/</sup> by adopting a "comprehensive drug testing policy" without

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<sup>1/</sup> 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

first negotiating with the ATU. The charge also alleged that NJ Transit intended to implement the policy on December 21, 1989.

On January 9, 1990, a Complaint and Notice of Hearing issued. On March 20, NJ Transit filed an Answer asserting that the drug policy contained no substantial changes in terms and conditions of employment; negotiations on the subject "would significantly interfere with the exercise of managerial prerogative"; the terms and conditions were "required to be adopted"; and negotiations had occurred, leaving the charge moot.

On March 20 and 21 and April 4, 20, and 30, 1990, Hearing Examiner Jonathon Roth conducted a hearing. The parties stipulated facts, examined witnesses and introduced exhibits. Post-hearing briefs were filed by July 26, 1990.

On April 11, 1991, the Hearing Examiner issued his report and recommendations. H.E. No. 91-36, 17 NJPER 263 (¶22123 1991). He found that NJ Transit violated the Act when it refused to negotiate with ATU concerning a comprehensive drug testing policy which includes random unannounced drug testing of safety-sensitive employees. He recommended that NJ Transit be ordered to rescind mandatorily negotiable portions of the policy.

On May 9, 1991, after an extension of time, NJ Transit filed exceptions, requested oral argument and moved to reopen the record. It also incorporated its post-hearing brief. On May 17, NJ Transit supplemented its exceptions. On May 22, ATU filed its post-hearing brief as its reply to NJ Transit's exceptions and also

requested interim relief. On May 23, interim relief was denied. On September 30, we denied NJ Transit's motion to supplement the record but scheduled oral argument for November 25. On November 6, we granted NJ Transit's request for leave to file a supplementary brief addressing the impact of In re NJ Transit Bus Operations, Inc., 125 N.J. 41 (1991). That decision changed the scope of negotiations applicable to NJ Transit. Oral argument was held on January 30, 1992. On February 7, NJ Transit filed a letter giving citations to two cases mentioned in oral argument and responding to statements and questions raised during argument. On February 13, ATU filed a response to NJ Transit's letter.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-23) are generally accurate. We incorporate them with these changes and additions.

We modify finding no. 20 to indicate that Edward F. Butler, NJ Transit's deputy general manager of legal affairs and labor relations, conceded that he did not offer ATU the opportunity to appear before the committee of NJ Transit that was formulating the new alcohol and drug testing policy (2T68). The referenced testimony does not indicate that ATU was precluded from presenting its views in other forums.

Finding no. 22 accurately reflects Butler's testimony that he was not authorized to negotiate over the drug policy.

Finding no. 23 is modified to indicate that ATU filed its application for an injunction in the Superior Court, Law Division.

Finding no. 24 was correct in stating that a temporary waiver from compliance with regulations of the Urban Mass Transportation Administration ("UMTA") mandating drug and alcohol testing for recipients of UMTA aid could not extend beyond December 31, 1989. We add that a certification of compliance after a temporary waiver would have been due no later than 12 months after the expiration date of the waiver, i.e., December 31, 1990.

We modify finding no. 26 to indicate that ATU requested on February 5, 1990 that it be given some time to put together a proposal (1T81; 2T118). NJ Transit did not solicit a proposal from ATU.

We clarify finding no. 27 to indicate the ATU wanted to more clearly define the phrase "subject to duty" (3T8). Butler later indicated to ATU that the issue was not negotiable (3T11).

We clarify finding no. 28 to indicate that Butler believed that an employee with alcohol in his system would be disciplined under both the old and new policies. However he acknowledged, under a hypothetical presented to him, that an employee could be disciplined under the new policy and that there was some question as to whether the employee could be disciplined under the old policy (3T94).

NJ Transit suggests other factual findings that it believes should have been made. In addition, it contends the Hearing

Examiner reached some erroneous factual conclusions in his analysis. We will independently reach our legal conclusions and will comment on the Hearing Examiner's analysis to the extent necessary to decide this case.

On September 13, 1989, ATU's counsel requested that the union be afforded the opportunity to review any random drug testing program before implementation. On October 5, NJ Transit's vice-president and general manager responded that pursuant to UMTA regulations, NJ Transit intended to implement a random drug testing program by December 21, 1989 and intended to review the program with union representatives before implementation. On or about November 18, 1989, NJ Transit's deputy general manager of legal affairs and labor relations received a rough equivalent of the drug testing policy. He met with ATU officers a few days before November 28 to explain how the random testing was going to work. He was not authorized to negotiate regarding the drug testing policy. On November 28, the policy was adopted. On January 19, 1990, the Court of Appeals for the District of Columbia Circuit invalidated the relevant UMTA regulations. NJ Transit then discontinued random drug testing and met with ATU over the drug testing policy on at least five occasions.

On December 5, 1989, ATU filed this charge claiming that NJ Transit violated the Act by unilaterally adopting the comprehensive drug testing program effective December 21, 1989. At the hearing, the union rested based on the parties' stipulations and joint

exhibits. According to the union, the testimony of the respondent's witnesses as to purported negotiations which occurred after the UMTA regulations were invalidated was permitted over the objection of the union's counsel and for the limited purpose of determining the appropriate remedy should a violation be found (Brief at 4). Based on the charge and the union's representation in its brief, we consider only whether NJ Transit violated the Act when it unilaterally adopted the drug testing policy on November 28, 1989, effective December 21, 1989. Therefore, we will not judge whether the employer had an obligation to negotiate after the UMTA regulations were invalidated or whether the employer negotiated in good faith at that time.

When NJ Transit implemented the disputed drug testing program, the scope of negotiations for their bus employees was governed by Local 195, IFPTE v. State, 88 N.J. 393 (1982). On February 22, 1988, the Commission had issued an opinion finding that under N.J.S.A. 27:25-14d, matters intimately and directly affecting the work and welfare of NJ Transit's bus employees were mandatorily negotiable unless negotiations would block the employer's statutory mission to deliver bus service. P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988). The Appellate Division reversed, requiring application of the negotiability balancing test applicable to other public employees and articulated in Local 195. 233 N.J. Super. 173 (App. Div. 1989). The Supreme Court later reversed and restored the

statutory mission test. The Appellate Division's decision was in effect when NJ Transit instituted the disputed drug testing policy. Accordingly, we will apply the traditional public sector negotiability standards in judging the legality of the employer's actions in November and December 1989. Under Local 195:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

Drug testing intimately and directly affects employee work and welfare. Test results can affect whether an employee has a job.

We next inquire whether negotiated agreement on this issue would have significantly interfered with the determination of governmental policy. The Public Transportation Act of 1979 created New Jersey Transit Corporation. That act provides that the corporation:

may do all acts necessary and reasonably incident to carrying out the objectives of this act, including...[a]pply for, accept and expend money



from any federal, State, or municipal agency or instrumentality and from any private source; comply with federal statutes, rules and regulations, and qualify for and receive all forms of financial assistance available under federal law to assure the continuance of, or for the support or improvement of public transportation....  
[N.J.S.A. 27:25-5]

The Legislature intended that the corporation would use UMTA funds to purchase private transit companies and understood that the corporation would be required to abide by UMTA regulations as a condition of receiving funds. In re NJ Transit Bus Operations, Inc., 125 N.J. 41, 61-62 (1991). On November 21, 1988, UMTA issued a final rule requiring all recipients of UMTA funds to have an anti-drug program for employees who perform safety-sensitive functions. 49 CFR Part 653. The anti-drug program had to include testing an employee for drugs prior to employment, after an accident, when there is reasonable cause, randomly, and before returning to duty to perform safety-sensitive functions after a positive drug test. The rule was effective December 21, 1988 and required recipients to file their first certification of compliance by December 21, 1989. NJ Transit developed a drug testing policy to comply with the UMTA regulations. An agreement not to comply with UMTA drug testing regulations would have resulted in the loss of \$38 million of UMTA funding for the remainder of the 1990 fiscal year. For fiscal year 1990, \$141 million of NJ Transit's \$839 million budget came from UMTA. Given the Legislature's intention that NJ Transit secure UMTA funding, and given the substantial amount of funding involved, we find that NJ Transit's December 1989 decision to comply with UMTA regulations and implement random and unannounced

drug testing for safety-sensitive employees was not mandatorily negotiable and did not violate subsection 5.4(a)(5) of the Act. Loss of UMTA funding would thus have significantly interfered with the determination of governmental policy.

ATU argues that NJ Transit, relying on Fraternal Order of Police v. Newark, 216 N.J. Super. 461 (App. Div. 1987), should have applied for a temporary waiver of UMTA's random drug testing requirement under a provision of the UMTA regulations permitting temporary waivers if a recipient is unable to comply with all or part of the regulations because of a conflicting state or local law. ATU contends that as of December 21, 1989, random drug testing under the New Jersey Constitution was unconstitutional given Fraternal Order. That case found that a directive mandating that all members of the narcotics bureau be subject to urine testing for drug abuse without probable cause or reasonable individualized suspicion violated the State constitution. NJ Transit responds that there has never been an authoritative determination that any UMTA requirement would violate the New Jersey constitution and that the Attorney General believes that there is no such conflict (Reply brief at 14).<sup>2/</sup> Requests for waivers require an opinion of

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<sup>2/</sup> On December 22, 1989, the Appellate Division denied ATU leave to appeal from an order of the Law Division declining to restrain implementation of NJ Transit's drug and alcohol testing policy. The Court stated that the right upon which ATU based its claim was unsettled and that Fraternal Order was relevant, but not dispositive of the application before it. On April 30, 1992, a stipulation of dismissal with prejudice was filed in the Superior Court matter.

counsel explaining the conflict. NJ Transit argues that the Attorney General could hardly have been expected to issue an opinion of counsel that Fraternal Order constituted contrary state law. Given the position taken by the Attorney General in this litigation about the applicability of Fraternal Order, we cannot expect the Attorney General to have taken a contrary position before UMTA. We therefore find that NJ Transit was not required to have filed for a waiver.

