P.E.R.C. NO. 2022-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS OPERATIONS INC.,

Petitioner,

-and- Docket No. SN-2022-021

AMALGAMATED TRANSIT UNION,
NEW JERSEY STATE COUNCIL,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that an arbitration award concerning ATU State Council's (ATU) grievance challenging the termination of the grievant, a bus operator, for a "refusal to test" under NJTBO's Drug and Alcohol Policy (the Policy) was legally arbitrable, in part, and not legally arbitrable, in part. The case was referred to the Commission from the Superior Court - Chancery Division's review of the parties' arbitration award, which reinstated the grievant with a five-day suspension. The Commission finds that the arbitration award was legally arbitrable to the extent it reviewed whether the specific discipline imposed on the grievant was proper in relation to her violation of the Policy. However, the Commission further finds that the arbitration award was not legally arbitrable to the extent it found that there was not an actual "refusal to test" triggering the regulatory return-to-duty process and to the extent it capped or created a deadline for grievant's follow-up drug and alcohol testing due to the preemption of certain regulations in 49 C.F.R. Part 40 and 49 C.F.R. Part 655.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, McElroy Deutsch Mulvaney & Carpenter, LLP, attorneys (John J. Peirano, of counsel and on the brief; David M. Alberts, of counsel and on the brief)

For the Respondent, Cohen, Leder, Montalbano & Connaughton, LLC, attorneys (Paul A. Montalbano, of counsel and on the brief; Brady M. Connaughton, of counsel and on the brief)

DECISION

On December 3, 2021, this scope of negotiations determination was transferred to the Commission by court order in the matter of Amalgamated Transit Union, New Jersey State Council v. NJ Transit Bus Operations, Inc., Docket No. C-167-21. In that matter, NJ Transit Bus Operations, Inc. (NJTBO) sought to vacate an arbitration award in favor of the Amalgamated Transit Union, New Jersey State Council (ATU) that reinstated a terminated bus operator, with a five day suspension, for violating NJTBO's Drug and Alcohol Policy when the grievant refused to submit to a

random drug screening by not producing sufficient urine. The court stayed the arbitrator's award pending the Commission's scope of negotiations determination.

NJTBO filed a brief and exhibits, which included the filings in the Chancery matter.[1/] The ATU filed a brief, exhibits, and the certifications of ATU Chairman Orlando Riley, and ATU Counsel, Paul A. Montalbano. These facts appear.

The ATU represents NJTBO employees including, but not limited to, bus operators. NJTBO and the ATU are parties to an expired CNA with a term of July 1, 2017 through June 30, 2021, which continues to be in effect. The CNA contains a "management rights" provision that allows employees to be disciplined, including discharge, "for proper cause." The grievance procedure ends in binding arbitration.

NJTBO's Drug and Alcohol Policy (the Policy) applies to all NJTBO bus operators and incorporates US Department of Transportation (USDOT) and Federal Transit Administration (FTA) regulations. The Policy has been in effect since 1989, and its most recent iteration is from August 15, 2019. Section I, "Purpose", of the Policy provides:

1/ N.J.A.C. 19:13-3.6(f) requires that all briefs filed with the Commission shall recite all pertinent facts supported by certification(s) based upon personal knowledge. The certifications submitted by the parties only authenticate the exhibits.

> The purpose of NJ TRANSIT's Drug-And-Alcohol-Free Workplace policy is to ensure that NJ TRANSIT provides the safest possible transportation for the public and to promote the safety and welfare of our employees and customers through the requirement of a workplace and workforce free from the effects of prohibited drugs and alcohol in compliance with the Drug-Free Workplace Act of 1988 and the Omnibus Transportation Employee Testing Act of 1991, as amended.
>
> This document outlines the requirements of NJ TRANSITS drug-and alcohol testing program and establishes the processes and procedures for the administration of NJ TRANSIT's Drug-And-Alcohol-Free Workplace Program in accordance with the regulations, rules, and guidelines established by the United States Department of Transportation (DOT) and the Federal Transit Administration (FTA). Specifically, this policy mandates urine drug testing and breath alcohol testing, as is required by the FTA under 49 C.F.R. Part 655, for all positions defined as safety-sensitive, as defined in 49 C.F.R. Part 655.4. Accordingly, the application of this policy is expressly limited to NJ TRANSIT employees who perform safety-sensitive functions (Covered Employees) as is defined more specifically below and listed in the hereto attached Exhibit 1 to this policy and to any person applying for such positions.
>
> All testing under this policy is pursuant to the FTA requirements for the Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations in 49 C.F.R. Part 655 and will be conducted in strict accordance with the DOT Procedures for Transportation Workplace Drug and Alcohol Testing Programs In 49 C.F.R. Part 40.

