STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KENT COUNTY ROAD COMMISSION,
Respondent-Public Employer

-and- Case No. C01 B-30

TEAMSTERS STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 214,
Charging Party-Labor Organization
_____/

APPEARANCES:

Jack C. Clary, Esq., Miller, Johnson, Snell & Cummiskey, PLC, for the Public Employer

Michael L. Fayette, Esq., Pinsky, Smith, Fayette & Hulswit, LLP, for the Labor Organization

DECISION AND ORDER

On July 17, 2002, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

DATED:

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455 (10), this matter came on for hearing at Lansing, Michigan, on October 24, 2001, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on February 1, 2001, by Teamsters, State, County, and Municipal Employees, Local 214, alleging that the Kent County Road Commission had violated Section 10 of PERA. Based upon the record, including briefs filed on or before December 26, 2001, the undersigned makes the following findings of fact and conclusions of law, and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges that the Employer failed to bargain in good faith when it failed to follow the drug testing policy set forth in the collective bargaining agreement. The Union maintains that the procedures require that certain safeguards be in place, including the splitting of samples and the sealing of samples in the presence of the donor. According to the Union, this was not done in the case of employee Brent Willmer

and by failing to do so the Employer repudiated the contract.1

Facts:

Teamsters Local 214 represents a bargaining unit of Road Commission and Parks employees employed by the Kent County Road Commission. The most recent contract between the parties covered the period June 1, 1997 to May 31, 2000. Jon Rice is the managing director of the Kent County Road Commission. Brent Willmer worked for the Road Commission beginning in 1987 as a driver; his most recent position was assistant park manager.

The Road Commission has in place a substance abuse policy pursuant to federal regulations requiring that covered employers promulgate a written policy regarding controlled substances and alcohol use and testing. 49 CFR Sec. 382 *et seq*. The regulations mandate random drug testing but leave to the individual employer the discipline to be imposed. Late in 1994 the Road Commission drafted and provided to the Union a document entitled Kent County Road Commission Commercial Motor Vehicle Driver Substance Abuse Policy. Employees were given a copy of the policy and signed a form to acknowledge receipt. The policy provides at III (A) (8) that: "No driver shall refuse to submit to post-accident, random, reasonable suspicion, or follow-up alcohol or controlled substances testing, such refusal shall be presumed to be a "positive test." This policy also provides at Section V that:

> Failure of a driver to cooperate fully during the collection process (e.g., adulteration of or refusal to provide a complete specimen, complete paperwork, authorize the disclosure of test results to the Road Commission, provide an adequate amount of breath without valid medical excuse for alcohol testing, etc.) will result in discipline up to and including discharge, independent and regardless of test results. Collection of a new specimen and retesting are required when necessary pursuant to the regulations.

The collective bargaining agreement also contains provisions on drug and alcohol testing at Section 13.5. This section provides that violation of the Employer's drug/alcohol policy will result in discipline up to and including discharge.

On February 18, 1998, Rice wrote to Union representative Fred Bennett informing him of changes to the Employer's work rules. One of the changes was to separate possessing or using illegal drugs from alcoholic beverages, and creating a separate violation. The changes included language indicating that the penalty for a first violation of testing positive for illegal drugs was discharge. On March 2, 1998, Rice sent a letter to Bennett stating in part:

1 Other allegations in the charge were withdrawn prior to hearing.

> As we have discussed, the former Rules and Regulations in the Employee Manual erroneously provided for a WN-5 (five day suspension) for a first drug-related offense at work, followed by D (discharge) for a second such offense. This language is not consistent with Section 13.5 of the Collective Bargaining Agreement or the Commercial Motor Vehicle Driver Substance Abuse Policy and Operating Procedures which were developed after the Manual's language. Both the Agreement and this Policy provide for discipline up to and including discharge for a first offense….Henceforth, an employee will be subject to immediate discharge for a first violation of any rule on drugs.

Rice indicated further that the Employer's rules and regulations as well as the Commercial Motor Vehicle Driver Substance Abuse Policy would be changed to reflect this policy. Rice concluded his letter by summarizing the settlement of a grievance regarding employee Guy Vaughn:

> It is my understanding that in consideration of settling the grievance regarding Guy Vaughn's recent discharge and entering into the Last Chance Agreement covering him, the Union agrees that (1) an employee's discharge will be for just cause if discharged for violating any rule on prohibited drugs including for a first offense, and (2) the Union will not in any arbitration or other legal proceeding take a position contrary to this statement in (1) immediately above in this paragraph. Please sign the acknowledgement below if the Union accepts this understanding.