We note that there may be procedural aspects of random drug testing that were severable from the decision to test and not mandated by UMTA regulations. The ATU did not specifically address this issue in its post-hearing brief. Nor did the ATU specifically show how other portions of NJ Transit's comprehensive drug testing policy changed mandatorily negotiable terms and conditions of employment. Instead, the ATU broadly argued that there were numerous other areas which the union would have discussed and perhaps attempted to negotiate with NJ Transit had it been given that opportunity prior to November 28, 1989. Nevertheless, the Hearing Examiner found that some portions of the new policy changed mandatorily negotiable terms and conditions of employment, some did not, and that the record was insufficient to determine the effect of the remaining portions.

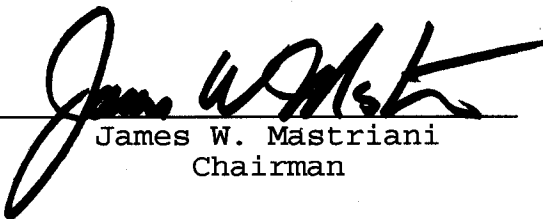
We will not decide whether specific portions of the policy, other than random testing, were or are mandatorily negotiable. ATU

did not brief those issues and the Hearing Examiner only partially addressed them, given the record before him. On this record, and in the absence of any ATU exceptions, we find that the disputed portions were either required in order to receive UMTA funding, not mandatorily negotiable, or consistent with existing drug and alcohol policies. We emphasize, however, that NJ Transit has a legal duty to negotiate, on request by ATU, over mandatorily negotiable subjects, including drug and alcohol testing procedures. Given the posture of this case, we will not determine whether the meetings between ATU and NJ Transit between January 31 and February 28, 1990 satisfied that negotiations obligation. That issue was not part of ATU's charge and was not litigated by ATU.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Regan and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: June 24, 1993  
Trenton, New Jersey  
ISSUED: June 25, 1993

H.E. NO. 91-36

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE  
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Respondent,

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Docket No. CO-H-90-159

NEW JERSEY STATE COUNCIL,  
AMALGAMATED TRANSIT UNION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that New Jersey Transit Bus Operations, Inc. violated §5.4(a)(5) and derivatively (a)(1) when it failed and refused to negotiate with New Jersey State Council, Amalgamated Transit Union regarding its decision to unilaterally implement random unannounced drug testing (as part of an overall drug-free and alcohol-free workplace policy) of "safety sensitive" employees.

He also recommends that the employer violated the same subsections by refusing to negotiate to impasse mandatorily negotiable "procedural" components of the overall policy. The Hearing Examiner dismissed the employer's defense that random unannounced drug testing is a managerial prerogative. He recommended that all negotiable portions of the policy be rescinded and that the employer begin negotiations. (Terms and conditions of employment existing before the implementation date remain in effect).

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 91-36

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Charging Party.

Appearances:

For the Respondent, Hon. Robert Del Tufo, Attorney General  
(David S. Griffiths, D.A.G.)

For the Charging Party, Weitzman & Rich, Attorneys  
(Richard P. Weitzman, of Counsel)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On December 5, 1989, the New Jersey State Council, Amalgamated Transit Union ("ATU") filed an unfair practice charge against New Jersey Transit Bus Operations, Incorporated ("NJTBO"). The charge alleges that on or about November 28, 1989, NJTBO violated subsections 5.4(a)(1), (2) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13-1 et seq. ("Act") by unilaterally adopting a "comprehensive drug testing policy" without

negotiating with the ATU.<sup>1/</sup> The charge also alleged that NJTBO intended to implement the policy on December 21, 1989.

On January 9, 1990 a complaint and notice of hearing issued. On March 20, 1990 NJTBO filed an Answer, asserting that the drug "policy" adopted contained no substantial changes in terms and conditions of employment; that negotiations on the subject "would significantly interfere with the exercise of managerial prerogative"; that the terms and conditions were "required to be adopted..."; and that negotiations had occurred, leaving the charge moot. (C-2).

On March 20 and 21, April 4, 20, and 30, 1990 I conducted hearings at which the parties stipulated facts, presented evidence, examined witnesses and argued orally. Post-hearing briefs were filed by July 26, 1990.

#### FINDINGS OF FACT

The parties stipulated these facts:

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<sup>1/</sup> 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. These subsections prohibit public employers, their representatives or agents from: (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

1. NJTBO is a public employer within the meaning of the Act and the ATU is a public employee representative within the meaning of the Act. The ATU reserves its right to argue that the "scope of negotiations" is broader than that typically applied to public employees in New Jersey. The exact nature and extent of any such differences awaits the outcome of a case involving the same parties pending before the Supreme Court of New Jersey, Docket No. 30,622.

2. The parties jointly submit labor agreements extending from March 1984 to June 1987 (J-1(a)-(d)).<sup>2/</sup>

3. On September 13, 1989, counsel for the ATU mailed a letter (attached to the charge, (C-1)) to NJTBO's Edward F. Butler, Jr., Esq. and George W. Heinle (J-2). On October 5, 1989, Heinle responded (J-3).

4. On or about November 28, 1989, New Jersey Transit Corporation ("Corporation") and NJTBO unilaterally adopted a "Drug & Alcohol-Free Workplace Policy" ("Policy") which includes random drug testing provisions (J-4).

5. The Policy includes items which affect terms and conditions of employment.

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<sup>2/</sup> "J" refers to joint exhibits; "C" refers to Commission exhibits; "CP" refers to charging party exhibits; "R" refers to respondent exhibits; 1T refers to transcript dated March 20, 1990; 2T refers to transcript dated March 21, 1990; 3T refers to transcript dated April 4, 1990; 4T refers to transcript dated April 20, 1990; and 5T refers to transcript dated April 30, 1990.



6. The Policy was not submitted as a demand(s) by NJTBO during the last contract negotiations or the Interest Arbitration which resulted in the current labor agreements.<sup>3/</sup>

7. The ATU contends that had it been afforded the opportunity to discuss the Policy prior to its adoption and implementation, it would have been prepared to negotiate and discuss (for purposes of clarification and possible modification) those specific provisions referenced in a letter from ATU counsel to the assigned State deputy attorney general ("DAG") dated January 29, 1990 (J-5).

8. NJTBO, the former Transport of New Jersey, is an operating subsidiary of the Corporation, established pursuant to to the New Jersey Transportation Act of 1979, N.J.S.A. 27:25-1 - 34, to provide interstate and intrastate bus service between, to and from points within the State of New Jersey.

9. NJTBO operates a fleet of about 1,873 commuter buses over 152 routes or lines. The vehicles have maximum operating weights of from 15 to 19 tons, passenger capacities from 50 to 75 and overall lengths from 31 to 60 feet. 110 buses (articulated) are 60 feet long; the remaining buses are 40 feet or less in length. NJTBO makes about 8,000 trips per day, carrying about 411,000 passengers. The vast majority of the more than 50 million miles driven annually are in congested urban areas or on highspeed

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<sup>3/</sup> The interest arbitration award sets terms and conditions of employment from March 24, 1987 to June 30, 1990 (J-10).

highways. The ATU relies upon the good faith representations of NJTBO about the accuracy of the statistics.

10. Most NJTBO employees work under collective agreements signed by NJTBO and majority representatives. Represented employees include over 2,900 operators, 1,100 maintenance personnel and almost 275 field salaried employees. About 685 unrepresented employees work at NJTBO.

11. A bus operator must possess a special license issued by the New Jersey Division of Motor Vehicles. The special licensing requires an extensive, initial (and subsequent biennial) physical examination including a urinalysis, by a licensed physician of the individual's choosing. The ATU does not stipulate that this urinalysis includes testing for drugs and alcohol. A copy of the certification form used by the examining physician is attached (J-6(b) and (d)). NJTBO conducts the biennial physical examination for operators who are not examined by their own physicians. The NJTBO biennial examination includes a urinalysis, specifically testing for the presence of controlled dangerous substances and alcohol.

12. All "final" applicants for unit positions must be examined by a NJTBO physician. The examination includes a urinalysis measuring the presence of drugs and alcohol.

13. In 1981, NJTBO issued a bulletin reminding employees that consumption of alcohol or drugs while on duty or, within four hours of reporting for duty, and possession of drugs or alcohol on

NJTBO property, is prohibited. The document advised that employees are subject to drug and alcohol testing, upon suspicion of "being under the influence" (J-7). Since 1986, NJTBO policy (unilaterally adopted) has been that employee consumption of illegal drugs "at any time" is prohibited (J-8).<sup>4/</sup> Provisions of J-8 may be subject to challenge by the ATU.

14. NJTBO has the contractual right to "require of employees that they shall submit to a physical examination at any time at the expense of the Company." The provision has appeared in all NJTBO/ATU collective agreements since 1981 (J-1(a) p. 48; J-1(b) p. 27; J-1(c) p. 55).

15. In 1983, NJTBO issued an "Operating Employees Service Guide" stating that, "Operators suspected of being under the influence of alcohol or drugs may be required to submit immediately to a chemical test" (J-9 pp. 38-39).

The ATU has the right to challenge the reasonableness of the "suspicion."

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<sup>4/</sup> The August 1986 "policy" addressed to all NJTBO employees states in part:

Drinking alcoholic beverages four hours prior to reporting to duty is prohibited. Ingesting, injecting, inhaling or smoking illegal, illicit and controlled substances is totally prohibited at any time. Impairment from the effects of alcohol and drugs or medication while on duty will not be tolerated and will be justifiable cause for discharge.