Section V(D), "Policy Scope and Application", of the Policy states as follows:

> The provisions of this policy shall be subject to any limitations or requirements imposed by federal or state law. Moreover, any employment action taken by NJ Transit due to violation of this policy shall be taken in accordance with the procedures contained in any applicable labor agreement.

The Policy requires drug testing of safety sensitive employees, such as bus operators, in the following circumstances: pre-employment, post-accident, reasonable suspicion, random, and return to duty/follow-up. (Section V(F)).

Under the Policy employees must provide 45 milliliters of urine when selected for a drug test. Section XIII(C)(5), "Specimen Collection", provides:

> Upon notification of testing, individuals are required to remain available until the completion of the collection process. Individuals are required to provide at least 45 ml of urine under the split sample method of collection described below. If the Individual is unable to provide at least 45 ml, the DATT shall instruct the individual that he may drink a maximum of 40 ounces of fluids over the course of three hours. The individual shall again attempt to provide a complete specimen. If the individual fails for any reason to provide 45 ml of urine within three hours, the test shall be discontinued and DATT shall direct the individual to report to Medical Services for an evaluation by the MRO. The MRO may direct the employee to another physician with expertise in the appropriate medical discipline to determine if the employee's failure to provide a sufficient specimen is valid or constitutes a refusal to cooperate with a drug test. The proof must be presented within five (5) business days after MRO evaluation.

Section VIII(I), "Behavior that Constitutes a Refusal to Cooperate and/or Test Refusal", provides:

> Behavior that constitutes a refusal to cooperate with testing includes, but is not limited to, the following:
>
> 1. Failure to appear for any test (except for a pre-employment test) within a reasonable time, as determined by the employer, after being directed to do so by the employer.
>
> 2. Failure to remain at the Testing Site until the testing process is complete (except for a pre- employment test).
>
> 3. Failure to remain readily available for drug and/or alcohol testing following an accident or incident until tests have been conducted and/or specimens have been collected, regardless of whether the employee provided subsequent specimens or testing results.
>
> 4. Refusal to take the test.
>
> 5. Refusal to cooperate with the testing procedures contained in 49 C.F.R. Part 40.
>
> 6. Failure to attempt to provide a breath or urine specimen or the failure to provide a sufficient quantity of breath or urine without a valid medical explanation.
>
> 7. Refusing to be examined or to comply with any medical requirements to explain why a specimen was not provided in a shy lung or bladder situation and/or failure to undergo a medical evaluation as required by the MRO or DER.
>
> 8. Refusing to remove outer clothing (including but not limited to coveralls, jackets, coats, hats, and sweaters) and refusing to empty pockets and display items to the collector and/or the refusal to follow

> an observer's instructions to raise and lower clothing and turn around.
>
> 9. Refusal to permit monitoring or observation of a collection when such monitoring or observation is required under DOT or FTA rule or regulation and/ or this policy.
>
> 10. Failure to take a second test when required.
>
> 11. Admitting to adulteration or substitution of a specimen to the DATT or MRO.
>
> 12. Submission of an adulterated or substituted sample as verified by the MRO.
>
> 13. Possessing or wearing any device used to tamper with the testing process.
>
> 14. Refusal to sign Step 2 of alcohol test form.
>
> [Emphasis added.]

Under the Policy, an employee who has refused to take a drug test must immediately cease performing any safety-sensitive functions. (Section X(A)(1)). Section VII H(3) of the Policy, "Cooperation and Compliance with Collection and Testing", states "refusal to cooperate in the testing of drugs and alcohol or the collection of specimens is a dischargeable offense..." Section X(B), "Consequences of a Violation of Policy", provides:

> 1. NJ Transit considers the following dischargeable offenses:
>
> > a. Producing a verified positive drug test or confirmed positive alcohol test (subject to right of mandatory Employee Assistance Program [EAP] participation described in Section XI-C below).

> b. Violation of any of the prohibited behaviors described in Section VIII-A above
>
> c. Failure to timely notify one's supervisor of a formal charge, conviction, or a violation otherwise of a criminal drug statute
>
> d. Conviction of a violation of a criminal drug statute
>
> e. Refusal to cooperate with collection or testing requirements.
>
> f. Failure to cooperate with and successfully complete EAP requirements (including after care) recommended by NJ Transit's SAP [substance abuse professional]
>
> g. Failure of a sworn law enforcement officer to report suspected drug use by another sworn law enforcement officer.

