United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF THE AIR FORCE ONIZUKA AIR FORCE BASE SUNNYVALE, CALIFORNIA and LOCAL 2090, NATIONAL FEDERATION OF FEDERAL EMPLOYEES	Case No. 92 FSIP 36

DECISION AND ORDER

Local 2090, National Federation of Federal Employees (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of the Air Force, Onizuka Air Force Base, Sunnyvale, California (Employer).

After investigation of the request for assistance, the Panel determined that the impasse relating to the Employer's civilian drug testing program should be resolved through written submissions from the parties, with the Panel to take whatever action it deemed appropriate to resolve the impasse. Written submissions were made pursuant to this procedure, and the Panel has now considered the entire record.[1/]

BACKGROUND

The Employer is the headquarters for the 2d Satellite Tracking Group, which operates, maintains, and manages a worldwide satellite tracking station network supporting the Department of Defense, the North Atlantic Treaty Organization, and allied nations, as well as the NASA space shuttle program. The Union represents approximately 157 General Schedule (GS) and Wage Grade (WG) employees. GS employees work as secretaries, procurement or travel clerks, contract specialists or negotiators, engineers, budget analysts, and specialists in logistics, security, safety, or equipment. WG

1/ Neither party filed a rebuttal statement.

employees hold such positions as utility systems repairer or operator, power support systems mechanic, and electrician. The parties are covered by a collective-bargaining agreement (CBA) which expires in July 1994.

This dispute arose during impact-and-implementation negotiations over the Employer's civilian drug testing program. After the Union filed its request for Panel assistance, the Employer implemented that program, including its proposed provision which affords employees who have tested positive for drug use a 5-minute consultation with a Union representative immediately preceding their meetings with the Medical Review Officer (MRO). The MRO is a licensed physician with knowledge of substance abuse disorders whose role is to review and interpret positive test results obtained through the Employer's drug testing program.[2/] For Onizuka Air Force Base employees, the MRO is an Air Force physician assigned to Travis Air Force Base, "some 2 hours distant when traffic is light," according to the Employer. Approximately 100 GS and WG bargaining-unit employees whose positions have been approved for testing will be affected by the outcome of this dispute.

ISSUES AT IMPASSE

The parties disagree as to (1) whether employees who have tested positive for drug use should be allowed Union representation at meetings with the MRO and (2) whether the Employer should be obligated to notify employees of their right to Union representation at meetings with the Employer's representatives before any such meetings.

POSITIONS OF THE PARTIES

1. The Union's Position

The Union proposes that: (1) an employee with a positive test result be entitled to Union representation at any meeting between the employee and the Employer's representatives concerning the test results; (2) the Employer notify the employee of his or her right to representation prior to any such meeting; and (3) the right to representation be extended to meetings with the MRO.

In its view, any meeting concerning a positive test result between the tested employee and a representative of the Employer, including the MRO, is "an examination of an employee in the unit by a representative of the agency in connection with an investigation," within the meaning of § 7114(a)(2)(B) of the

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2/ Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Programs § 2.7(b), 53 Fed. Reg. 11,970, 11,985 (1988).

Statute,[3/] and otherwise falls within the scope of that section. There can be no serious question about this because the MRO's role is to verify that the positive test results were caused by illegal drug use and the inquiry, including eliciting of information from the employee, is investigatory in nature. It is reasonable to envision that during their meeting the employee would make statements either denying, admitting, or explaining the alleged drug use in response to questions posed by the MRO. As to the employee's reasonable belief that disciplinary action may result, such a belief is more than reasonable, given that, under "the Air Force Plan," disciplinary action must be taken unless the employee can offer the MRO an adequate explanation for the positive test result.

Aside from the statutory right to representation, the Union's proposal would serve an important purpose. Because of the severe consequences of the employee's failure to explain or justify a positive test result to the MRO, including loss of job, there are few situations where Union representation would be more urgently needed. Union representatives can play an important supporting role on behalf of employees who will be standing on the threshold of serious disciplinary consequences. In doing so, the Union representatives do not intend, nor do they have the capacity, to interfere with the MRO's authority to rule on any exculpatory evidence offered by the employee.

2. The Employer's Position

The Employer proposes the following:

> Upon request, an employee with a positive test result shall be entitled to Union representation at any meeting between the employee and Agency management representatives concerning the test results, except when the MRO affords the employee the opportunity to discuss the results of the test. Upon request, an employee shall be entitled to consultation with a Union official, for not more than 5 minutes, before the meeting with the MRO. [Emphasis added.]

A requirement that the Employer notify an employee of the right to Union representation, before any meeting with management representatives about the test results, goes beyond what the law and the CBA require. Thus, for example, § 7114(a)(3) of the

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3/ This statutory provision provides that an exclusive representative shall be given the opportunity to be represented at such an investigatory examination if the employee reasonably believes that the examination may result in disciplinary action against him or her and if the employee requests representation.

Statute provides that each agency shall **annually** inform its employees of their rights to Union representation at an "examination . . . in connection with an investigation." The parties' agreement contains a provision requiring the Employer to "take such action" as prescribed in the Statute to inform employees of their rights and obligations. To require any more in the way of notification would make the statutory requirement "mere surplusage" and would violate the intent of Congress. Moreover, the Union already had an opportunity to brief all employees who are assigned to "testing designated positions," at a meeting held 30 days prior to implementation of the drug testing program, and it will have the same opportunity each time the Employer designates a new position whose incumbent will be tested.