[J-8]

16. Since 1985, unit employees returning to work after a "significant period of time off" are subject to physical examinations, including a urinalysis measuring in part levels of drugs and alcohol.

17. In January 1986, NJTBO began an Employee Assistance Program ("EAP") to provide a "confidential environment in which any employee (and family members) may seek assistance in resolving personal problems which may interfere with work performance..."

18. Maintenance employees subject to random testing under the Policy do mechanical and electrical repairs and clean, fuel and services buses. Employees who repair the buses are: mechanics (A, Special and Shops), repairmen (A, B and C), and group specialist, group 1, 3, and 4. Employees who clean, fuel and service the buses are cleaners and servicemen.

Mechanics inspect, test, diagnose buses; repair and replace parts; realign brakes; repair electrical systems and cut and weld metal. They perform the most demanding repairs and are subject to the least supervision. Repairman A, B, C have similar responsibilities and independence but "to a lesser degree than mechanics." Mechanics and repairmen drive buses on public thoroughfares to determine their road-worthiness before being placed into service.

Cleaners sometimes drive buses on NJTBO property. Servicemen share the cleaners' duties and change tires, fuel vehicles, and check fluid levels.

19. Starters operate buses on NJTBO property and in terminals, including the Port Authority Terminal in New York City. Starters also direct buses into street traffic.

[Stipulations 8-19 are marked S-1 in evidence].

I find these facts:

20. Butler is deputy general manager of legal affairs and labor relations at NJTBO (1T54). His responsibilities include deciding grievances at step 3 (immediately preceding arbitration) of the grievance procedures in the NJTBO/ATU collective agreements and advising the ATU of possible changes in terms and conditions of employment (1T54; J-1(a), (b), and (c)).

In 1989, Butler knew that the Corporation was preparing a drug and alcohol abuse policy and was given several drafts which included pre-employment, post-accident, reasonable suspicion and random drug and alcohol testing (1T59; 2T63).

The Corporation was facing a December 21, 1989 deadline for implementing federal Urban Mass Transportation Administration ("UMTA") regulations on employee drug and alcohol use.

On September 15, the ATU counsel sent Butler a letter advising that the ATU was aware of the possibility of random testing, that it had and was now again seeking the opportunity to review the policy and "make its views known" (J-2).<sup>5/</sup> Butler conceded that he did not give the ATU the opportunity to present its views on random testing to the Corporation or NJTBO (2T68).

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<sup>5/</sup> The ATU requested information on random drug testing before September 13, quite possibly as early as 1988 (2T57).

21. On October 5, NJTBO vice president and general manager George Heinle mailed ATU counsel J-3, advising that NJTBO "intends to implement a random drug testing program," pursuant to UMTA regulations. He advised that NJTBO "intended and [is] prepared to review the [Policy] with union representatives prior to implementation." Heinle suggested that the ATU meet with Butler (J-3).

22. On or about November 18, 1989, Butler received the rough equivalent of J-4 (2T69). He met with ATU officers a few days before November 28 to "explain how the random was going to work" (1T63; 2T72). Butler conceded that he was "not authorized to entertain negotiations with the [ATU] regarding the drug policy" (2T73-74).

23. On November 28, the Corporation Board of Directors adopted the Policy and it was distributed to all employees (stipulation #4; 1T65-66).

J-4 includes detailed sections on employee selection, collection, the chain of custody, testing procedures with drug cutoff levels, quality control, confidentiality, and employee assistance. For example, employees will be selected by a "scientifically valid random number generation method and objective, neutral criteria." Selection will not be "the result of the exercise of discretion by any NJ Transit employee." Finally, the randomness of the selection process shall be "capable of verification."

Employees will also have "individual privacy" in providing specimens unless there exists a "reason to believe that a particular individual may alter or substitute the specimen to be provided..." The policy then cites four exclusive grounds constituting the "reason(s) to believe..." (J-4, p. 19). After initial screening, a positive result is confirmed by gas chromatography/mass spectrometry (J-4, p. 19). A positive result is then transferred to a NJTBO medical review officer, who in reviewing the employee's medical history, interprets the result to "determine if there is evidence of prohibited drug use" (J-4, p. 22). Such results are forwarded to the designated management official, who notifies the employee. The employee may request and receive a re-test of the original specimen by a certified laboratory.

NJTBO announced that the Policy would be implemented on December 21, 1989 (2T77). NJTBO and the ATU scheduled a December meeting to discuss J-4, which the ATU cancelled. On or about December 21, the ATU filed an application in New Jersey federal district court for a preliminary injunction to restrain NJTBO from implementing J-4. The application was denied (Dkt. No. L-17854-89)(1T67).

24. In fiscal 1990, the Corporation budget was about \$839,000,000 and about \$141,000,000 was received from UMTA. An UMTA regulation required funding recipients to implement a comprehensive drug testing policy, including random unannounced testing for "safety sensitive" employees by December 21, 1989 (R-7(e), Final

Rule, Control of Drug Use in Mass Transportation Operations, 53 Fed. Reg. 47, 156, 47, 174 (Nov. 21, 1988) to be codified at 49 CFR §653; 5T117).<sup>6/</sup> The rule was intended to "ensure a drug-free transit workforce and to eliminate drug use and abuse in the public transit industry." The Corporation's failure to adopt such a policy risked \$38,000,000 in funding for fiscal 1990. The money would be applied to new equipment purchases and to "approved projects already in the pipeline" (5T121). If the money was not received, the Corporation, in balancing its budget, could have raised fares, reduced services, applied for an emergency appropriation or filed a lawsuit against the Department of Transportation for funds already committed to contracted-for services (5T122-123).

NJTBO might also have applied for a temporary waiver of the regulations (R-7(e); 5T133). The UMTA regulation,

...permits a recipient to seek a temporary waiver from this implementation period if the recipient is unable under State or local law to comply with the regulation...A request for a temporary waiver must

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<sup>6/</sup> N.J.S.A. 27:25-5 provides that the Corporation, "may do all acts necessary and reasonably incident to carrying out the objectives of this act, including, but not in limitation thereof the following:

...(g)

Apply for, accept and expend money from any federal, State, or municipal agency or instrumentality and from any private source; comply with federal statutes, rules and regulations, and qualify for and receive all forms of financial assistance available under federal law to assure the continuance of, or for the support or improvement of public transportation and as may be necessary for that purpose to enter into agreements, including federally required labor protective agreements;....



include a legal opinion regarding the conflict between the rule and the state or local law, an indication of how the recipient is addressing the conflict at the state or local level, and an estimate of how long it will take to resolve the conflict....

[R7(e) at 47166]

A temporary waiver would not extend beyond December 31, 1989.

On January 19, 1990, the U.S. Court of Appeals for the District of Columbia Circuit invalidated the drug testing regulations issued by UMTA. Amalgamated Transit Union v. Skinner, 894 F.2d 1362, 5 IER cases 1 (D.C. Cir. 1990). The Court determined that Congress did not grant UMTA the statutory authority to promulgate general safety regulations, including a mandatory drug testing program for local transit authorities.

25. On January 29, 1990 the ATU counsel mailed a letter to the DAG citing about 21 provisions of the Policy which the ATU believed, "were subject to negotiations, questions or discussion" (J-5). The letter also confirmed that the parties were meeting on January 31, 1990 to discuss J-4.

On January 30, 1990, the DAG mailed (or faxed) a response, stating that NJTBO wished to engage in good faith negotiations "unconditionally" and that it "intends not to continue random unannounced testing without providing the [ATU] at least 10 days notice..." (CP-1). The DAG cautioned that discussions were not a concession that any subjects discussed were "negotiable" under the law. The letter also advised that Butler had the authority to negotiate with the ATU.

26. On January 31, February 5, 20, 21 and 28, 1990, representatives of the ATU and NJTBO discussed the Policy and J-5 (1T76; 2T112; 115). In the first two meetings, NJTBO responded to ATU questions about the Policy, federal regulations and the breathalyzer (1T80-81). It also asked the ATU for its proposal (2T116-119). At the next meeting, the ATU emphasized its concerns with the Policy as outlined in J-5 (2T119-120).

By the last meeting, the parties had narrowed their differences to 18 items in J-5 (2T121). Butler proposed some changes and stated that other items "were policy matters, and as such, we would not negotiate them" (2T122; 129). Butler relied "on advice of counsel" in the discussions (3T14). The ATU made "...some mention, perhaps, [of] looking at the other things and leaving this random till some time in the future..." (3T34).

NJTBO agreed to create a "separate document" (the Policy) for NJTBO employees exclusively; establish a labor-management advisory committee "to make recommendations"; pay back wages to employees drug tested for "reasonable suspicion" but whose results were negative; permit employees in the EAP to use vacation time if sick leave is exhausted; and release drug test results to the ATU, if the employee so authorizes. None of these items substantially changed the Policy (2T123-127; R-1).

Discussions or negotiations were concluded on February 28 (2T128).

Findings 27-37 summarize the parties' discussions about J-4.

27. NJTBO had never before required random unannounced drug testing of employees, including those in "safety sensitive" positions (3T35). "Safety sensitive" employees were identified for the first time in the Policy (2T11). In March 1990, NJTBO limited this category to bus operators and maintenance employees (see finding 26).

In the January and February 1990 meetings, the ATU asked NJBTO to more narrowly define the phrase, "subject to duty" at page 6 of the Policy. NJTBO wanted to "leave the general definition there" and conceded it did not discuss the term with the ATU before November 1989 (3T5-15). The Policy states that NJTBO employees are prohibited from (as a "condition of employment"): a) being impaired...by drugs or alcohol while subject to, reporting for or on duty, while in the workplace or while in a recognizable NJ Transit uniform; b) using controlled substance at any time, whether on or off duty...; c) unlawfully manufacturing, distributing or using a controlled substance at any time...; and d) drinking alcohol within 4 hours of reporting or duty... (J-4, p. 6).

