

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

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In the Matter of )  
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DEPARTMENT OF DEFENSE )  
DEFENSE MAPPING AGENCY )  
HYDROGRAPHIC/TOPOGRAPHIC CENTER )  
LOUISVILLE, KENTUCKY )  
 )  
and ) Case No. 90 FSIP 4  
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LOCAL 1482, NATIONAL FEDERATION )  
OF FEDERAL EMPLOYEES )  
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DECISION AND ORDER

On July 17, 1990, a factfinding hearing was held on one of three issues which remain at impasse between the parties in the above-referenced case concerning the Employer's proposed drug testing policy.<sup>1/</sup> Thereafter, the factfinder submitted her report (which is attached), without recommendations, to the Panel on whether: (1) the collection of a second (or reserved) 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 the Employer. Local 1482, National Federation of Federal Employees, essentially had proposed that the collection of a second sample be automatic and that the costs associated with the second sample be borne by the Employer. We note for the record that subsequent to the issuance of the factfinder's report, the Employer submitted a document disagreeing in part with the factfinder's statement of the "Issue at Impasse" as set forth in the report. In this regard, the Employer asserts that its primary position is that the collection of second urine samples is unnecessary. Its proposal that the collection of such samples be at the request of employees, and associated costs be borne by the employees or the Union, "was intended to be a fall-back position only in the event that the Panel found that the use of [second] samples was appropriate in some form." In addition, the Employer continues

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<sup>1/</sup> The issues in dispute concern both the Employer's proposed random and reasonable suspicion drug testing programs.

to maintain that the Panel lacks the jurisdiction to decide the issue on its merits.

As stated in the factfinder's report, the Panel initially determined to resolve the issues presented in the parties' joint request for assistance through an informal meeting between the parties and a Panel representative. This Decision and Order addresses the issue which was the subject of the factfinding hearing, as well as the other two issues which remain in dispute in the case. In reaching its decision, the Panel has now considered the entire record, including the factfinder's report, and the recommendations of the Panel's representative for resolving the issues.

#### ISSUES AT IMPASSE

In addition to the issue involving second urine samples, the parties also disagree over Union and/or employee access to: (1) documentation supporting a decision to conduct "reasonable suspicion" tests of employees, and (2) information which would verify that employees have been randomly selected for testing.

#### 1. Information Concerning Reasonable Suspicion Tests

##### a. The Union's Position

The Union proposes that the following wording be adopted:

If an employee is ordered to submit to a reasonable suspicion drug test, the employee will be entitled upon request to a copy of the written report that management is required to prepare under Section X(B) of the DMA Drug [Free] Workplace Plan, along with any other documents prepared by management to comply with the requirements of Section X(B). All witness statements relied upon by management to order a reasonable suspicion test will be included with the documentation described above. The names of any witnesses who provided statements will not be sanitized.

The Employer's allegation that the Panel lacks jurisdiction to decide this issue should be disregarded because the Union's proposal is fully negotiable. On the merits of the issue, the information which would be provided under the proposal is justified, given the onerous nature of reasonable suspicion testing. In this regard, employees ordered to submit to such testing are entitled to know the names of their accusers.

Moreover, receipt of the requested information would enable the employee and the Union to investigate completely any incident upon which management based its decision to conduct such testing, thereby ensuring the accountability of the parties involved. It also would protect employees from the kinds of "witch hunts" which have occurred at the activity in the past.

b. The Employer's Position

The following wording is proposed by the Employer:

If an employee is ordered to submit to a reasonable suspicion drug test, the Union will be entitled upon request by the employee to a copy of the written report that management is required to prepare under Section X(B) of the DMA Drug [Free] Workplace Plan, along with other documents prepared by management to comply with the requirements of Section X(B). All witness statements relied upon by management to order a reasonable suspicion test will be included with the documentation described above. The witnesses' statements will be sanitized so that the witnesses may not be identified.