Bennett signed agreement with this policy on March 2, 1998.

On October 14, 2000, Willmer was directed to go for a random drug/alcohol test at Drug Screens Plus, located 10 to 15 miles from the parks office. Willmer testified that he reported to the facility mid to late morning. There were only two individuals at the facility, the technicians who were responsible for overseeing the testing. Willmer was given a specimen bottle for a urine sample and was directed to a private restroom. Willmer supplied a sample and subsequently put it on a counter before being led to another room for a breathalyzer test. He then returned back to the area with the counter where he first came in. Willmer testified that at that time the urine sample was in two different containers and the containers were sealed. Willmer was then asked to sign a form under the following provision:

> I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; that each specimen bottle used was sealed with a tamper-evident seal in my presence and that the information provided on this form and on the label affixed to each bottle is correct.

Willmer signed this form and also initialed the seals on the two bottles. Willmer testified that he didn't remember whether he read the whole statement; although he didn't think that he read the paragraph fully, he signed his name in order to be cooperative. On cross-examination Willmer acknowledged that at a previous

unemployment compensation hearing he testified that he did read the entire statement before signing. Willmer also testified that he did not adulterate the sample he gave that day.

The two individuals employed by Drug Screens Plus who were involved in Willmer's testing both testified regarding the testing procedures followed. Erin Modreske had worked for the company for two years and performed roughly 100 urine collections a week. Modreske testified that only she and the alcohol tester are present in the part of the facility where testing is performed. Only one urine collection is done at a time. Modreske did not specifically remember Willmer's testing, but testified that it is standard procedure to separate the sample in the donor's presence and read to the donor the statement which he/she is to sign. She testified that she never varied from these procedures. Karen Voss, the clinic manager, also testified as to procedures regarding the chain of custody and the care taken to ensure that only one donor at a time is permitted in the collection and testing area so that no adulteration takes place.

Dr. John Budnick serves as the medical review officer (MRO) for Drug Screens Plus. Budnick testified that when a negative test comes in, it is simply a matter of providing the required signatures and his assistants handle it. If the test is positive, and the individual has failed the test because of a drug in their system or an adulterated or substituted specimen, it is the primary duty of the MRO to contact the client and give them an opportunity to explain why the drug was found in their urine. Budnick testified that when he received Willmer's test results from the lab, the printout indicated that the test was not performed, the specimen was substituted and was not consistent with normal human urine. Budnick testified that a "substituted" specimen is so diluted that the human body could not produce such urine. Under federal regulations, a substituted specimen constitutes a refusal to test and cannot be legally retested, either the split specimen or the primary specimen.[2] Budnick contacted Willmer on October 12 at about 6 p.m. and told him that his urine sample was a substituted specimen not consistent with human urine. Budnick testified that although he offered to answer any questions, Willmer did not have any, other than to ask what would happen to him now. Willmer had previously signed to acknowledge receipt of the drug policy and testified that he was aware that testing positive for an illegal drug could be grounds for immediate discharge.

Gerald Byrne, the director of maintenance and local construction for the Road Commission serves as the Employer's designated representative for the drug policy. Byrne answers employee questions relating to the drug policy and distributes the random drug test notices. Byrne testified that on October 13 at about 6 a.m., Willmer met him in his office and asked if he could speak to Byrne in confidence. Byrne testified that Willmer then told Byrne that he had talked to the MRO and that he had testified positive for marijuana. According to Byrne, Willmer told him that he had made a mistake, he had been to a wedding reception the prior weekend and had smoked marijuana. Byrne testified that Willmer said he would basically do whatever would be required of him to keep his employment.

Roger Sabine, director of parks, was Willmer's immediate supervisor. Sabine testified that on the morning of October 13, Willmer stopped by his office at around 7:00 a.m., which was earlier than his usual reporting time. According to Sabine, Willmer told him that he had made a bad decision and smoked some marijuana at a wedding reception. Sabine testified that Willmer was apologetic, and appeared nervous and

2 This is in contrast to an initial screen positive drug test result, for which confirmatory testing is required.

embarrassed. Willmer offered to take drug testing in the future on a regular basis or whatever the Employer required. After Willmer left his office Sabine spoke to Byrne and they discussed what to do next. Ultimately they both went to discuss the matter with Rice. In his testimony at hearing, Willmer denied stating to either Byrne or Sabine that he had smoked marijuana. He testified that he may have told them that he was around people who were smoking, or that he was drinking heavily at the wedding and the alcohol might have thrown off his system.