The parties discussed the provisions in February 1990 (3T16). The ATU objected to all four sections (3T16-24). It specifically objected to the "while in uniform" and "workplace" phrases in "a" (3T16). Butler first testified that "b" represented "no change" from prior practice (2T17). He testified on cross-examination that the ATU "never agreed" to "non-use at any time" and may have "commented" that it objected to the provision

(3T17). On redirect examination, he asserted that he did not "recall any specific objections or prohibition against use of drugs" (3T79). Butler apparently "recalled" the ATU's concerns in the earlier cross-examination and it is that testimony which I credit.

28. Butler was also examined about differences in the "old" (J-7, J-8) and "new" (J-4) policies concerning alcohol levels subjecting employees to discipline (3T86-95, 3T21-25). He acknowledged that an employee reporting to work "[with] alcohol in [his] system" may be subject to discipline under J-4 but may not be subject to discipline under J-7 and J-8 (3T94-95). The relationship between urine testing for alcohol under Section 3(d) and breathalyzer testing under Section 14(f)<sup>7/</sup> of the Policy is unclear (3T142-143; 85-95; 5T72). NJTBO asserted in the February 1990 discussions with the ATU that the .04 blood alcohol level was a non-negotiable subject (3T25; 55). Commercial license holders with a .04 blood alcohol level were "presumably impaired" by the Federal Railway Administration. The level was applicable to states (and bus drivers) receiving federal funds in 1991 (3T56).

29. Before November 1989, employees were required to notify NJTBO of criminal arrests or charges filed against them while on duty (2T19-20). J-4 requires employees to notify their immediate

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<sup>7/</sup> 14f states: No individual will be deemed to have tested positive for alcohol (and no individual will be deemed to have alcohol in his system in violation of this policy) unless a confirmed breath test result of at least .04 percent blood/alcohol level is obtained."

supervisor within five days of "being formally charged with a violation [or] conviction of any criminal drug statute" (J-4, p. 7). Butler agreed that J-4 "represented a change" (3T26).

30. The Policy states that "refusal to cooperate will result in immediate removal from duty and is a dischargeable offense" (J-4, p. 8). This does not change the previous policy (2T21).

31. The ATU objected to the Policy's requirement that "all drug testing...will be performed via urine analysis..." The ATU wanted a blood test option, which NJTBO rejected (J-5; 2T23). The ATU did not rebut NJTBO's explanation that urinalysis was a less cumbersome, more accurate measure of controlled substances in the body (5T68-71).

32. The "reasonable cause" testing provision added a breathalyzer test to existing NJTBO policy (see finding 15); (2T35; 3T42-43).

33. After discussions, the ATU had no objections to the "post-accident testing" provision on page 16 of J-4 (2T36). Post-accident testing of "safety sensitive" NJTBO employees is generally required unless a supervisor could determine "that the employee was not a contributing factor to the accident" (J-4, p. 17; 3T47-49). Butler could not recall any "extensive discussion" on this item (3T49). NJTBO's previous policy was that post-accident testing was conducted only upon "reasonable suspicion" (2T37). The J-4 standard for post-accident testing is different than the standard used before November 1989.

34. The ATU requested and received U.S. Department of Transportation regulations concerning paragraph 5(d) of the Policy. It had no objections to the provision (2T39).

35. The ATU proposed and was denied participation in a "labor/management" oversight committee which would select the "medical review officer" responsible for verifying positive and negative drug test results (J-4, p. 8; 3T52-53). NJTBO was interested in a committee with less authority (see finding 26).

36. The ATU wanted NJTBO to eliminate the requirement that an employee whose retest of his urine sample is negative will be subject to "unannounced follow-up testing during the next ninety days" (J-4, p. 24). NJTBO replied that the matter was non-negotiable (2T46; 3T53).

37. The ATU had no specific objection to D(1) of the Policy concerning the EAP (J-4, p. 27; 2T49-50). The Policy has "mandatory EAP participation" under certain circumstances as a condition of employment (J-4, p. 28). The ATU objected to mandatory participation if an employee was tested "post-accident" and the employee was not "at fault"; it also objected to participation after a positive finding on random drug tests (3T59). The ATU also objected to a 30 day suspension for employees who tested positive and agreed to the "mandatory" EAP plan. NJTBO said the suspension period was non-negotiable (2T52; 3T60).

38. On or about March 19, 1990, the DAG sent a letter to the ATU counsel summarizing the results of the discussions (see

finding 25) and stating that NJTBO decided: 1) to randomly drug test operators and maintenance employees only (and not test field salaried positions); 2) to reduce the follow-up testing period under the EAP from five years to three years; 3) to allow an employee a third effort in the EAP under certain conditions; and 4) to "require an employee who participates in EAP on a mandatory basis to serve the suspension from duty...concurrently with EAP participation." The letter also stated that NJTBO intended to "continue random unannounced drug testing" under the Policy on or about March 29, 1990 (R-1).

39. Elizabeth Schneider is manager of medical services at NJTBO and oversees drug and alcohol testing (3T100). Schneider compiled R-3, " Drug Screening Statistics," for all NJTBO employees from 1985 to 1989. It also has results of "pre-employment" drug tests administered to job applicants.

R-3 shows the results of "reasonable suspicion" and "post-accident" testing. 1986 was the first year NJTBO used gas chromatography drug tests (3T126). In 1986, 27 employees were tested under the reasonable suspicion standard and 14 tests were positive. In 1987, 13 of 27 employees tested positive. In 1988, 11 of 19 employees tested positive. In 1989, 14 of 30 employees tested positive. R-3 does not distinguish unit from non-unit employees (except in "post-accident" testing which refers to operators and/or mechanics) (3T117-118, 141). Accordingly, the probative value of the "reasonable suspicion" test data concerning safety sensitive

employees is greatly attenuated. The most it suggests is that a fraction over 0.5% of all NJTBO employees are tested under "reasonable suspicion" and that those enforcing the policy are fairly accurate.

From 1985 to 1988 NJTBO conducted one post-accident drug test and the result was negative. In 1989, five tests were conducted and two were positive (3T133-140). One positive test involved a mechanic who was "road-testing" a bus and "lost control" of the vehicle and killed a pedestrian (3T140). The other "positive" test concerned an operator who was not "at fault" (3T140).

40. NJTBO provided data on employees with drug and alcohol problems who participated in the EAP between 1986 and 1989 (R-5). The data does not distinguish employees who participated voluntarily from those who were required to enter the program because they had "positive" drug or alcohol tests (4T25). The data concerning "safety sensitive" employees includes operators, repairmen a, b and c and servicemen (4T8; 21). The chart distinguishes safety sensitive bus employees with a "drug" problem from those with an "alcohol" problem from those with both problems. Any employee participating in more than one year (repeater) is counted once only (4T12).

In 1986, for example, 17 "safety sensitive" bus employees had a "drug" problem, 20 had an "alcohol" problem and 11 had a drug and alcohol problem for a total of 48. In 1987, the respective numbers were 24, 16, and 12 for a total of 52; in 1988, the numbers



were 33, 22, and 4 for a total of 59; and in 1989, the numbers were 29, 20 and 9 for a total of 58 (R-5). From 1986-1989, the percentage of total EAP cases (safety sensitive and non-safety sensitive bus employees) having drug and/or alcohol problems declined (4T14).

41. NJTBO also submitted about 32 grievance arbitration decisions concerning safety sensitive bus employees who allegedly violated rules about drugs and alcohol. The decisions were written between 1983 and 1990. Nineteen decisions concern the possession or use of alcohol. Between 1983 and 1988, seven decisions denying the grievance (sustaining the discipline) concerned safety sensitive employees who either reported to work under the influence of alcohol, drove buses under the influence or were observed drinking while on duty. Thirteen decisions concern the use or possession of drugs or insubordination for refusing to submit to testing. Eight decisions ending in discharge concern safety sensitive employees who either tested positive for illegal or illicit drugs or refused to be tested. One drug case is the result of post-accident testing (R-2).

42. Robert J. Pandina is scientific director of the Center of Alcohol Studies and clinical psychology professor in the Graduate School of Applied and Professional Psychology at Rutgers University. His expertise is in physiological psychology, neuro-psychology and psychopharmacology (4T28, 29). Pandina has established alcohol and drug programs for professional baseball and

developed the current drug and alcohol program for the Southeast Pennsylvania Transit Authority ("SEPTA")(4T32). Pandina also provided "expertise in the typology of drug users, methods of dealing with drug users,...and information about rates of rehabilitation," etc., to the New Jersey Supreme Court Taskforce on Drugs (4T41).

Pandina has advised the Corporation about drug and alcohol policies since 1986 and was hired to formulate and revise J-4 (4T43-44).

43. Pandina used national and regional studies to project drug use in the "labor pool" from which NJTBO draws its work force (4T48; 5T32; 38-40). The highest incidence of drug use occurs in males between the ages of 19 and 35. About 10% of the NJTBO safety sensitive job applicants test positive for drugs or alcohol (4T51). The EAP data confirmed national data, reflecting a higher incidence of drug and alcohol use in the northeast and northwest areas of the country. Off-duty drug consumption, "creates risks, depending on frequency of use and other factors." The "risks" or effects of drug use are "acute" (peak intoxication), "post intoxication" (e.g., hangovers) and "chronic" (habitual, long-term dangers)(4T57). In each category, drug use "tends to be substantially debilitating for basic abilities such as sensory motor coordination, cognitive judgment, thinking processes and emotional appreciation" (4T57).