An employee's meeting with the MRO is not an "examination" as contemplated by the Statute, nor is it reasonable for the employee to believe that it may result in discipline. On the first point, the meeting is voluntary and serves the purpose of "giving the employee the opportunity, in a highly confidential and private medical setting, to support an assertion of legitimate drug use." The MRO is not "investigating," since he or she can verify a positive result without the interview if the employee declines such opportunity. The interview is much more akin to a medical discussion than an examination: it lacks the confrontational aspect inherent in an examination in connection with an investigation. Moreover, it is not reasonable to believe that the voluntary interview will result in discipline because (a) its purpose is only exculpatory in nature and (b) the MRO is not responsible for determining what action will be taken. Reasonable fear of discipline arises, if at all, upon administration of the drug test and upon confrontation with management officials who have discovered the employee's illegal drug use, but not upon meeting voluntarily with a medical doctor who is seeking exculpatory information.

Finally, its proposal that an employee who has tested positive for drug use be provided a 5-minute consultation with a Union representative before the employee's meeting with the MRO, presents the fairest solution to the problem. The presence of a Union representative during a medical interview would be disruptive to the doctor-patient relationship, would create a confrontational atmosphere where none is expected, cost a great deal of representational time because a 6-hour round trip to the MRO's office at Travis Air Force Base is likely, and serve no legitimate need of the employee, "especially since Union representatives have no expertise in the subject matter to be discussed."

CONCLUSIONS

We conclude that the parties' dispute over Union representation at employee meetings with the MRO and over

notification of the right to Union representation should be resolved on the basis of the Union's proposal. We find that the Union's proposal more adequately addresses the needs of employees faced with the considerable risks to their employment status resulting from positive drug tests, and that the burden it places on the Employer is minimal.

The Employer's opposition to the disputed parts of the Union's proposal is based largely on the argument that the employee rights sought go beyond those provided in the Statute. In ruling that proposals similar to that made here by the Union were negotiable, however, the Federal Labor Relations Authority specifically held that "[n]othing in section 7114(a)(2) of the Statute prevents unions from negotiating contractual rights to union representation which exceed the rights set forth in that section of the Statute."[4/]

The Authority's decision in Department of Energy, therefore, makes it clear that the resolution of this dispute does not depend on whether the Union's proposal goes beyond the representation and notification rights mandated by the Statute. It must depend, rather, on a careful weighing of the legitimate interests of the parties. Here, the employees with whom the parties' respective proposals are concerned will be in a highly stressful situation. Although their meetings with the MRO are voluntary, these meetings provide them with an important, if not the most important, vehicle for defending themselves against the disciplinary outcomes that are understood to lie at the end of an adverse finding. If they so choose, their election to attend with the assistance of a Union representative could, at least in some cases, affect the outcome by permitting them to make more persuasive presentations of their explanations of the positive test results. Such an assisted presentation would be no more likely to impede the MRO in making his or her findings than to aid the MRO and the ultimate decision-makers in ensuring that a valuable employee is not lost to the

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4/ National Treasury Employees Union and U.S. Department of Energy, Washington, D.C., 41 FLRA 1241, 1247 (1991) (footnote omitted). The Authority also held that the presence of a union representative during an employee meeting with an MRO would not affect the agency's right to ensure the security or integrity of the testing process nor would the providing of employees with notice of their contractual rights to Union representation during all stages of the drug testing process (including the meeting with the MRO) mandate the release of otherwise protected information or in any other way directly interfere with management's rights. Id. at 1246, 1248.

Employer by virtue of an erroneous finding.[5/] The Employer-proposed 5-minute consultation is not an adequate substitute.

We agree with the Union that there is nothing inherently disruptive about the presence of a Union representative during an employee's meeting with the MRO. Nor does anything in the Union's proposal preclude the Employer from placing reasonable limitations on the representative's participation, as is its right where participation is pursuant to § 7114(a)(2)(B) of the Statute, in order to prevent an adversary confrontation and to achieve the objective of the examination.[6/] Moreover, we do not think that, given the MRO's function at such meetings, it is accurate to describe the MRO's relationship to the employee as essentially that of doctor-patient. And, to the extent that confidential matters will be discussed, the Union representative will become privy only to what the employee wishes him or her to know. The representative may be excused at any time at the employee's option. Finally, we take administrative notice that, to the extent that Union representation does present some burden on the Employer, the historically low number of Federal employees who have tested positive for drug use under various agency drug programs minimizes any realistic potential burden.

With respect to the issue of Employer notification of each positively-tested employee as to his or her rights to representation, such notification could well prevent a serious hardship to an employee who, under the stress of the situation, fails to remember having been advised of those rights at the last annual notification or at the single briefing held before the drug testing program was implemented. In our view, the potential forfeiture of those rights outweighs the slight burden on the Employer to make specific notification a routine part of the drug

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5/ In NLRB v. Weingarten, Inc., 420 U.S. 251, 262 (1975), the Supreme Court noted that a union representative's participation in an investigatory interview is useful to both employee and employer. The Court quoted with approval the comments of the arbitrator in Independent Lock Co., 30 Lab. Arb. 744, 746 (1958): "[Participation by the union representative] might reasonably be designed to clarify the issues . . ., to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at state, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, [and] the implications of the facts ... more clearly ... ."

6/ See Norfolk Naval Shipyard, Tidewater, Virginia and Federal Employees Metal Trades Council, 9 FLRA 458 (1982).

testing program.

ORDER

Pursuant to the Authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of the proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel under § 2471.11 (a) of its regulations hereby orders the following:

The parties shall adopt the Union's proposal.

By direction of the Panel.

Linda A. Lafferty
Executive Director

August 26, 1992
Washington, D.C.