Preliminarily, the Employer contends that the Panel lacks jurisdiction to decide this issue, and should defer to the Federal Labor Relations Authority (FLRA) for resolution of the matter. In this regard, the Union's proposal "could jeopardize the investigatory process and substantively interfere with reasonable suspicion testing of employees." Accordingly, it is nonnegotiable because it directly and excessively interferes with management's right to determine its internal security practices, under section 7106(a)(1) of the Statute. Should the Panel continue to retain jurisdiction over the issue, however, its proposal would ensure that there is a reasonable basis on which to initiate reasonable suspicion testing without "inhibiting the intent and purpose of the reasonable suspicion testing program." In this regard, the Agency regulation implementing its drug testing program "establishes more than adequate safeguards to guard against abuse of reasonable suspicion testing." The Union's proposal, on the other hand, would make known the names of individuals reporting suspicious behavior and "would subject those individuals to possible retaliation."

2. Information for Monitoring the Randomness of Selection

a. The Union's Position

The Union proposes the following wording:

The Employer will provide the Union a list of the names of all Louisville Office (LUO) bargaining-unit employees randomly tested under the DMA Drug Free Workplace Plan within 28 days after the test date. Should an employee get a deferral from a random drug test, the employee's name will be sanitized from the list. The number of nonunit employees who were randomly tested and their position titles will also be shown on the list.

There is no merit to the Employer's allegation that the Panel lacks jurisdiction to decide this issue because the Union's proposal is fully negotiable. Further, its proposal should be adopted because it would permit the Union effectively to monitor the randomness of the drug testing program to ensure that the employees being tested include nonbargaining-unit employees, as it should if the selection procedure truly is random. In this regard, disclosure of the position titles of nonbargaining-unit employees tested would provide the Union with additional assurance that the Employer's data regarding the number of nonunit employees tested are accurate.

b. The Employer's Position

The following is the Employer's proposal:

The Employer will provide the Union a list of the names of all LUO bargaining-unit employees randomly tested under the DMA Drug Free Workplace Plan within 28 days after the test date. Should an employee get a deferral from a random drug test, the employee's name will be sanitized from the list. The number of nonunit employees who were randomly tested will also be shown on the list.

As with the Union's previous proposal involving reasonable suspicion testing, the Employer contends that the Panel lacks jurisdiction to decide this issue, and should defer to the FLRA for resolution of the the matter. In this regard, the Union's proposal "does not concern matters affecting working conditions

of bargaining-unit employees within the meaning of section 7103(a)(14) of the Statute" because it "extends to nonbargaining-unit employees." It cites the FLRA's decision in Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235 (1986) to support its position.<sup>2/</sup> Should the Panel retain jurisdiction of the issue, however, the data to be provided under its proposal, in conjunction with other anonymous statistical data for bargaining-unit employees which the Employer already has agreed to provide, "will be sufficient for the Union to monitor the randomness of the testing process as between unit and nonunit employees.

#### CONCLUSIONS

We shall turn first to the jurisdictional argument raised by the Employer that the Panel "lacks jurisdiction" to decide the negotiability issues it raises in connection with the Union's second urine sample proposal, and should, therefore, defer to the FLRA regarding those issues. In such circumstances, the Panel is guided by the FLRA's decision in Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364, 31 FLRA 620 (1988) (Carswell), where the FLRA determined that the Panel may apply existing case law to resolve an impasse where a duty-to-bargain issue arises. In this regard, the Panel's initial determination to assert jurisdiction over the parties' joint request for assistance in this case was based in part on the FLRA's decision in National Federation of Federal Employees, Washington, D.C. and U.S. Army Aberdeen Proving Ground, Installation Support Activity, 33 FLRA 702 (1988). There the FLRA ruled negotiable a union proposal allowing an employee to retain a portion of a urine sample, provided in connection with the agency's drug testing program, for confirmatory testing in the event that the official sample yields a positive test result.