There are no reliable behavioral tests or indicators of off-duty use. An on-the-job accident suggests that the employee has

been "at risk" for some time -- days or even months, while operating the vehicle (4T59). Pandina has no evidence from NJTBO accident rates (and the "reasonable suspicion" follow-up drug tests) to support an opinion about drug or alcohol use in the "safety sensitive" work force (5T71).

44. Pandina cannot "quantify" the precise risk associated with the use of drugs by bus drivers and maintenance employees. Analogizing drug use to alcohol consumption, he argued that the "risk" is "substantial"; 5% to 7% of the 4000 NJTBO safety sensitive employees are "at risk for alcohol abuse and alcohol problems" (4T61; 5T47). Pandina later asserted that 3% to 7% are "projected to be alcoholics" and as high as 15% of this work force "would be considered to be at some point in time alcohol abusers" (5T52).

Using the same "analysis," he estimates that 20% of the employees between the ages of 21 and 35 are "yearly users" of marijuana and 5% may be "weekly users" (5T52). Anyone who has used marijuana once within thirty days has a drug "problem" and is "at risk" (5T37).

45. It is very difficult to correlate the presence of drugs in one's system with the "absolute effect on behavior." The goal is to reduce the "risks" associated with drug use by reducing drug use (4T72-73). Random testing would ostensibly detect users in all three risk categories (see finding 43). Pandina denies there is an "acceptable" level of drug use which does not require "massive" intervention (5T53). For example, a 2% risk ratio means that 2 of

every 100 drivers are at risk for the "debilitating effects of drugs" -- that risk is unacceptable to Pandina (5T54). J-4 sets the "acceptable risk" at zero -- the policy aims at having no one at risk (5T54).

Random drug testing fulfills the "deterrence" need in a comprehensive policy. Urine "surveillance" provides the "broadest window"; that is, it represents a "holding tank" from which one could detect drug use over a greater span of time than one could detect from a blood test only (4T71; 5T92-93).

Pandina concedes that an employee who exceeds the "cutoff" on a urine test for marijuana use may not have a "present abuse" problem and may not have been "impaired" at time of the test (5T73).

#### ANALYSIS

N.J.S.A. 34:13A-5.3 provides in part:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

N.J.S.A. 34:13A-5.4(a)(5) prohibits a public employer from refusing to negotiate in good faith with the majority representative concerning terms and conditions of employment. A public employer may violate these obligations by implementing a new rule or changing an old rule concerning a term and condition of employment without first negotiating in good faith to impasse or having a managerial prerogative or contractual defense authorizing the change.

Hunterdon Cty. Freeholders Bd. and CWA, 116 N.J. 322 (1989);

Red Bank Reg. Ed. Assn. v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978).

The parties stipulated that the Corporation and NJTBO "unilaterally adopted" the Drug & Alcohol-Free Workplace Policy. Although this case arises in the unfair practice forum, a significant part of its resolution turns on whether random unannounced drug testing of NJTBO safety sensitive employees is within the scope of negotiations. Local 195, IFPTE v. State, 88 N.J. 393 (1982) articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 403-404]<sup>8/</sup>

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<sup>8/</sup> The question of whether this standard is applicable to NJTBO has been appealed to the New Jersey Supreme Court. In In re N.J. Transit Bus Operations, Inc., 233 N.J. Super. 173 (App. Div. 1989), rev'g P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), the court found that mandatorily negotiable subjects for NJTBO employees should be determined by using the standards applicable to public employees covered by the Act.

NJTBO contends that the entire Policy (including any "procedural" provisions) is preempted by State statute and federal regulations.<sup>9/</sup> It argues that UMTA regulations, 53 Fed. Reg. 47, 156 et seq. and N.J.S.A. 27:25-5 exempt it from negotiating provisions of the Policy with the ATU.

The preemption test is articulated in Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn., 19 N.J. 38 (1982). See also Hunterdon Cty. Freeholders Bd. and CWA. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." The legislation must "speak in the imperative and leave nothing to the discretion of the public employer." Bethlehem Tp. Bd. of Ed. at 44.

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8/ Footnote Continued From Previous Page

PERC No. 88-74 held that under the New Jersey Public Transportation Act of 1979, N.J.S.A. 27:25-1 et seq. proposals that settle an aspect of the relationship between N.J. Transit and its employees are mandatorily negotiable, unless an agreement would prevent N.J. Transit from fulfilling its statutory mission.

The Commission applied the former standard in its decision on remand PERC No. 90-96, 16 NJPER 267 (¶21114 1990).

Certification has been granted, S. Ct. Dkt. No. 30,622 (10/19/89).

9/ NJTBO also asserts that the discussions held in January and February 1990 render the charge "moot." I dismiss this defense because the "discussions" were not held before the implementation of new work rules as required by subsections 5.3 and 5.4 of the Act. NJTBO also did not negotiate to "impasse" before implementing the Policy.

N.J.S.A. 27:25 states that the Corporation "may do all acts necessary...to carry out the objectives of this act, including...comply[ing] with federal statutes, rules and regulations...." (See footnote 6, p. 11). This statute neither speaks in the "imperative," nor "expressly" establishes a term and condition of employment; it leaves to the Corporation's discretion the means by which it will carry out the act's objectives.

The UMTA regulations conditioned a carrier's receipt of federal funds on its having an anti-drug program which included random testing. The regulations were invalidated by the District of Columbia Circuit Court of Appeals in January 1990 (see finding 24) and cannot preempt negotiations on mandatorily negotiable terms and conditions of employment.

Throughout 1989 NJTBO might have applied for a "temporary waiver" while facing contrary state law (i.e., Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 216 N.J. Super. 461 (App. Div. 1987))(see footnote 10, p. 27)). It also had more than one year to process a scope of negotiations petition or to negotiate to impasse (conceded negotiable subjects) before implementing a policy. Under these circumstances, I cannot find that the regulations were preemptive before January 1990.

In Borough of Hopatcong, P.E.R.C. No. 91-60, 17 NJPER 62 (¶22028 1990), the Commission determined whether a contract provision limiting urine testing of police officers to instances of individualized "probable cause" and to bona fide annual physical examinations is mandatorily negotiable.

The Commission wrote:

Fraternal Order 10/ recognized that a public employer has an important interest in assuring that its police abstain from drug use because drug use can impair job performance and put the public at risk. 216 N.J. Super. at 472. But it also recognized that mandatory urine testing involves a highly intrusive procedure which carries a variety of consequences and risks for the persons tested. Ibid. It weighed the public need against the private intrusion and found that the "reasonable individualized suspicion test fairly accommodates the legitimate interest of employee privacy without unduly restricting the public employer's opportunity to monitor and control the use of drugs by its employees." Id. at 473. This constitutional balancing test closely parallels the negotiability balancing test we must apply.

Fraternal Order and Local 194A11/ also held that drug testing as part of a bona fide health checkup is not constitutionally objectionable. 219 N.J. Super. at 469 n. 6; 240 N.J. Super. at 24-25; see also Allen v. Passaic Cty., 219 N.J. Super. 352, 381 (Law Div. 1986). Employees have a lower expectation of privacy as to such testing and thus the testing is only minimally intrusive. 240 N.J. Super. at 17.

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- 10/ Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 216 N.J. Super. 461 (App. Div. 1987) holds that a directive requiring all members of the police narcotics bureau be subjected to urine testing for drug abuse without probable cause or reasonable individualized suspicion violated the New Jersey Constitution. The court noted that the State Constitution protects fundamental rights independently of the U.S. Constitution and "has often been construed, particularly in recent years as providing greater protection...than...the federal constitution." Id. at 477.
- 11/ IFPTE, Local 194A, AFL/CIO-CLC v. Burlington Cty. Bridge Commission, 240 N.J. Super. 9 (App. Div. 1990) holds that drug testing of interstate bridge operators as part of an annual physical examination is constitutional under state law. The court noted, "Fraternal Order of Police involved random testing which involves a much greater privacy interest than a regularly scheduled annual physical...." Id. at 16.



We are required to balance the employer's interest in detecting drug use that impairs performance and puts the public at risk against the employees' interests in privacy and autonomy. Conclusory statements that negotiated agreement on drug testing would significantly interfere with the exercise of a management prerogative are not sufficient to eliminate the subject of drug testing from the collective negotiations arena.

[17 NJPER 63]

In Hopatcong, the Borough asserted only that testing for drug use "simply cannot be found to fall anywhere on the balancing scale other than the management prerogative side." Id. at 63.

NJTBO has offered more than "conclusory statements" that negotiated agreement on random drug testing significantly interferes with the "objective of reducing and eliminating [drug and alcohol] risks and problems" (NJTBO post-hearing brief). EAP statistics, based upon involuntary and voluntary compliance with NJTBO policy, suggest that annually, about 60 of the 4000 safety sensitive employees (or about 1.5%) have a drug or alcohol "problem." By eliminating those with alcohol problems only, the statistics show that between 1987 and 1989 an annual average of 37 safety sensitive employees (or about 0.8%) had a drug or alcohol and drug problem. Although the severity of the problems was not adduced, the ATU did not rebut expert testimony that EAP statistics are a "tip of the iceberg" estimate of employees with such problems.

Between 1987 and 1989, eight grievance arbitration decisions ending in discharge concerned safety sensitive employees who either tested positive for drugs or refused to be tested. Two

of the five post-accident drug tests in 1989 were positive; in one case, the driver was not "at fault"; in the other, a mechanic road-testing a bus lost control and killed a pedestrian.

The court in Fraternal Order of Police wrote that, "[i]n weighing the public need against the private intrusion, the courts are persuaded by the absence of a factual showing that drug use is widespread among the affected employees or that it presents an identifiable risk to the public." Id. at 472-473. The record in Fraternal Order of Police disclosed five positive drug tests among recruits and no evidence of use among officers.

