United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

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| In the Matter of<br><br>DEPARTMENT OF DEFENSE<br>DEFENSE MAPPING AGENCY<br>HYDROGRAPHIC/TOPOGRAPHIC CENTER<br>LOUISVILLE, KENTUCKY<br><br>AND<br><br>LOCAL 1482, NATIONAL FEDERATION OF FEDERAL EMPLOYEES | Case No. 90 FSIP 4 |

FACTFINDER'S REPORT

The Department of Defense, Defense Mapping Agency, Hydrographic/Topographic Center, Louisville, Kentucky (Employer) and Local 1482, National Federation of Federal Employees (Union) filed a joint request with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under section 7119 of the Federal Service Labor-Management Relations Statute (Statute).

The Panel initially directed the parties, pursuant to section 2471.6(a)(2) of its regulations, to meet informally with Staff Associate Joseph Schimansky for the purpose of assisting them in resolving any outstanding issues concerning their dispute over the Employer's proposed drug testing policy. If no settlement were reached, he was to notify the Panel of the status of the dispute, including the parties' final offers and his recommendations for resolving the issues. Following consideration of this information, the Panel would take whatever action it deemed appropriate to resolve the impasse.

On February 12 and 13, 1990, Mr. Schimansky met with the parties in Louisville, Kentucky. A number of issues were resolved, but seven remained at impasse.1/ Thereafter, Mr. Schimansky notified the Panel of the status of the dispute, including the parties' final offers and his recommendations for resolving the issues. After due consideration of Mr. Schimansky's report, pursuant to section 2471.11 of its regulations, the Panel notified the parties that it had decided

1/ As a result of subsequent negotiations, the parties reached agreement on four additional issues.

to conduct a factfinding hearing[2/] for the purpose of supplementing the record with respect to the issue of testing "split," "second," or "reserved" urine samples[3/] for the presence of drugs. The parties also were notified that the report of the factfinder, without recommendations for settlement, would be submitted to the Panel in accordance with section 2471.9(c) of the Panel's regulations. Both parties submitted prehearing briefs outlining their respective positions (Jt. Exhs. 12, 13)

Accordingly, the undersigned was appointed as factfinder and a hearing was conducted on July 17, 1990, at the Panel's offices in Washington, D.C. A stenographic record was made, testimony and argument presented, and documentary evidence submitted. The parties also submitted posthearing briefs solely concerning a jurisdictional argument raised by the Employer prior to the hearing.

## BACKGROUND

The Employer's mission is to produce maps and charts for various branches of the Department of Defense. It is part of the Defense Mapping Agency (DMA), which has approximately 9,000 employees in more than 50 locations around the world (Jt. Exh. 12). The Union represents about 275 cartographers and other employees engaged in a variety of technical positions, primarily GS-5 through -12. The parties' impasse over the Employer's drug testing policy arose from negotiations pursuant to agency head rejection of portions of a previously-negotiated term agreement. The parties subsequently agreed to separate their negotiations over drug testing from the rest of their term agreement, which has been implemented and will expire on June 28, 1992.

## ISSUE AT IMPASSE

The basic issue at impasse is whether: (1) the collection of a reserved or second urine sample from employees randomly selected for drug tests should be automatic or at the request of the employees, and (2) the costs associated with the second sample should be borne by the employees, the Union, or by the Employer.

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2/ The factfinding hearing concerned only one of the three issues which currently remain in dispute between the parties.

3/ In the context of this case, the parties use these terms interchangeably to mean the amount of urine provided by an employee at the collection site in excess of 60 milliliters (ml.), and placed in a separate container for testing, if necessary, at a future date.

1. The Parties' Proposals

The Union proposes the following:

> If an employee can provide at least 70 ml. of urine during a specimen collection, the collection site person will take the urine in excess of 60 ml. and place it in a separate container. Both the original sample (containing 60 ml.) and the reserved sample (containing at least 10 ml.) will be processed for shipment to the agency's drug testing laboratory in accordance with the requirements of the Department of Health and Human Services (DHHS) guidelines. Once the samples arrive at the laboratory, the security and analysis procedures contained in Section 2.4 of the Guidelines will be followed.
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> If an employee is unable to produce 70 ml. of urine at the time of a specimen collection but can produce at least 60 ml., the employee will remain at the collection site and be given a reasonable amount of liquid (approximately 8 oz. every 20-30 minutes) until the employee is able to urinate again. An employee will be given no more than 3 hours to drink liquids and attempt to provide enough urine for a reserve sample of at least 10 ml. (Jt. Exh. 10)
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> If confirmatory testing of the original sample yields a positive result, the reserve sample will be tested. Test results from both the official and reserve samples will be reported to the Medical Review Officer (MRO) pursuant to Section 2.4(g) of the [D]HHS Guidelines.4/

The Employer consistently has contended, both during negotiations and before the Panel, that for various reasons the Union's proposal is outside its duty to bargain (Tr. 15-16; Jt. Exh. 13). Should the Panel continue to retain jurisdiction, however, the Employer proposes the following:

> 1. A reserved or second urine sample may be collected from bargaining-unit employees under the following circumstances.
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> a. An employee requests that the second sample be collected.