On October 17, 2000, Rice wrote to Willmer, informing him that in accordance with the Commission's Commercial Motor Vehicle Driver Substance Abuse Policy, the consequence of a positive test is termination of employment. Rice indicated that effective October 16, 2000, Willmer's employment was terminated. Willmer subsequently filed a grievance which stated:

> Grievant was discharged without just or fair cause. Employer failed to follow the doctrine of progressive discipline. Further, under section D of the drug policy, the grievant must be tested randomly by a scientifically valid method, and Union disputes the random method used as being valid.

Willmer testified that prior to filing the grievance he had a discussion with his Union steward who informed him that the specimen needed to be split and sealed in his presence. The steward also advised Willmer to immediately have his own test conducted, which he did approximately 10 days after the initial test; this test was negative. At the third step grievance hearing the Union argued against Willmer's discharge, relying on this negative test and Willmer's prior work record and years of service. The Union did not raise any issue alleging that the testing was improper because the sample was not split in Willmer's presence. The Employer denied the grievance and informed the Union that it would not arbitrate disputes which arose after the expiration of the agreement.

Discussion and Conclusions:

The Charging Party argues that the Employer's drug testing policy was violated when the sample was not properly split and sealed in Willmer's presence. In addition, the Union asserts that Section 13.5 of the contract does not require discharge in the event of a failed drug test. The Charging Party therefore maintains that the Employer implemented the contract in a way that repudiated Section 13.5 and thereby violated its duty to bargain in good faith. The Employer takes the position that Willmer is not a credible witness, and his claim that the sample was not split in his presence is not believable. The Employer further asserts that even if this element of the procedure was not followed, it does not amount to a change in policy which substantially impacts the bargaining unit.

I agree with the Employer that Willmer is not a credible witness. His testimony was inconsistent, contradictory, and unconvincing. Both Bynre and Sabine testified credibly that Willmer had approached them on October 13, admitting that he had smoked marijuana and asking for another chance. Willmer denies that these conversations took place, even though both Byrne and Sabine remembered specific details and the context in which the exchange took place. Willmer then modified his denial somewhat, testifying that he may have told them about smoking taking place at the wedding reception he attended and that he

had been drinking heavily. Neither Byrne nor Sabine had reason to lie and their version of events was similar. I can only conclude that Willmer was not being truthful in his denial of these conversations.

Willmer's claim that the specimen was not divided and sealed in his presence appears to be nothing more than a belated attempt to invalidate the test. At the time of the test he signed a statement certifying that the specimen bottles were sealed in his presence. At hearing he testified that he did not read the statement fully, or did not remember reading it, even though he had previously testified in an unemployment compensation hearing that he did read the provision before he signed the form. The technicians at Drug Screens Plus were experienced in drug screening and convincing in their testimony regarding standard procedures at the clinic to prevent any tampering or adulteration of the specimens. Willmer's complaint regarding the procedure itself did not even arise until after the third step grievance hearing. Based on the record as a whole, I find that Willmer's testimony that the sample was not separated in his presence is not credible.

Even if such an irregularity had been proven, the Charging Party has failed to demonstrate that this would impact Willmer or the bargaining unit. It would not invalidate Willmer's drug test; the record is clear that in cases of substituted specimens, there is no further testing of the split specimen. More importantly, one claimed error or omission of this type does not constitute a unilateral change or repudiation of the contract as argued by the Union. The Commission has found that isolated actions involving no substantial impact on the bargaining unit do not constitute changes in terms and conditions of employment giving rise to a bargaining duty, even if such action violates the parties' contract. *City of Romulus*, 1991 MERC Lab Op 566, 568; *Crestwood Sch Dist*, 1975 MERC Lab Op 716, 721. The Commission has refused to find a unilateral change or renunciation of the contract based on a single incident, without some indication that the employer has altered its policies. *Grass Lake Comm Sch*, 1978 MERC Lab Op 1186, 1190; *City of Westland*, 1988 MERC Lab Op 853; See also *City of Petoskey*, 2002 MERC Lab Op __ (Case No. C01 H-151, issued 1/7/02). There is no evidence here that the Employer intends any change in its drug testing procedures.

As to the claim that discharge was not an appropriate penalty for a failed drug test under the contract, the evidence is overwhelming that the Employer had amended its drug policy to make discharge the penalty for a first offense and this was conveyed to and accepted by the Union.

Based on the above discussion, it is recommended that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Nora Lynch
Administrative Law Judge

DATED: _____