In Transport Workers Union of Philadelphia, Local 234 v. Southeastern Pa. Transportation Auth., 884 F.2d 709, 132 LRRM 2331 (3rd Cir. 1989), the court determined that six "major" accidents in 1986 and 1987 (injuring 89 people), an operator at fault in another accident who refused to be tested, and a 31% positive test "for cause" ratio of employees in a two and one-half year period was adequate federal constitutional justification for SEPTA's decision to implement a random drug testing policy. The employees who could be tested included train conductors, bus operators, welders, passenger attendants, SEPTA police officers and others. The Court affirmed that the drug use presented a "significant safety problem" and that the prior suspicion-based testing program was insufficient "to satisfy the needs of public safety."

In Cambria Cty. Transit Auth., 21 PPER ¶21007 (Final Order 1989), the Pennsylvania Labor Relations Board Found that the public employer had demonstrated a "very real drug and alcohol problem among its employees." From 1981 to about 1988, four bus drivers had lost their licenses for driving under the influence of alcohol while off-duty (one of the four also tested positive for drugs), one was removed from his bus for driving under the influence of alcohol while on-duty, one voluntarily entered an alcohol detoxification program, and one on-duty driver, whose medication for epilepsy would have been disclosed through random testing, destroyed the employer's vehicle in a collision when he was inadequately medicated. The Board found in part that the employer, "acted within its managerial prerogative by determining that random drug/alcohol testing should be conducted among its operators." Id. 21 PPER 25.

The Pennsylvania Board relied on two U.S. Supreme Court cases permitting suspicionless urine testing of private sector and public sector employees, Skinner v. Railway Labor Exec. Assn., 489 U.S. 602 (1989) and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).<sup>12/</sup> The Board emphasized the "record

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<sup>12/</sup> In Skinner, the Court upheld Federal Railroad Administration rules requiring blood and alcohol testing of rail employees following major train accidents. The record disclosed that from 1972 to 1983, there were 21 train accidents in which drugs or alcohol was a probable cause or contributing factor. The accidents resulted in deaths, injuries and extensive property damage. The governmental interest in providing safe

evidence" in Skinner and noted particularly Justice Scalia's dissent in Von Raab, which decried the absence of a "demonstrated frequency of drug and alcohol use by the targeted class of employees and the demonstrated connection between such use and grave harm..." Von

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12/ Footnote Continued From Previous Page

rail transportation dispensed with usual constitutional protections against unreasonable searches and seizures and individualized suspicion.

In Von Raab, the Court upheld Customs Service rules requiring drug testing of employees seeking transfer or promotion to positions concerned directly with drug interdiction. While there was no evidence of a drug problem among customs employees, the Court found a "special need" or compelling interest in ensuring the "integrity and judgment" of these employees.

Seven circuit courts of appeal have upheld random drug tests for safety sensitive, security sensitive or public integrity sensitive jobs. See, e.g., Bluestein v. Department of Transp., slip op. 6933, 6948, 5 IER Cases 887 (9th Cir. July 10, 1990) (airline industry personnel); Taylor v. O'Grady, 888 F.2d 1189, 1199, 4 IER Cases 1569 (7th Cir. 1989) (correctional officers in regular contact with inmates); American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884, 893, 4 IER Cases 1153 (D.C. Cir. 1989) (various transportation workers), cert. denied 110 S.Ct. 1960, 5 IER Cases 480 (1990); National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 615, 4 IER Cases 1164 (D.C. Cir. 1989) (Army civilian guards), cert. denied, 110 S.Ct. 864 (1990); Thomson v. Marsh, 884 F.2d 113, 115, 4 IER Cases 1445 (4th Cir. 1989) (per curiam) (civilian workers in Army chemical weapons plant); Harmon v. Thornburgh, 878 F.2d 484, 496, 4 IER Cases 1001 (D.C. Cir. 1989) (Justice Department employees with clearance for top-secret information), cert. denied sub nom. Bell v. Thornburgh, 110 S.Ct. 865, 4 IER Cases 1888 (1990); Guiney v. Roache, 873 F.2d 1557, 1558, 4 IER Cases 637 (1st Cir.) (per curiam) (police officers carrying firearms or engaged in drug interdiction efforts), cert. denied, 110 S.Ct. 404, 4 IER Cases 1568 (1989); Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562, 567, 3 IER Cases 769 (8th Cir. 1988) (nuclear power plant engineers); Transport Workers' Union v. Southeastern Pa. Transp. Auth. (3rd Cir. 1989)(mass transit workers).

Raab at 489 U.S. 680. (Such a demonstration in Skinner led Scalia to vote with the majority in favor of testing).

In delineating the "identifiable risk to the public" in New Jersey (New Jersey provides greater protection of fundamental rights than provided by the federal constitution), one should first focus on the "nature of the employment sector to be tested." This approach was taken in Lovvorn v. City of Chattanooga, 846 F.2d 1539, 3 IER Cases 673 (6th Cir. 1988) and Penny v. Kennedy, 846 F.2d 1563, 3 IER Cases 691 (6th Cir. 1988), consol., vac., and remanded en banc, Penny v. Kennedy, 862 F.2d 567, 5 IER Cases 1290 (6th Cir. 1990). (Lovvorn and Penny applied federal constitutional standards; the later Penny court reconsidered its earlier decisions in light of Skinner and Von Raab, declaring that the employer has a "compelling interest" in seeing that police officers and firefighters perform their duties "free of any risk of impairment by the use of illegal drugs"). The Lovvorn court struck down a random testing scheme for city firefighters without any evidence of a "widespread or significant" drug problem. The court stated:

....there is a continuum of employment categories that are defined by the degree of suspicion that a drug problem exists and the potential harm to society of an impaired employee operating in that employment sector. When determining whether a mandatory drug search is "reasonable," we believe that, as the costs to society of an impaired employee increase, the requisite level of suspicion that a drug problem exists decreases. The lower the potential harm to society, the more suspicion needed. This view is reinforced by the observation that if the potential harm to society of an impaired public employee is likely to be very large, society will be less willing

to consider reasonable that employee's subjective expectations of privacy. Of course, this suspicion must be based in good faith and grounded in objective evidence.

[Id. at 1547]

The court wrote that without the evidence of drug use among firefighters, the potential gains to society of starting a mandatory drug testing program are "significantly lower than would have been the case if there had been evidence of a systemic drug problem."

The court placed air traffic controllers and nuclear plant operators at one end of the continuum, stating that no individualized reasonable suspicion was necessary for their random testing because the potential harm to the public is "catastrophic." Further down the continuum are police officers, followed closely by firefighters.<sup>13/</sup> Lovvorn and Penny (1988) are in accord with Fraternal Order of Police, which reserved judgment on whether public employees in "extra-hazardous activities" may be subjected to random testing.

NJTBO bus drivers and the mechanics and repairmen who road test vehicles may be placed alongside firefighters on the employment continuum. These employees "discharge duties fraught with such

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<sup>13/</sup> Police officers are subject to call 24 hours a day, expected to perform in off-duty emergencies and violate their duty when obtaining drugs from a dealer or friend. Drug testing these employees therefore measures impairment and reduced, in the court's view, the employer's burden of justifying the initiation of drug tests. See Penny, 846 F.2d 1563 (6th Cir. 1988). The absence of any evidence of drug use among the officers led the court to declare random testing in the earlier Penny decision constitutionally unreasonable.

risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Skinner at 489 U.S. 628. See also Burka v. NYC Transit Auth., 739 F.Supp. 814 (S.D.N.Y. 1990); Amalgamated Transit Union Local 589 v. Mass. Bay Transp. Auth., Mass. Super. Ct. No. 91-0633 (2/27/91). A substantial number of these employees work without any supervision and bus drivers work alone, a circumstance permitting some impairment to go unnoticed by fellow employees.

A drug problem of some dimension exists at NJTBO. The EAP statistics reveal that between 1987 and 1989, 0.8% of the safety sensitive workforce had a drug or alcohol and drug problem. An extrapolation of this percentage from the ridership data reveals that in about 64 trips per day, about 3280 passengers were exposed to a driver or a mechanic or repairman or serviceman who used illegal or illicit drugs. This estimate does not include all other drivers and passengers who share the roads with NJTBO buses or pedestrians who are also at risk. The increased incidence of grievance arbitration decisions from 1987 to 1989 ending in the discharge of safety sensitive employees based upon positive reasonable suspicion test results is alarming. The two positive post-accident findings and pedestrian fatality in 1989 demonstrate that reasonable suspicion testing cannot detect all drug users and suggest that drug use impairs judgment and may have dire consequences.

This amount of drug use may very well "endanger" the public or present an adequate "identifiable risk to the public" within the meaning of Fraternal Order of Police and consequently tip the continuum scale in favor of random unannounced testing. Such a proposition is bolstered by the fact that cases frequently cited in Fraternal Order of Police (Lovvorn; Penny; Von Raab at 649 F.Supp. 380 (E.D. La. 1986); Patchogue-Medford Congress v. Bd. of Educ., 119 A.D. 2d 35, 505 N.Y.S. 2d 888 (N.Y. App. Div. 2nd Dept. 1986)) revealed no evidence of drug use among the targeted employees. (Three of the four cited decisions were reversed and remanded on appeal). Furthermore, Fraternal Order of Police was issued two years before the U.S. Supreme Court permitted suspicionless testing in Von Raab, followed by federal court progeny permitting random testing in a variety of settings (see footnote 12).<sup>14/</sup> It can no longer be said that only a minority of cases permit random testing, especially when surpassing safety interests are at stake.