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4/ The third paragraph of the Union's proposal was amended with the Employer's consent after the factfinding hearing.

b. An employee is able to produce at least 70 ml. of urine; 60 ml. for the first sample and at least 10 ml. for the second sample. If an employee is unable to produce the required amount of urine immediately, the standard procedures as set forth in the "Urinalysis Collection Handbook for Federal Drug Testing Programs" shall be followed.

c. Second samples shall be treated exactly the same as the first samples with regard to collection, labeling, record keeping, storage, shipment, etc., except that the first and second samples shall be so labeled.

d. All costs relevant to the second sample shall be paid by the employees and/or the Union.

2. If the first sample is confirmed positive, the MRO will direct a retest using the second sample. Specimen processing and testing will be in strict compliance with [D]HHS Guidelines. All drug testing, or retesting, results from the first or second samples will be reported directly to the MRO in accordance with [D]HHS Guidelines, including chain of custody requirements. The MRO will make final review decision to verify a positive test result in accordance with [D]HHS Guidelines.

3. The employee shall be informed of the test results for both samples. (Jt. Exh. 11(b).)

2. Jurisdictional Issues

The Employer contends that the Panel "lacks jurisdiction" to decide the negotiability issues it raises in connection with the Union's proposal, and should, therefore, defer those issues to the Federal Labor Relations Authority (FLRA) (Jt. Exh. 13).[5/] In this regard, it believes that the Union's proposal directly conflicts with: (1) various provisions of the DHHS Guidelines; (2) its right to determine the internal security practices of the agency, under section 7106(a)(1) of the Statute; and (3) management's rights to assign work and contract out, under section 7106(a)(2)(B) of the Statute. Its contention that the proposal conflicts with the DHHS Guidelines

5/ In support of its position, the Employer cites the FLRA's decision in Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364, 31 FLRA 620 (1988), which clarifies the authority of interest arbitrators and the Panel to consider duty-to-bargain issues raised by the parties to a proceeding.

is supported by the decision of the United States Court of Appeals for the District of Columbia Circuit in Department of the Army, U.S. Army Aberdeen Proving Ground Installation Support Activity v. Federal Labor Relations Authority, 890 F.2d 467 (D.C. Cir. 1989). There the court held that two union proposals requiring split urine samples, similar to the Union's proposal in the instant case, were inconsistent with the Guidelines and hence were not negotiable. Moreover, in its view "the [c]ourt would have found that split samples are clearly inconsistent with the spirit, if not the letter, of the [DHHS] Guidelines and thus not negotiable" (Jt. Exh. 13).

The Union's proposal impermissibly interferes with its right to make determinations with regard to contracting out because it "would dictate the services which the agency would be required to contract for" (Emp. Br. 3). Specifically, it would require a modification of its contracts with its contractors "to provide for the collection of a second urine sample from each employee and for the testing of that second sample should the original sample test positive" (Emp. Br. 2). Moreover, the proposal does not constitute a "procedure" or an "appropriate arrangement," within the meaning of section 7106(b)(2) and (3) of the Statute. With regard to the latter point, the Union has failed to demonstrate that the drug testing policy would create an adverse impact upon employees, or that its proposal would alleviate such impact (Emp. Br. 4). Thus, under applicable FLRA precedent, the Employer is under no obligation to bargain over the Union's proposal.

The Union alleges that under the criteria established by the FLRA in Carswell, "a body of precedent has been established upon which the Panel can rely in solving the negotiability question presented by the split sample provision in this case" (Jt. Exh. 12 at 6). Contrary to the Employer's allegations, its proposal is fully consistent with the requirements for sample collection and security contained in the DHHS Guidelines (Jt. Exh. 12 at 11). In addition, unlike the proposal found nonnegotiable by the court in Aberdeen, its proposal would not "undercut" the authority of the MRO to make final determinations of illegal drug use (Jt. Exh. 12 at 13). Moreover, the proposal is a negotiable procedure to be used in implementing the Employer's drug testing program because it would not prevent management from "acting at all," nor directly interfere with the agency's right to contract out (Jt. Exh. 12 at 14; Un. Br. 3). In the alternative, however, the proposal also constitutes a negotiable appropriate arrangement, under section 7106(b)(3) of the Statute, for employees adversely affected by the exercise of management's rights (Jt. Exh. 12 at 15; Un. Br. 3, 4). In this regard, contrary to the Employer's

assertions, the Union believes that "the threat of error in the collection and testing of urine specimens" demonstrates the adverse affects that "may potentially arise in even the most carefully run drug testing programs" (Un. Br. 3).