On appeal, the United States Court of Appeals for the District of Columbia Circuit remanded the decision to the FLRA, ruling that the union's proposal in that case was inconsistent with the Department of Health and Human Services (DHHS) Mandatory Guidelines for Federal Workplace Drug Testing Programs. Department of the Army, U.S. Army Aberdeen Proving Ground, Installation Support Activity v. Federal Labor Relations

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<sup>2/</sup> It also contends that the FLRA's decision in American Federation of Government Employees, Local 32 and Office of Personnel Management, 33 FLRA 335 (1988) (OPM), where it adopted the "vitally affects" test for determining the negotiability of a proposal when it affects positions outside the unit, is not applicable.

Authority, 890 F.2d 467 (D.C. Cir. 1989) (Aberdeen). The court's decision was based upon an examination of the union's intent in requesting the additional data. The union stated that an employee could present the information to a supervisor to rebut the Medical Review Officer's (MRO) positive finding. Accordingly, the court concluded that the proposal was inconsistent with the Guidelines because it would give the employee's supervisor the authority to disregard the findings of the MRO. Upon remand, the FLRA rescinded its order that the parties negotiate concerning the proposal, based on the rationale and conclusions of the court in Aberdeen. National Federation of Federal Employees, Local 2058 and U.S. Army Aberdeen Proving Ground, Installation Support Activity, 35 FLRA No. 97 (April 30, 1990). Significantly, the FLRA added that "in future cases involving proposals that are not materially different" from the proposal in Aberdeen "and that are intended to be applied in the same manner, we will also find them to be nonnegotiable."

Upon careful review of these legal developments, we are persuaded that the proposal in the instant case is fully consistent with the DHHS Guidelines, and that sufficient precedent exists under Carswell to support the Panel's determination to retain jurisdiction. We note that the instant proposal is materially different from the one in Aberdeen. Specifically, it is not intended to permit an employee to present the information to a supervisor to rebut the MRO's positive finding. Rather, should confirmatory testing of the official sample yield a positive result, the reserve sample would be tested, and test results from both samples would be reported to the MRO "pursuant to Section 2.4(g) of the DHHS Guidelines." Accordingly, we find that the Union's proposal is properly before the Panel.

Having carefully examined the evidence and arguments submitted by the parties at the factfinding hearing on the merits of the second sample issue, including the Employer's post-factfinding statement, we shall order the parties to withdraw their proposals. Preliminarily, the parties share the burden of developing a full and complete record on the basis of which this decision is made. In our view, there is no objective evidence in the circumstances of this case that providing a second urine sample at the collection site would add to the fairness of the Employer's drug-testing program so long as a portion of the first sample is set aside for future use in case of a question of validity regarding a confirmed positive test, or provide greater assurance that an error would not occur. At most, the record reflects that a second sample would provide greater psychological comfort to employees forced to participate in an involuntary program.

On balance, we do not believe that the additional costs to the Employer of implementing the Union's proposal are warranted, given the very limited psychological comfort it would provide. With regard to expense, it was estimated at the hearing that under the contractual agreements reached by the Employer, the cost of collecting, labeling, and storing a second sample would be \$25 per employee tested. In addition, if the laboratory under contract to the Employer in this case concluded that the official sample contained illegal drugs, testing of the second sample, which would be automatically required under the Union's proposal, would cost approximately \$30 to \$35. Thus, the unrebutted testimony establishes that the cost of the Union's proposal to this Employer would be between \$25 and \$60 per employee tested.

Unrebutted testimony describing the collection procedures, labeling, and chain-of-custody documentation, as well as the procedures established by the laboratory under contract with the Employer for checking the documentation after the urine samples have arrived, convinces us that the potential for the wrong sample being tested is virtually nil. This is further supported by the quality control procedures used by the laboratory to prevent contamination of urine samples by another employee's urine or other contaminants. In this regard, we found particularly persuasive the testimony of the Assistant Technical Director of the drug-testing laboratory, who stated that over the last 3 years, of the 4,000 to 5,000 "blind samples" sent to the laboratory for quality control purposes by those agencies who are utilizing the laboratory's services, no false positives had been reported (Tr. 180, 181).