We incorporate the facts of the parties' July 2, 2021 arbitration award herein. See City of Camden, P.E.R.C. No. 2022-29, 48 NJPER 301 (¶67 2022). The arbitrator found the following facts:

> The basic facts essential to decide this case are not in dispute. After completing her run on March 8, 2020, [the grievant] returned to the Newton Avenue garage and used the restroom. The evidence supports the fact that she did so. Although the grievant did not testify at the hearing, in Dr. Jayanathan's testimony and her notes of the morning following the test (T. at 131 and Company Exhibit 11), she reports that [the grievant] said she had emptied her bladder just before the test. It makes sense that the grievant would have done so, and there was no evidence to the contrary. Soon after using the restroom, the grievant was told she would be

> taking a random drug and alcohol test. She completed the alcohol test with negative results at 3:12 p.m.
>
> For a valid drug test, an employee must provide a specimen of at least 45 milliliters of urine. [The grievant's] initial attempt to provide a specimen at 3:25 p.m. yielded 30 milliliters of urine. This unsuccessful try brought her into the "shy bladder" procedure, under which she was given three hours to produce a 45-milliliter urine specimen. "Instruct the donor to drink fluids and that they cannot exceed 40 ozs." is printed on the Shy Bladder Log. Per that requirement, the grievant was told that during the three-hour period, she could drink up to 40 ounces of fluid. (T. at page 82) The Company's actions were consistent with Federal DOT Rule 49 CFR Part 40 Sections 40.191 and 40.193. (Company Exhibits 3B and 3A)
>
> Danita Wheeler-Cavaliere, the collector, completed the Shy Bladder Log (Company Exhibit 5). [The grievant] signed and dated the form. The log emphasizes that a refusal to drink "IS NOT" a refusal to test, but refusals to drink must be documented on the form. Ms. Wheeler-Cavaliere documented that [the grievant] refused to drink water at 3:25, 3:45, 4:30 and 5:01 p.m.
>
> At 5:01 p.m., Ms. Wheeler-Cavaliere called Jaime Jaramillo, the designated employer representative ("DER"), and told him that [the grievant's] first two attempts had each provided only 30 milliliters of urine, not the required 45 milliliters. Mr. Jaramillo's contemporaneous notes, as well as his testimony at the arbitration hearing, indicate that he explained to the grievant the DOT regulations and Company Policy 3.25A, its Drug and Alcohol-Free Workplace Policy, which was effective August 15, 2019. (Joint Exhibit 2)
>
> Filtered city water was available at the testing site from an office water cooler with

> a hot and cold water spigot. There was bottled water in vending machines outside the testing area in the day room. [The grievant] did not ask to leave the testing area to get bottled water or any other fluid. (T. at 96-97, 103 and 158) Dr. Jayanathan testified that on the morning after the random test, the grievant told her she didn't want to drink the water and that was why she couldn't give the urine. (T. at 131) The record in this case does not establish that the grievant made a similar statement to the Company representatives during the shy bladder protocol.
>
> When he spoke with [the grievant] during the shy bladder protocol, Mr. Jaramillo explained that she was allowed to drink anything she chose, such as soda, juice or water. Mr. Jaramillo recorded that the grievant responded to him, "I don't want to drink nothing." He told her she had 90 minutes left before the end of the three-hour session. Mr. Jaramillo told her if she did not provide a specimen within the three hours, she would have to report to Medical Services the next business day, and that could lead to the termination of her contract with NJ Transit. She replied that she understood. She said that she was not stupid, and did not need to talk to him anymore.
>
> At the end of the three hours, Ms. Wheeler-Cavaliere notified Mr. Jaramillo that [the grievant] had not provided a specimen by 6:25 p.m. and was given paperwork to report to Medical Services on March 9, 2020.
>
> Subendrini Jayanathan, M.D., the Medical Review Officer ("MRO"), saw [the grievant] on March 9th, and gave her the opportunity to provide medical documentation that she had a valid medical condition that would have prevented her from providing a 45- milliliter urine specimen within a three-hour period. Subsequently, Dr. Jayanathan reviewed the documentation provided by the physician seen by the grievant and determined there was no

> valid medical reason that would explain [the grievant's] failure to provide a sufficient urine specimen. (Company Exhibits 10 and 11)
>
> In a March 16, 2020 email, Mr. Jaramillo, advised Joseph Butterfield, the Newton Avenue garage manager, what had occurred and that [the grievant's] failure to provide a sufficient specimen constituted a refusal to cooperate with testing under the Company's Standards of Conduct. Mr. Jaramillo further indicated that, under the Company's enforcement policy, failure to provide a sufficient quantity of urine without a valid medical explanation is considered a dischargeable offense. He testified that gave garage management no alternative to discharge. 2 (T. at 117) On March 18, 2020, Mr. Butterfield discharged [the grievant] and upheld the discharge at a first step hearing. (Company Exhibits 12 and 13) The Union requested a second step hearing, and ultimately the instant arbitration.
>
> [Arbitrator's Award at 7-9.]