3. Union's Position

It is the position of the Union that given the substantial benefit that would accrue from the use of split samples and the minimal burden that split samples would impose on the Employer, its proposal should be adopted (Tr. 12; Jt. Exh. 12). The Union contends utilization of a split sample would allow for collection and retention of a portion of an employee's official sample. Accordingly, if the official sample is reported positive, the split sample would also be available for testing. Thereafter, the test results from both samples would be reported to the MRO, who has the final authority under the DHHS Guidelines to review and interpret test results (Tr. 11-12).

The Union's expert witness testified that the testing and analysis of urine specimens for the presence of drugs is a very complicated and precise endeavor, requiring great skill on the part of laboratory technicians and collection site personnel. It was his opinion that no drug testing is completely without error, even if it is conducted in accordance with strict guidelines (Tr. 11, 30-33).

The possibility of administrative error, e.g., mislabeling or mishandling, or analytical error,[6/] faulty equipment or instruments, and incorrect procedures, is very real in the best laboratories and collection sites. While collecting or retaining a portion of an employee's urine cannot completely eliminate such errors, as a safeguard, it can provide a vital measure of assurance to employees facing severe consequences, including the loss of their jobs, should they be falsely accused of drug use as a result of simple human error (Tr. 11, 48).

The splitting of urine samples is a relatively simple

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6/ The Union's expert witness testified that the DHHS Guidelines do not mandate any particular analytical procedure, but direct that the gas chromatography or mass spectrometer tests be used. In his opinion there are numerous ways to use these tests. He disagrees with the method used by most laboratories in the country tc identify the presence of drugs in urine testing. (Tr. 33-34.)

procedure that has been done for years[7] and can be done at minimal cost to the Employer (Tr. 40, 41). The Union points out that several Federal agencies have begun drug testing and are reporting positive test results of 1 percent or less (Tr. 12; Jt. Exh. 12 at 10). Since there is no reason to believe that the employees in question will yield positive results in greater numbers than their counterparts at other Federal agencies, it can be expected that only 1 percent of split samples collected would require testing. Therefore, the only significant cost to the Employer would be the purchase of additional specimen collection kits (Tr. 12, 40-41).

In advancing its position, the Union relies in part on a report published by the National Institute on Drug Abuse (NIDA)[8] (Un. Exh. 1), a component agency of DHHS that recently recommended modifications to the DHHS Guidelines to allow the use of split samples.[9] The report provides a consensus statement that split urine samples should be permitted provided both samples are part of the same specimen and handled with identical safeguards.

While acknowledging that the laboratory the Employer uses is well maintained, the Union contends it is not without error or the possibility of error. Finally, the Union argues that

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7/ In this regard, the Union's expert witness provided testimony that in his over 40 years of experience in the field, split samples have been widely used. According to him, by splitting the sample and refrigerating it, and testing only if the first or official sample is deemed positive, there is no loss of integrity to the reserve sample. (Tr. 34-35.)

8/ NIDA recently invited some 300 scientists to a conference to discuss issues in connection with a drug-free workplace. As a result, a consensus report containing recommendations was formulated and published. See, Technical, Scientific and Procedural Issues of Drug Testing, (Consensus Report), National Institute on Drug Abuse (1990).

9/ The Employer pointed out that the report issued after the NIDA-hosted conference "is only a recommendation, a consensus recommendation, from the conference itself and the attendees" (Tr. 15), that is, not an official NIDA recommendation.

the costs of its proposal are negligible when viewed in the context of the Employer's large budget (Tr. 229). In any event, the costs associated with the split sample should not be borne by the employees, since the entire drug testing program is the Employer's initiative. Therefore, split samples are in the best interests of the employee because they would make false accusations less likely, and are a small price to pay for the additional safeguards they would provide (Tr. 230).