But Fraternal Order of Police established an "individualized reasonable suspicion" standard for drug testing public employees (the court reserved on whether public employees in "extra-hazardous" activities could be randomly tested). The holding is "based exclusively on Article 1 §7 of the New Jersey

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<sup>14/</sup> A recent appellate division case concerning a private sector employee's alleged wrongful discharge noted that Skinner and Von Raab "dilute the vitality" of Fraternal Order of Police. Hennessey v. Coastal Eagle Point Oil Co., App. Div. Dkt. No. A-1375-89T1 (4/1/91).



Constitution," which provides "greater protection against unreasonable searches and seizures than may be required by the U.S. Supreme Court's interpretation of the Fourth Amendment." Id. at 477.

Evidence of nationwide drug use is constitutionally inadequate to prove reasonable suspicion under the Fourth Amendment. Bell v. Thornburgh; Burka v. N.Y. Transit Auth. Pandina's expert testimony regarding national studies and regional studies suggesting even greater drug use in the northeast do not prove reasonable suspicion. The most that may be said of the record is that it supports a general suspicion of drug use by NJTBO safety sensitive employees (The court in Burka found that from 1984 to 1986, 2% of New York's Transit Authority employees tested positive for marijuana and other drugs, which supported a general suspicion).

NJTBO has provided more than "conclusory statements" that a negotiated agreement on drug testing significantly interferes with its prerogative in detecting drug use that impairs performance and puts the public at risk.<sup>15/</sup> However, the employees' interest in

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<sup>15/</sup> I do not believe that the evidence of drug use inspired NJTBO's decision to implement the Policy. No witnesses specifically cited either the increased incidence of positive test results ending in employee discharges, the post-accident test results or the fatality as the reason for implementing the policy. Furthermore, the graphs and summaries of drug use at NJTBO were assembled a short time before the hearing.

I believe that the Policy was implemented because NJTBO was "concerned" that UMTA funding might otherwise be endangered. Faced with contrary state law (i.e., Fraternal Order of

privacy and autonomy must be measured by the "individualized reasonable suspicion" standard in Fraternal Order of Police, which "closely parallels the negotiability balancing test" set by the Commission in Hopatcong. The record does not support such a finding.

Accordingly, I recommend that the employees' interests in privacy and autonomy outweigh the NJTBO's interests and that random unannounced drug testing of safety sensitive employees is mandatorily negotiable as defined in Local 195 and Hopatcong.

NJTBO must also negotiate drug testing procedures with the ATU. In City of Newark and Fraternal Order of Police, Lodge No. 12, P.E.R.C. No. 91-5, 16 NJPER 435 (¶21186 1990), app. pending App. Div. Dkt. No. A-125-90T1, the Commission found that a negotiated agreement on drug testing procedures would not significantly interfere with the exercise of inherent or express managerial prerogatives. "Drug testing procedures addressing notification, chain of custody, confidentiality and accuracy protect employees' interests without significantly interfering with the exercise of any prerogatives." 16 NJPER at 436. The Commission also favorably cited administrative and court decisions of other jurisdictions

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15/ Footnote Continued From Previous Page

Police) NJTBO ignored the option in the UMTA regulations permitting it to apply for a temporary waiver.

That concern for continued funding, like an "abstract interest" in enhancing public confidence in Fraternal Order of Police is "not of sufficient weight to justify sacrificing the palpable privacy interests" of NJTBO bus drivers, mechanics, repairmen and servicemen.

which declared negotiable, "the integrity and reliability of the testing process and matters of employee discipline." Cambria Cty.; AFSCME, AFL-CIO v. Illinois State Lab. Rel. Bd., 190 Ill. App. 3rd 259, 546 N.E. 2d 687 (1st Dist. 1989); City of New Haven; Decision No. 2554-A, Conn. State Bd. of Lab. Rel. (1987); Dept. of Army v. FLRA, 890 F.2d 467, 132 LRRM 3071 (D.C. Cir. 1989). The Commission concluded that the City of Newark violated subsections 5.4(a)(5) and derivatively (a)(1) by failing to negotiate drug testing procedures before announcing a testing policy. See also IFPTE Local 194A.

Applying this standard to provisions of the Policy contested by the ATU, I recommend:

Section IVA1 of the Policy is negotiable only as it applies to ATU unit employees (NJTBO narrowed the targeted group of employees to those in safety sensitive positions).

Section IVA2, ("controlled substance") is not mandatorily negotiable because "...agreement over certain drug testing procedures might effectively eliminate the ability to test for certain kinds of drugs." Newark at 437.

Section IVA2 ("medical review officer" - "safety sensitive position"). The ATU did not adequately address this provision. (See Section IVC(8)).

Section IVA2 ("subject to duty") is mandatorily negotiable because it implicates employees' working hours, "one of the items most evidently in the legislature's mind when it extended the Act to

public employees." State of New Jersey (CWA and Local 195), P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985); Borough of Paramus, P.E.R.C. No. 86-71, 11 NJPER 502 (¶16178 1985).

Section IVA3(a)("subject to duty" and "while in recognizable NJ Transit uniform") are mandatorily negotiable because they implicate employee work hours. Paramus. It is not clear if the remaining phrases change NJTBO "policy."

Section IVA3(b) ("using a controlled substance at any time"). The ATU did not demonstrate that this term and condition was changed in the Policy. Although Butler conceded that the ATU never agreed to non-use at any time, a 1988 arbitration award dismissed the ATU's contention that a violation of the "at any time" rule was not a dischargeable offense (R-2(21)).

One may argue that such an award defines a term and condition of employment (see, for example, Chap. 11 of How Arbitration Works, Elkouri and Elkouri, BNA, 4th Ed. (1985)). I recommend only that the ATU failed to demonstrate a change in this term and condition of employment.

Section IVA3(c) and (d) are mandatorily negotiable only insofar as the "subject to duty" and "while in recognizable NJ Transit uniform" phrases implicate terms and conditions of employment. Other sections do not appear to change the NJTBO policy in effect before November 1989.

Section IVA4 ("Notification of Charges and Convictions...") is a change in terms and conditions from previous NJTBO policy,

which required notice only upon conviction. I recommend that this provision is non-negotiable because it implicates the employer's ability to safely manage the workplace. Furthermore, it does not directly concern NJTBO testing policy.

Section IVA6 ("Refusal to cooperate...") did not substantively change NJTBO policy.

Section IVC1 is negotiable to the extent that it concerns the reliability and accuracy of the breath testing devices. The "urine testing" sentence is negotiable only insofar as it changes the circumstances by which NJTBO employees were tested before November 1989.

Section IVC2(a) ("An employee not in a safety sensitive position...") is non-negotiable because this provision is substantively similar to one requiring a drug screening as part of an annual physical examination. Such examinations are constitutional and non-negotiable. Local 194A.

Section IVC(d) ("Random and Unannounced Drug Testing"). I recommend that this provision is mandatorily negotiable. See earlier discussion.

Section IVC2(e) ("reasonable cause testing") is negotiable only insofar as it changes previous NJTBO "reasonable suspicion" testing procedures. Discipline under this section is negotiable. Newark.

Section IVC2(f) (post-accident testing for NJTBO employees) is negotiable to the extent it changes a "reasonable suspicion"

standard to one requiring something less than reasonable suspicion and changes the circumstances under which employees could be so tested before November 1989. Fraternal Order of Police.

Section IVC(8) is negotiable to the extent the provision concerns notification of results. Newark.

Section IVC(9) is non-negotiable because it implicates the employer's ability to safely manage the workplace, pending the negotiation of formal disciplinary procedures (An improperly "removed" operator may later be reinstated with back pay).

Section IVC(10) (the last two sentences) is negotiable insofar as it concerns the accuracy of test results. The second sentence is also negotiable because it concerns unannounced testing without individualized reasonable suspicion. Fraternal Order of Police.

Section IVC(13) is negotiable to the extent that the ATU needs information concerning any unit employee's drug test results in order to process grievances. NJTBO has agreed to supply the information to the ATU.

Section IVC(14) is negotiable because it pertains principally to the accuracy of breathalyzer equipment. Newark.

Section IVD is negotiable insofar as it changes EAP employee eligibility after November 1989.

#### RECOMMENDATION

I recommend that NJTBO violated subsections 5.4(a)(5) and derivatively (a)(1) when it implemented random unannounced drug

testing of safety sensitive employees. I also recommend that the unilaterally implemented drug testing procedures which the parties disputed in correspondence following the filing of the charge also violated subsections 5.4(a)(5) and derivatively (a)(1).

I recommend that the 5.4(a)(2) allegation be dismissed.

RECOMMENDED ORDER

I recommend that the Commission ORDER that:

A. The Respondent cease and desist from

1. Refusing to negotiate in good faith with New Jersey State Council, ATU concerning a comprehensive drug testing policy which includes random unannounced drug testing of safety sensitive employees.

B. That Respondent take the following affirmative action:

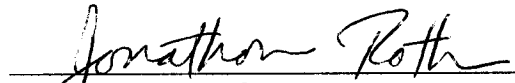
1. Rescind the mandatorily negotiable portions of the Drug and Alcohol Free Workplace Policy issued November 28, 1989. The rescission shall not change terms and conditions of employment which existed before November 28, 1989.

2. Negotiate with the New Jersey State Council, ATU a drug testing policy and attendant procedures which are mandatorily negotiable.

3. 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.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

  
\_\_\_\_\_  
Jonathon Roth  
Hearing Examiner

DATED: April 11, 1991  
Trenton, New Jersey



# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

AN ORDER OF THE

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT.

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from refusing to negotiate in good faith with New Jersey State Council, ATU concerning a comprehensive drug testing policy which includes random unannounced drug testing of safety sensitive employees.

WE WILL rescind the mandatorily negotiable portions of the Drug and Alcohol Free Workplace Policy issued November 28, 1989. The rescission shall not change terms and conditions of employment which existed before November 28, 1989.