The stipulated issue before the arbitrator was, "Was there proper cause for the discharge of the grievant, and if not, what shall the remedy be?" The arbitration award provides, in pertinent part:

> The Company methodically presented its case to establish what occurred with respect to [the grievant's] random drug test. There is no doubt that the Company proved its procedures were consistent with the federal regulations and NJ Transit's drug and alcohol policy, and that failure to provide a sufficient quantity of urine without a medical explanation is specified as a dischargeable offense in the policy.[2/] But

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2/ Footnote 3 of the arbitration award states:

(continued...)

> that is not what the Arbitration Board is asked to decide. My responsibility is to address in this Opinion the question the parties agreed to at the arbitration hearing: Was there proper cause for the discharge of the grievant, [the grievant], and if not, what shall the remedy be?
>
> The Union did not challenge the Company's right to have [the grievant] undergo random drug and alcohol testing on March 8, 2020 in accordance with its policy and applicable DOT rules. Nor did the Union challenge the Company's administration of the testing, including the judgment of the MRO that there was "not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine." (Company Exhibit 3a at page 2) Rather, the Union focused on the language in the Company's Drug- and Alcohol-Free Workplace Policy that states "any employment action taken by NJ TRANSIT due to violation of this policy shall be taken in accordance with the procedures contained in any applicable labor agreement." (Joint Exhibit 2 at page 9) The Union homes in on the fact that the applicable labor agreement indisputably provides that "proper cause" is

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2/ (...continued)

> Not every failure to provide a 45-milliliter urine specimen results in discipline. Disciplinary actions are set forth in the Company policy, and were not shown to be addressed in the federal regulations that govern drug testing. The regulations indicate that if a bus operator being randomly tested for drugs is unable to produce a sufficient amount of urine due to a medical condition, the drug test would be cancelled and the Company would "take no further action with respect to the employee." (Company Exhibit 3A) Such an employee would continue serving as a bus operator, presumably even if there were actually drugs in the operator's urine.

> the standard for discharge. That is the standard recognized in the issue the parties agreed upon in this arbitration.
>
> What [the grievant] did wrong on March 8, 2020 did not rise to the level of proper cause for discharge. It is undisputed that she passed the alcohol screening, and there is no claim that she tested positive for drugs on that day or any other day. As noted, her inability to provide a specimen of 45 milliliters of urine during a three-hour shy bladder protocol without a valid medical explanation is considered behavior that constitutes a refusal to cooperate with testing, which NJ Transit's policy (Joint Exhibit 2) provides is a dischargeable offense. That provision must be considered in light of the contractual requirement of "proper cause" and the particular facts and circumstances of the grievant's situation.
>
> The Company's case falls short when the evidence in this case is considered against the contractual requirement of proper cause. My role is not to decide what action I would have taken, but rather to review whether the Company demonstrated there was proper cause for discharge. Based on the arbitration record, I conclude that the Company did not demonstrate there was not proper cause for discharge. The discharge of [the grievant] was excessive, unreasonable and an abuse of discretion.
>
> Although [the grievant's] inability to provide 45 milliliters of urine is considered to be a refusal to cooperate with testing, she actually cooperated to a large extent with the drug and alcohol testing. As Mr. Butterfield properly noted in his first step hearing report, [the grievant's] case has been "deemed" as a refusal. But behavior that is deemed a refusal is not an actual refusal. In reality, [the grievant] cooperated in various ways. She took and passed the alcohol screening. She gave two urine samples during the "shy bladder" protocol, although each