4. Employer's Position

The Employer adopts the view that second samples would impose unnecessary financial burdens. Additional costs would be incurred as a result of collection, documentation, shipping, handling, and storage at the laboratory, when second testing is required. The Employer estimates that the total costs for each second sample collected and stored under the Union's proposal would be $50 (Tr. 13). According to the testimony of a representative of the contractor that provides the collection services, the additional cost of testing the second sample would be "approximately $30 to $35 (Tr. 128-130; Emp. Exh. 1). Thus, the additional cost for each employee if second samples are required would be either $50 or $75 to $85 (Tr. 14).

Because of its sensitive mission, the Employer believes its positions require a high level of concentration which would be diminished if its employees participated in drug use. Of its several thousand employees, 95 percent occupy sensitive positions and are subject to random drug testing (Tr. 86). Its current drug testing policy was reviewed and approved by DHHS, and the mandatory guidelines issued by DHHS are without a doubt carefully drafted. They ensure that, within the bounds of scientific reason, programs such as the Employer's afford the necessary safeguards to preclude false accusations of employee drug use (Tr. 15).

Split samples are unnecessary to ensure the integrity of its program and to protect the well-being of its employees. In the absence of second samples, employees would not be falsely accused because each step in the collection and testing process contains multiple safeguards, and each subsequent safeguard serves as a backstop to the preceding one. Moreover, the Employer's Director of Personnel testified that those employees who test positive and are identified as having drug abuse problems are provided with assistance and given every opportunity to be rehabilitated before any adverse action is taken. This witness stated that if an employee is sucessfully rehabilitated, he or she will have every opportunity to continue employment (Tr. 90).

The company which provides its testing and collection services also provides the same services to myriad other

Government agencies and companies in the private sector (Tr. 102). This company employs very strict procedures which include: (1) securing the area where the specimen is given; (2) maintaining log books, chain of custody documents, and tamper proof mechanisms used in preparing urine samples for shipment and in safeguarding samples while in transit; and (3) rigid quality controls after each stage of the process once the samples are received at the laboratory. (Tr. 103-114.)

As part of its quality control, the contractor's representative testified that when a specimen is received in the laboratory, it is initially checked for errors. Any errors are then categorized as fatal or non-fatal. Occasionally, dates, times of collection, or Social Security numbers may be missing; specimen identification numbers or labels may be incomplete, and specimen seals may be broken. Such instances would be deemed fatal. The witness cited as an instance of a non-fatal error the failure to record the temperature of the specimen. According to her, if there is any error that could result in misidentification of the specimen or where chain of custody is in doubt, the specimen simply is not tested. Such fatal errors result in the specimen being reported as negative. (Tr. 118-121.)

For those specimens deemed to be without error and ultimately tested, the Assistant Technical Director of the laboratory testified that the testing procedures are reliable and demonstrated how the use of its state-of-the-art laboratory equipment and the insertion of blind quality control samples that are regularly tested along with employees' specimens maintain strict quality assurance. In this regard, when doing specimen testing, laboratory technicians are unaware as to what specimens are blind quality control samples. (Tr. 141-154.) He testified that once tested the technicians receive a computer printout of the results, and all samples are matched with the respective results, including the positive and negative quality controls (Tr. 155-156). He stated, of the 4,000 to 5,000 blind samples received from the various agencies and tested, its overall accuracy has been 100 percent (Tr. 180-181).

In support of the Employer's position, the Drug Program Manager of the Department of the Interior testified as to the reliability of the particular laboratory used for drug testing. He stated that to his knowledge the laboratory has never misidentified or failed to analyze correctly any of the blind samples sent by his agency for testing and that overall the laboratory used was excellent (Tr. 200).

According to the testimony of the MRO, her role as an independent medically qualified individual is to protect employees from the adverse impact of false positive test

results (Tr. 204, 205). In this regard, she stated that one of her responsibilities is to determine whether a positive test result should be discounted because of the existence of excusing conditions, e.g., precription medications (Tr. 204, 207, 211). The MRO meets privately with employees who have tested positive before the Employer is given any information as to an employee's test results (Tr. 207). Moreover, she stated that it is standard operating procedure to seek a retest of all positive samples of employees after consultation with the individual, further protecting employee rights (Tr. 211). The MRO explained that if there were any doubt whatsoever in her mind about the laboratory's findings, following a retest, the test results would be discarded and reported as negative (Tr. 204, 212-217). The MRO serves to safeguard employee interests, thus eliminating the need for split or second samples.

## CONCLUSIONS

The above Report, which summarizes the transcripts, exhibits, and posthearing briefs of the parties, is respectfully submitted to the Panel.

Susan S. Robfogel

Susan S. Robfogel
Factfinder

August 28, 1990
Rochester, New York