In addition, the 100-percent accuracy rate on blind samples was corroborated by the manager of the Department of the Interior's drug testing program with respect to the 300 blind samples that agency has submitted to this laboratory. Also, the testimony of the Employer's MRO concerning her role in protecting the interests of employees compels us to reject the Union's proposal. The MRO, a medical doctor employed by the Public Health Service, described the part her office played in persuading DHHS to include in its drug-testing guidelines the requirement that test results be screened by an independent, medically-qualified individual, before being communicated to an employer (Tr. 204, 207). The function of the MRO is to determine whether a positive test result should be discounted because of the existence of excusing conditions, e.g., medications (Tr. 204, 207). The MRO meets privately with the employee who has tested positive before the employer is given any information as to an employee's test results (Tr. 206, 207). She described her chief role as the protection of the individual employee from the adverse impact of a false positive

test result, and explained that if there were any doubt whatsoever in her mind about the laboratory's finding, the test results would be discarded and reported as negative (Tr. 204, 216, 218). Moreover, it is her standard operating procedure to require retesting of all samples of employees which the laboratory has reported as testing positive, after consultation with the individual (Tr. 211). The official sample is large enough to supply urine for retesting (Tr. 162-63, 177). Hence, we are convinced that the procedure is very protective of employee rights.

Although human error is always possible, we are not persuaded that the potential for error would be reduced by using a second sample. In fact, by requiring a doubling of paperwork and handling, the potential for error might actually increase.

We also are unpersuaded by the recommendations contained in the "Consensus Report" (Un. Exh. 1) published after a conference of 300 drug testing specialists sponsored by the National Institute for Drug Abuse (NIDA) in December 1989, regarding the Federal drug testing program. The report recommends that DHHS amend its Guidelines to provide for separate urine samples at the collection site (Tr. 44). In this regard, we note that DHHS fully considered the use of second samples prior to the publication of its current guidelines, and concluded that such a procedure would not add materially to the protection of employees (Tr. 50, 218). There was no testimony at the hearing to persuade us that something beyond what is required by the current DHHS Guidelines is called for under the facts of this case. If DHHS should change its Guidelines to provide for second samples, however, any future negotiations between the Employer and the Union should of course take this development into account. Even if DHHS Guidelines are not changed, the parties may well agree, through the give and take of negotiations, that the extra psychological comfort of a second sample should be provided to employees. On the basis of the evidence presented here, however, we believe that such a decision should be left to the parties.

Turning to the dispute over the issue involving reasonable suspicion drug testing of employees, the United States District Court for the District of Columbia recently held that the Employer's proposed reasonable suspicion drug testing program violates the Fourth Amendment of the U.S. Constitution. National Federation of Federal Employees, et al. v. Richard B. Cheney, et al., No. 89-1727 (D.D.C. July 17, 1990). By virtue of the court's decision, which effectively prohibits the Employer from implementing this portion of its drug-testing program, the dispute appears to have been rendered moot.



Accordingly, we shall order the parties to withdraw their respective proposals on the issue.

Finally, concerning the parties' disagreement over the type of information the Union would receive to verify that the selection of employees is truly random, the Employer contends as a preliminary matter that the Union's proposal is outside its duty to bargain. Once again, we are guided in such circumstances by the FLRA's decision in Carswell. An examination of FLRA precedent indicates that the Statute imposes no limit on the information an employer may agree to furnish a union under a collective-bargaining agreement, provided that the information relates to working conditions within the bargaining unit and its disclosure is not prohibited by law. See, for example, Merit Systems Protection Board Professional Association and Merit Systems Protection Board, Washington, D.C., 30 FLRA 852 (1988) (MSPB).