> time she produced only 30 milliliters of urine, 15 milliliters shy of the required 45 milliliters. She participated in the medical review to determine if there was a medical reason for her inability to produce 45 milliliters of urine.
>
> The only insufficient cooperation [by the grievant] was her decision not to drink up to 40 ounces of fluid during the shy bladder session. Her choice not to drink what is a large amount of fluid was something that the Shy Bladder Log uses bold, underlined capital letters to make extremely clear is not in and of itself a refusal to test. The log form assures the donor that there is no compulsion to drink any fluid during the three hours. The log is silent on the point that a refusal to drink will result in discharge if the employee does not produce 45 milliliters of urine, absent a valid medical reason. The only ground for discharge pointed out on the Shy Bladder Log is if the employee fails to stay in the testing area unless expressly authorized by the DATT to leave. The grievant did not violate that rule.
>
> I find that [the grievant] does bear responsibility for her decision to drink no fluids during the three-hour shy bladder session. She chose not to consume any type of liquid, despite being told her job could be at risk and her belief that she would not have a medical reason for her inability to produce a sufficient urine sample. (Company Exhibit 6 and T. at 131) Of course, the grievant could not be expected to know, as Dr. Jayanathan did, that there was science connecting the consumption of 40 fluid ounces of fluid over three hours to the ability to produce 45 milliliters of urine. (T. at 145) But I take note that it is common human experience that the more you drink the more you pee. Even though the Company could not mandate that she consume any fluids, [the grievant] should not have passed on her opportunity to drink during the shy bladder protocol. It might well have avoided her

> discharge. Under the circumstances, her decision not to drink any beverage during the three-hour session was misconduct. A five-day unpaid suspension would be appropriate discipline.
>
> As there was not proper cause for termination, [the grievant] should be reinstated to her position. Before re-assuming her duties as a bus operator, [the grievant] should be required to take and pass a drug and alcohol test under Company authority. This step would be consistent with Joint Exhibit 2 at page 19. Furthermore, in addition to any testing for alcohol and/or drugs that [the grievant] would otherwise be subject to as a bus operator, NJ Transit, in its sole discretion, should be allowed to screen [the grievant] for alcohol and/or drugs as it sees fit to do through December 31, 2021. No remedy with respect to EAP is appropriate.
>
> The March 2020 discharge of [the grievant] should be reduced to a five-day unpaid suspension. NJ Transit should make the grievant whole. The Company should give [the grievant] back pay for the period from the day following the unpaid suspension until the date of her reinstatement, offset by her income, if any, during that period.
>
> [Id. at 9-12.]

The arbitrator awarded the following remedy:

> The Company did not prove that it had proper cause to discharge [the grievant]. The grievance claiming that [the grievant] was not discharged for "proper cause," as required by the parties' Agreement, is sustained.
>
> The remedy shall be as follows: [The grievant] shall be reinstated to her position. Before re-assuming her duties as a bus operator, [the grievant] shall be required to take and pass a drug and alcohol

> test under Company authority. Furthermore, in addition to any testing for alcohol and/or drugs that [the grievant] would otherwise be subject to as a bus operator, NJ Transit, in its sole discretion, may screen [the grievant] as it sees fit to do through December 31, 2021.
>
> The March 2020 discharge of [the grievant] shall be reduced to a five-day unpaid suspension. NJ Transit shall make the grievant whole. The Company shall give [the grievant] back pay for the period from the day following the unpaid suspension until the date of her reinstatement, offset by her income, if any, during that period.
>
> [Id. at 12-13.]

On September 21, 2012, ATU sought confirmation of the arbitration award through the Chancery Division, and NJTBO sought to vacate the award, or in the alternative, for the court to refer the case to the Commission for a scope of negotiations determination. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

NJTBO argues that the federal regulations preempt the arbitration award. NJTBO argues that the federal regulations clearly set forth what constitutes a "refusal to test", the consequences for a "refusal to test", which is removing the employee from performing any safety-sensitive functions, and the process for returning the employee to duty. NJTBO argues that the arbitration award found that the grievant's actions did not constitute a "refusal to test", which is inconsistent with the federal regulations. NJTBO further argues that the arbitration award contradicted the federally mandated return-to-duty process by allowing the grievant to be reinstated as a bus operator without having to complete an evaluation and treatment by an SAP.

NJTBO also argues that the arbitration award is beyond the scope of negotiations because it prevents NJTBO from fulfilling its statutory mission set forth in N.J.S.A. 27:25-2.[3/] Citing a previous NJTBO case decided by the Commission, NJTBO argues that

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3/ N.J.S.A. 27:25-2(s) provides:

> The provision of efficient, coordinated, safe and responsive public transportation is an essential public purpose which promotes mobility, serves the needs of the transit dependent, fosters commerce, conserves limited energy resources, protects the environment and promotes sound land use and the revitalization of our urban centers.

the Commission has found NJTBO's Drug and Alcohol Policy is within its non-negotiable, managerial prerogative because it is required by federal law. NJTBO asserts that the non-negotiable, federally-required Policy mandates that a refusal to test is a dischargeable offense, which the arbitration award contradicted. NJTBO asserts that allowing bus operators to avoid the severe consequence of discharge for a refusal to test will incentivize employees to provide insufficient urine samples, thereby, undermining NJTBO's ability to control the use of prohibited substances by its safety-sensitive employees, which interferes with NJTBO's statutory mission of providing safe, efficient, and reliable public transportation.