WE WILL negotiate with the New Jersey State Council, ATU a drug testing policy and attendant procedures which are mandatorily negotiable.

Docket No. CO-H-90-159

N. J. TRANSIT BUS OPERATIONS, INC.

(Public Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

## APPENDIX

### New Jersey Transit Corporation Drug and Alcohol Free Workplace Policy

#### (Disputed provisions)

#### IV. A.1. Application of Policy and Severability

As a condition of employment, this policy applies to all NJ TRANSIT employees regardless of classification except as otherwise specified herein. NJ TRANSIT management will ensure that this policy will be implemented uniformly throughout NJ TRANSIT to include all operating subsidiaries.

2. Controlled Substance - Has the meaning assigned by 21 U.S.C. 802 including substances listed on Schedules I through V as they may be revised from time to time (21 CFR Parts 1301-1316), and including those substances defined by N.J.S.A. Title 24 and companion regulations as they may be revised from time to time.

Medical review officer - Designated company doctor(s) or contract physician(s) authorized to receive, review and report laboratory drug test results.

Subject to duty - Any time period an employee is required to be available to report for duty.

Workplace - Any location, including but not limited to garages, depots, terminals, stations, offices, buses, trolleys or trains, whether or not owned or operated by NJ TRANSIT, where NJ TRANSIT business is conducted or where job duties are performed.

#### 3. Prohibitions

As a condition of employment, all NJ TRANSIT employees are prohibited from:

- a. Being impaired by or under the influence of a drug or alcohol while subject to, reporting for, or on duty, while in the workplace or while in recognizable NJ TRANSIT uniform.

- b. Using a controlled substance at any time, whether on or off duty, except as permitted by Section IV(A)(5) (Use of Prescribed Drugs) below. Under no circumstances may an employee perform his duties while he has a prohibited controlled substance in his system.
- c. Unlawfully manufacturing, distributing, dispensing, possessing or using a controlled substance at any time or possessing, distributing or using alcohol while reporting for or on duty, while in the workplace or while in recognizable NJ TRANSIT uniform, except as permitted by Section IV(A)(5) below.
- d. Drinking alcohol within four hours of reporting for duty or having alcohol in their system while subject to, reporting for or on duty, while in the workplace or while in recognizable NJ TRANSIT uniform.

4. Notification of Charges and Convictions of Criminal Drug Statutes

All NJ TRANSIT employees must notify their immediate supervisor within five days of being formally charged with a violation of, and/or conviction (which includes a plea of nolo contendere) of, any criminal drug statute.

Failure to timely comply with this notice requirement or conviction of any criminal drug statute are dischargeable offenses.

6. Requirement of Cooperation with Collection and Testing

Refusal to cooperate will result in immediate removal from duty and is a dischargeable offense. Any applicant who refuses to cooperate will not be hired.

C. Detection

1. General

All drug testing conducted pursuant to this policy will be performed via urine analysis unless otherwise required by Federal Railroad Administration (FRA) regulations. All alcohol testing conducted pursuant to this policy shall be performed with breath testing devices selected among those listed on the Conforming Products List of Evidential Breath Testing Devices amended and published from time to time by the National Highway Traffic Safety Administration (NHTSA).

2. Circumstances Under which Drug and/or Alcohol Testing will be Administered

a. In Connection with all Pre-Employment Physical Examinations

An employee not in a Safety Sensitive position may not transfer to a Safety Sensitive position until the employee passes pre-employment drug and alcohol tests as described herein.

d. Random and Unannounced Drug Testing

All employees in Safety Sensitive positions will be subject to random, unannounced drug testing. Selection of employees will be by a method employing a scientifically valid random number generation method and objective, neutral criteria which ensure that every such employee has a substantially equal statistical chance of being selected within a specified time frame. The method will not permit subjective factors to play a role in selection, i.e., no employee will be selected as the result of the exercise of discretion by any NJ TRANSIT employee. The selection method shall be capable of verification with respect to the randomness of the selection process.

A random test may be required on any day on which an employee in a Safety Sensitive position reports for work. All sampling will be done with replacement, which means that employees randomly tested will remain in the pool, even after the employee has been tested. The testing frequency level is designed to ensure that the number of tests conducted will equal at least fifty percent of the number of such employees in the pool during each calendar year. NJ TRANSIT, with the assistance of a professional statistician, will develop a detailed protocol to carry out this intent.

An employee will be subject to testing only while on duty. Notice of an employee's selection shall not be provided until the employee's tour of duty in which testing is to be conducted, and then only so far in advance as is reasonably necessary to ensure the employee's presence at the time and place set for testing. Each time an employee is selected for random testing the employee will be informed that the selection was made on a random basis and he will be provided a copy of a writing to that effect.

e. Reasonable Cause Testing

All employees of NJ TRANSIT are required to submit to a urine analysis to detect the presence of controlled substances and/or a breath test to detect alcohol when a supervisory employee has reasonable cause as defined below.

Under this type of testing, employees will be removed from service without pay pending the outcome of the test(s). Employees will be returned to service with back pay if the outcome of the test(s) is negative.

An employee who tests positive for drugs or alcohol on a reasonable cause test will be discharged.

In all cases where an NJ TRANSIT employee is required to be tested based upon reasonable cause, a written report setting forth the facts upon which the reasonable cause is based must be made out and signed by the supervisor(s).

f. Post-Accident Testing

Under this type of testing, employees will be removed from duty without pay pending the outcome of the test(s). Employees whose tests are negative will be returned to duty with back pay.

Any employee who tests positive for drugs or alcohol on a post-accident test, where it is determined by NJ TRANSIT Bus or Rail Operations that the employee was "at fault", will be discharged.

In connection with post-accident testing, every reasonable effort shall be made to ensure that bodily fluids are collected for testing as soon after the accident or incident as possible, but in no event shall they be collected more than 32 hours after any accident or incident.

NJ TRANSIT Bus Operations Employees

Post-accident drug and/or alcohol testing by NJ TRANSIT Bus Operations is required of any employee in a Safety Sensitive position involved in an accident as defined below:

"Accident" means an occurrence associated with the operation of a revenue service vehicle, whether or not such vehicle is in revenue service, if,

1. An individual dies or must be taken to a medical treatment facility; or
2. The occurrence results in property damage that is estimated to be more than \$5,000; or
3. The occurrence must be reported to the Federal Highway Administration.

8. Determination of Positive Urine Test Result by Medical Review Officer

Drug test results reported positive by the laboratory shall not be deemed positive by NJ TRANSIT or disseminated to any person other than to the employee tested (in a medical interview, if conducted) until they are reviewed by the medical review officer, who shall be the only person at NJ TRANSIT to receive the results of drug tests directly from the laboratory.

9. Removal of Employee from Duty Following Refusal or Positive Test

Any employee who refuses to cooperate with collection and testing or who tests positive on any drug or alcohol test will be immediately removed from duty and, in the case of a positive drug test, will be provided with a copy of the report of the test results and notice of the basis for the removal not later than the time of removal.

10. Since some substances may deteriorate during storage, detected levels of the drug(s) below the detection limits established in 49 CFR Part 40, but equal to or greater than the established sensitivity of the assay, shall, as technically appropriate, be reported and considered corroborative of the original results.

If the result of the retest is negative, the employee shall be returned to duty with back pay, but he shall be subject to unannounced follow-up testing during the next ninety days.

13. Individual Access to Test and Laboratory Certification Results

Any employee who is the subject of a drug test shall, upon written request, have access to any records relating to his drug test and any records relating to the results of or any relevant certification, review, or revocation of laboratory certification proceedings.

14. Breath Testing Safeguards

The following standards apply to the conduct of breath testing administered under this policy.

- a. Testing devices shall be selected from among those listed on the Conforming Products List of Evidential Breath Measurement Devices amended and published in the Federal Register from time to time by the National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation.
- b. Each device shall be properly maintained and shall be calibrated by use of a calibrating unit listed on the NHTSA Conforming Products List of Calibrating Units for Breath Alcohol Testers with sufficient frequency to ensure the accuracy of the device (within plus or minus .01 percent), but not less frequently than provided in the manufacturer's instructions.
- c. Tests shall be conducted by a trained and qualified operator. The operator shall have received training on the operational principles of the particular instrument employed and practical experience in the operation of the device and use of the breath alcohol calibrating unit.
- d. Tests shall be conducted in accordance with procedures specified by the manufacturer of the testing device, consistent with sound technical judgment, and shall include appropriate restrictions on ambient air temperature.
- e. If an initial test is positive, the individual shall be tested again after the expiration of a period of not less than 15 minutes in order to confirm that the test has properly measured the alcohol content of deep lung air.
- g. In any case where a breath test is intended for use in the discretionary process and the result is positive, the employee shall be given the prompt opportunity to provide a blood sample at an independent medical facility for analysis by a competent independent laboratory at the employee's expense. NJ TRANSIT will not be responsible for the arrangements but NJ TRANSIT shall provide the required transportation to facilitate the blood test.

D. Assistance

1. Employee Assistance Program (General)

NJ TRANSIT provides an in-house Employee Assistance Program (EAP) for any employee troubled by alcohol or drug problems. EAP is a program of therapy, counseling, and rehabilitation. Qualified, professional medical personnel, provided by NJ TRANSIT or through referrals by NJ TRANSIT, counsel and treat employees affected by substance abuse problems. These professionals also monitor the progress of employees in recovering from and controlling these problems which may affect job performance.

However, no employee will be permitted to participate in the Employee Assistance Program more than twice for drug and/or alcohol problems under any provision or combination thereof specified below.

Moreover, NJ TRANSIT shall not offer the following voluntary EAP or Co-worker Report options in a case where the seeking of assistance, referral or report is made for the purpose, or with the effect, of anticipating the imminent and probable detection of a rule violation by a supervisory employee.