We find no merit in the Employer's view that the Union's proposal is nonnegotiable because it "extends to nonbargaining-unit employees." This conclusion is in accordance with the FLRA's decision in MSPB, and its adoption of the "vitally affects" standard in OPM for determining questions involving the duty to bargain over proposals concerning conditions of employment of unit employees which also affect employees or positions outside the unit. In this regard, there can be no serious question that a proposal which is intended to verify that the selection of employees for drug testing is truly random by providing the Union with the position titles of the nonbargaining-unit employees tested, vitally affects the working conditions of unit employees. As the Employer does not contend, nor is it apparent, that the proposal is otherwise inconsistent with applicable law and regulations, we find that the Union's proposal is properly before the Panel.

Moving to the merits of the issue, it appears that the parties' proposals differ only as to whether the Employer should be required to provide the Union, in addition to the number of nonunit employees randomly tested, their position titles. In the circumstances of this case, we are persuaded that the additional information sought by the Union is unnecessary, and that an accounting of the number of nonunit employees tested should be sufficient to meet its needs in monitoring the randomness of the program. Thus, we shall order the parties to adopt the Employer's proposal to resolve the issue. Should legitimate questions arise, however, concerning the accuracy of the data provided by the Employer, we note that the Union may request the additional information it desires under section 7114(b)(4) of the Statute.

ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to section 2471.6(a)(2) of the Panel's regulations, the Federal Service Impasses Panel under section 2471.11(a) of its regulations hereby orders the following:

1. Second Urine Sample

The parties shall withdraw their proposals.

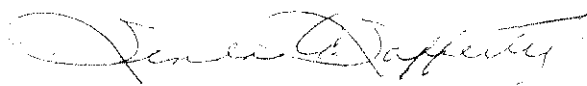
2. Information Concerning Reasonable Suspicion Tests

The parties shall withdraw their proposals.

3. Information for Monitoring the Randomness of Selection

The parties shall adopt the Employer's proposal.

By direction of the Panel.



Linda A. Lafferty  
Executive Director

November 9, 1990  
Washington, D.C.

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of )  
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DEPARTMENT OF DEFENSE )  
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LOUISVILLE, KENTUCKY )  
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LOCAL 1482, NATIONAL FEDERATION )  
OF FEDERAL EMPLOYEES )  
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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.<sup>1/</sup> 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

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

to conduct a factfinding hearing<sup>2/</sup> for the purpose of supplementing the record with respect to the issue of testing "split," "second," or "reserved" urine samples<sup>3/</sup> 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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<sup>2/</sup> The factfinding hearing concerned only one of the three issues which currently remain in dispute between the parties.

<sup>3/</sup> 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.

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)

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.<sup>4/</sup>

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.

a. An employee requests that the second sample be collected.

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<sup>4/</sup> 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).<sup>5/</sup> 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

<sup>5/</sup> 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,<sup>6/</sup> 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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<sup>6/</sup> 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 to identify the presence of drugs in urine testing. (Tr. 33-34.)



procedure that has been done for years<sup>7/</sup> 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)<sup>8/</sup> (Un. Exh. 1), a component agency of DHHS that recently recommended modifications to the DHHS Guidelines to allow the use of split samples.<sup>9/</sup> 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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<sup>7/</sup> 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.)

<sup>8/</sup> 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).

<sup>9/</sup> 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 successfully 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).

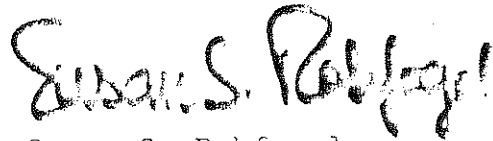
In support of the Employer's position, the Drug Program Manager of the Department of the Interior testified as to the reliability of the particular laboratory used for drug testing. He stated that to his knowledge the laboratory has never misidentified or failed to analyze correctly any of the blind 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., prescription 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  
Factfinder

August 28, 1990  
Rochester, New York