ATU argues that the arbitration award was not beyond the scope of negotiations because the arbitrator, as in any typical disciplinary grievance, applied the contractually-required "proper cause" standard to determine that NJTBO did not have proper cause to discharge the grievant for violation of the Policy. ATU argues that the discipline imposed for violation of the Policy is negotiable and subject to the CNA's grievance procedure; no different than a violation of any other policy. ATU notes that Section V(D) of the Policy expressly makes it subject to the CNA. ATU asserts that the federal regulations and guidance by the USDOT clearly state that discharge is not mandated for a "refusal to test" or a positive test, but rather,

such employer actions are discretionary and subject to any applicable labor agreements and legal requirements. ATU further asserts that the strict consequence of discharge for a "refusal to test", in all cases, is not necessary to fulfill NJTBO's statutory mission as evidenced by Section XII(c) of the Policy, which allows employees who test positive to serve a 30-day suspension and mandatory participation in EAP rather than discharge. The ATU maintains that the arbitration award was not inconsistent with federal regulations and provided NJTBO with safeguards to ensure that the grievant was properly tested, at NJTBO's sole discretion, prior to being returned to safety-sensitive duty.

The standard for determining mandatorily negotiable topics under the New Jersey Public Transportation Act, N.J.S.A. 27:25-1 et seq. (NJPTA), the legislation that established NJTBO and authorized the conversion of New Jersey's mass transit system from one of private ownership to one owned and operated by the State, was established in New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), rev'd, 233 N.J. Super. 173 (App. Div. 1989), rev'd and rem'd, 125 N.J. 41 (1991). In deciding what scope of negotiations the NJPTA authorized, we and the Supreme Court rejected both the employer's argument that public sector negotiability tests exclusively applied and the unions' argument that private sector

negotiability tests exclusively applied. Instead, we adopted this approach: an issue that settles an aspect of the employment relationship is mandatorily negotiable unless negotiations over that issue would prevent NJTBO from fulfilling its statutory mission to provide a "coherent public transportation system in the most efficient and effective manner." N.J. Transit, 14 NJPER at 174; N.J.S.A. 27:25-2. The Supreme Court approved this test and elaborated on it as follows:

> [A]bstract notions of the need for absolute governmental power in labor relations with its employees have no place in the consideration of what is negotiable between the government and its employees in mass transit. There must be more than some abstract principle involved; the negotiations must have the realistic possibility of preventing government from carrying out its task, from accomplishing its goals, from implementing its mission. All of the various rulings of PERC in its first opinion have that theme. They look to the actual consequences of allowing negotiations on the ability of NJTBO to operate and manage mass transit efficiently and effectively in New Jersey. If negotiations might lead to a resolution that would substantially impair that ability, negotiations are not permitted. But, if there is no such likelihood, they are mandatory. It is the effect on the ability to operate mass transit that is the touchstone of the test, rather than someone's notion of what government generally should be allowed to unilaterally determine and what it should not.
>
> [N.J. Transit, 125 N.J. at 61.]

The Commission and courts have continued to apply this statutory mission test to negotiability disputes involving NJTBO and the

ATU or its locals. See, e.g., N.J. Transit Bus Operations, P.E.R.C. No. 2018-31, 44 NJPER 310 (¶87 2018); N.J. Transit Bus Operations, P.E.R.C. No. 2015-53, 41 NJPER 392 (¶123 2015); New Jersey Transit and ATU, Local 822, P.E.R.C. No. 2013-45, 39 NJPER 267 (¶91 2012), aff'd, 41 NJPER 115 (¶41 App. Div. 2014); N.J. Transit Bus Operations, P.E.R.C. No. 2005-82, 31 NJPER 184 (¶74 2005); and N.J. Transit Bus Operations Inc. and Amalgamated Transit Union, N.J. State Council, P.E.R.C. No. 96-11, 21 NJPER 286 (¶26183 1995), aff'd, 22 NJPER 256 (¶27133 App. Div. 1996).

Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so "expressly, specifically and comprehensively." Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). Moreover, grievances involving the interpretation, application, or claimed violation of statutes and regulations may be resolved by binding arbitration as long as the award does not have the effect of establishing a provision of a negotiated agreement inconsistent with the law. See Old Bridge Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523, 527-528 (1985); West Windsor Twp. v. PERC, 78 N.J. 98, 115-117 (1978).

The issue before the Commission is whether the dispute as stipulated by the parties - "Was there proper cause for the discharge of the grievant, and if not, what shall the remedy be?" - is legally arbitrable. That issue requires us to consider various regulatory provisions within 49 C.F.R. Part 40 and 49 C.F.R. Part 655 in conjunction with applicable provisions of the Policy and the provision of the CNA that provides for discharge for proper cause. We find that the arbitration award was legally arbitrable to the extent it reviewed whether the specific discipline imposed on the grievant was proper in relation to her violation of the Policy. We further find that the arbitration award was not legally arbitrable to the extent it found that there was not an actual "refusal to test" triggering the regulatory return-to-duty process and to the extent it capped or created a deadline for the grievant's follow-up drug and alcohol testing.

Section V(D) of the Policy provides, "any employment action taken by NJ Transit due to violation of this policy shall be taken in accordance with the procedures contained in any applicable labor agreement." The parties' CNA provides for discharge for proper cause. Federal regulations provide NJTBO with discretion as to the discipline imposed for violations of the Policy. 49 C.F.R. 40.305 provides:

> (a) As the employer, if you decide that you want to permit the employee to return to the

> performance of safety-sensitive functions, you must ensure that the employee takes a return-to-duty test. This test cannot occur until after the SAP [substance abuse professional] has determined that the employee has successfully complied with prescribed education and/or treatment. The employee must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties.
>
> (b) As an employer, you must not return an employee to safety-sensitive duties until the employee meets the conditions of paragraph (a) of this section. However, you are not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that you have the discretion to make, subject to collective bargaining agreements or other legal requirements.
>
> [Emphasis added.]

Additionally, the USDOT's Office for Drug and Alcohol Policy and Compliance (ODAPC)[4/] has published the following guidance:

4/ 49 C.F.R. 40.5 ("Who issues authoritative interpretations of this regulation?) provides:

> ODAPC and the DOT Office of General Counsel (OGC) provide written interpretations of the provisions of this part. These written DOT interpretations are the only official and authoritative interpretations concerning the provisions of this part. DOT agencies may incorporate ODAPC/OGC interpretations in written guidance they issue concerning drug and alcohol testing matters. Only Part 40 interpretations issued after August 1, 2001, are considered valid.

> Will I lose my job if I test positive or refuse a test?
>
> The DOT regulations do not address hiring, termination, or other employment actions. These decisions are solely the employer's, which may be based on company policy and/or any collective bargaining agreements.[5/]

While the federal regulations mandate that the employee must be removed from safety sensitive duties upon a refusal to test or a positive test, they do not mandate discharge. Moreover, the Policy contemplates alternative disciplinary outcomes for the dischargeable offense of testing positive for drugs or alcohol, which is subject to the right of a 30-day suspension and mandatory participation in EAP. (Policy Section XII(C)(1)(c) and Section X(B)(1)(a)).

In N.J. Transit Bus Operations Inc. and Amalgamated Transit Union, N.J. State Council, ATU Locals 540, 819, 820, 822, 824, 825, and 880, P.E.R.C. No. 2020-32, 46 NJPER 278 (¶68 2019), the Commission found legally arbitrable disciplinary grievances concerning the termination of five NJTBO bus operators due to their alleged negligence in bus accidents. The Commission found that the unions were permitted to present evidence of mitigating factors concerning bus design for the arbitrator's review as to whether the terminations were appropriate and that arbitration

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5/ https://www.transportation.gov/odapc/faq#Will-I-lose-my-job-if-I-test-positive-or-refuse-a-test.

over the discipline imposed would not interfere with NJTBO's statutory mission. Similarly, we find that the arbitrator's review of whether the discipline imposed was proper in relation to the grievant's violation of the Policy was legally arbitrable and would not interfere with NJTBO's statutory mission of providing a "coherent public transportation system in the most efficient and effective manner." Within the limits of our scope of negotiations jurisdiction, we consider this issue in the abstract only and make no findings as to the merits of the arbitration award's reduced discipline for the grievant's violation of the Policy. Ridgefield Park, supra.

Notwithstanding the foregoing, to the extent the arbitration award found that there was not an actual "refusal to test" triggering the "return-to-duty" process, we find it was not legally arbitrable. 49 C.F.R. 40.193, "What happens when an employee does not provide a sufficient amount of urine for a drug test?", provides, in pertinent part:

> (a) This section prescribes procedures for situations in which an employee does not provide a sufficient amount of urine to permit a drug test (i.e., 45 ml of urine).
>
> (b) As the collector, you must do the following:
>
> (2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the

> employee declines to drink. Document on the Remarks line of the CCF (Step 2), and inform the employee of, the time at which the three-hour period begins and ends.

However, 49 C.F.R. 40.191(a)(5), "What is a refusal to take a DOT drug test, and what are the consequences?" provides, in pertinent part:

> (a) As an employee, you have refused to take a drug test if you:
>
> * * *
>
> (5) Fail to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see § 40.193(d)(2))[6/]

Thus, while 49 C.F.R. 40.193(b)(2) states that, standing alone, it is not a "refusal to test" if the employee declines to drink, 49 C.F.R. 40.191(a)(5) explicitly states that it is a "refusal to test" if an employee ultimately fails to provide 45 milliliters of urine without a valid medical explanation.

The consequence for a refusal to test is immediate removal of the employee from safety-sensitive functions until the employee completes the federally required "return-to-duty" process. 49 C.F.R. 655.61 provides, in pertinent part:

6/ The grievant's two 30 ML samples could not have been combined to provide a sufficient sample. Pursuant to 49 C.F.R. 40.193 and 40.65 the collector must discard any insufficient sample and is not permitted to combine urine collected from separate voids to create a sufficient specimen.

> (a)(3) If an employee refuses to submit to a drug or alcohol test required by this part, the employer shall require that the covered employee cease performing a safety-sensitive function.
>
> (b) Before allowing the covered employee to resume performing a safety-sensitive function, the employer shall ensure the employee meets the requirements of 49 CFR Part 40 for returning to duty, including taking a return to duty drug and/or alcohol test.
>
> [Emphasis added.]

The "return-to-duty test" cannot occur until after a substance abuse professional (SAP) has evaluated the employee and determined that the employee has successfully complied with prescribed education and/or treatment. 49 C.F.R. 40.285(a), "When is a SAP evaluation required?", provides:

> As an employee, when you have violated DOT drug and alcohol regulations, you cannot again perform any DOT safety-sensitive duties for any employer until and unless you complete the SAP evaluation, referral, and education/treatment process set forth in this subpart and in applicable DOT agency regulations. The first step in this process is a SAP evaluation.
>
> [Emphasis added.]

See also 49 C.F.R. 40.305(a)(providing that a return to duty test "cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment.")

Here, the arbitration award found facts establishing that the grievant's actions met the regulatory definition for a "refusal to test", but characterized the grievant's actions as not an "actual refusal". However, the federal regulations are explicit that a failure to provide a urine sample of 45 MLS is a refusal to test. Moreover, the arbitration award was not consistent with the mandated SAP evaluation and treatment requirements of the "return-to-duty" process, which are triggered by a "refusal to test." Lastly, the arbitration award subjected the grievant to follow up testing, as NJTBO sees fit, through December 31, 2021. To the extent that this portion of the award caps or creates a deadline for follow-up testing, we find this is also inconsistent with the purpose of the Policy and the regulations. NJTBO is required to test employees for prohibited substances pursuant to federal regulation, in accordance with the express procedures set forth therein.[7/] We find that, to the extent the arbitration award limits or creates a timeframe for

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7/ 49 C.F.R. 655.1. provides: "The purpose of this part is to establish programs to be implemented by employers that receive financial assistance from the Federal Transit Administration (FTA) and by contractors of those employers, that are designed to help prevent accidents, injuries, and fatalities resulting from the misuse of alcohol and use of prohibited drugs by employees who perform safety-sensitive functions."

Additionally, 49 C.F.R. 655.2(b) states, "This part must be read in conjunction with 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs."

this obligation to conduct ongoing testing, such a finding is not legally arbitrable.

ORDER

To the extent that the arbitration award determined whether the discipline imposed on the grievant for violation of the Policy was proper and reduced the disciplinary penalty, the award was legally arbitrable. To the extent the arbitration award found that the grievant's actions were not an actual "refusal to test" which did not trigger the regulatory "return-to-duty" process and capped or created a deadline for the grievant's follow-up drug and alcohol testing, the award was not legally arbitrable.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Ford was not present.

ISSUED: March 31, 2022

Trenton, New Jersey