STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, NEW YORK COUNCIL 66, AND ITS AFFILIATED AFSCME LOCAL 1095, AFL-CIO,

Charging Party,

- and -

CASE NO. U-25769

COUNTY OF ERIE and ERIE COUNTY MEDICAL CENTER CORPORATION,

Respondents.

In the Matter of
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ERIE UNIT OF LOCAL 815,

Charging Party,

- and -

CASE NO. U-26164

COUNTY OF ERIE and ERIE COUNTY MEDICAL CENTER CORPORATION,

Respondents.

JOEL M. POCH, ESQ., for Charging Party AFSCME

NANCY E. HOFFMAN, GENERAL COUNSEL (PAUL BAMBERGER of counsel), for Charging Party CSEA

COLUCCI & GALLAGHER, PC (ANTHONY J. COLUCCI, III of counsel) and GEORGE LONCAR, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Erie County Medical Center Corporation (ECMCC) to a decision of an Administrative Law Judge (ALJ), finding that the County of Erie (County) and ECMCC (together, Employer) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally imposed mandatory drug and alcohol testing and conducted background checks on County employees who transferred from County facilities into ECMCC, pursuant to contractual "bumping" rights, and on former ECMCC employees who returned to ECMCC under contractual "recall" rights.

Improper practice charges were filed on March 19, 2005, complaining of ECMCC's unilateral imposition of the testing and background checks by AFSCME, Council 66 (AFSCME) (Case No.U-25769) and on August 9, 2005 by the Civil Service Employees Association, Inc., Local 1000 (CSEA) (Case No.U-26164). The cases were consolidated for hearing.

EXCEPTIONS

The County argues that the ALJ erred in finding that the at-issue charges were timely filed, that County employees who transfer into ECMCC are not "new" employees, that County employees are not different from ECMCC employees who serve in "safety sensitive" positions, that unilateral implementation of drug and/or alcohol screening involves a mandatory subject of negotiations and issues related to the Fourth Amendment of the United States Constitution, that a criminal background check is a

mandatory subject of negotiations, and that procedures and penalties for drug and alcohol testing are mandatorily negotiable. Both AFSCME and CSEA support the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ's decision[1] and are repeated here only as necessary to address the exceptions.

AFSCME represents a County-wide unit of blue-collar employees, including several titles at ECMCC, including, among others, laundry worker, building maintenance mechanic and hospital aide. CSEA represents a County-wide unit of white-collar employees, embracing a variety of titles at ECMCC that include account clerk, lab technician, and attending physician.

The Erie County Medical Center (ECMC) was for many years a department of the County. Then, ECMC, the Erie County Home and several community health clinics were combined and operated by the County as the ECMC Healthcare Network (Network), with all the employees remaining County employees. ECMCC is a public benefit corporation created in July 2003 for the purposes of operating the Network

[1] 39 PERB ¶4596 (2006).

facilities.[2] In January 2004, ECMCC and the County entered into a Sale, Purchase and Operating Agreement by which the ownership and operation of the Network assets were transferred to ECMCC.

Pursuant to the Public Authorities Law, Article 10-C, §3629, the County employees employed at ECMC became employees of ECMCC. Expressly referencing the Act, the statute provides that the employees of ECMCC are deemed to be employees of the County and that ECMCC is bound by the collective bargaining agreements between the County and the unions representing those employees which were in effect at the time of the transfer, and any successor agreements negotiated between the County and those employee organizations.[3]

In December 2004, ECMCC adopted a revised personnel policy regarding the hiring of new employees that required passing a drug test and a criminal background check as pre-conditions of employment. When this change was initially proposed prior to its adoption, ECMCC advised CSEA that it would apply only to newly hired employees, the understanding on CSEA's part was that it applied only those persons hired from outside the bargaining unit.

In February and March 2005, the County laid off hundreds of employees, resulting in a number of County employees exercising their contractual and/or civil

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[2]Public Authorities Law Article 10-C. New York Health Care Corporations, Title 6 Erie County Medical Center Corporation §§3625-3646. [Laws of 2003, Chapter 143] Joint Exhibit 4.

[3] Public Authorities Law, §3629.

service rights to displace (bump) or retreat into other positions, some at ECMCC. Each of these employees[4] was at the time of transfer subjected to a drug and alcohol screening and criminal background check by ECMCC, pursuant to its new policy.[5]

While ECMCC did not challenge the right of certain unit employees to bump into positions at the hospital, it maintained that those employees were "new" employees and required them to fill out an application form and meet all the qualifications for new hires, including drug and alcohol testing. As a result, those employees who sought positions with ECMCC through their bumping rights and tested positive in a drug or alcohol screening were refused a position of employment. ECMCC claimed that the screenings were required by the Joint Commission on Accreditation of Health Care Organizations (JCAHO).[6]

In April 2005, ECMCC recalled five ECMCC employees who had been laid off as a result of the bumping process the previous month. Those employees were subjected to a physical, which included drug and alcohol screening, and a criminal background check under ECMCC's new policy. The consequences of the screening and background check as to those employees varied from those who sought positions with ECMCC through bumping, in that ECMCC considered the former existing ECMCC employees,

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[4] The ALJ's decision references that some of the transfers were into housekeeping attendant or receptionist positions.

[5] As relevant to the CSEA's charge, the drug/alcohol testing was first imposed on a CSEA unit employee on April 14, 2005.

[6] No documentation was provided to support this assertion.

and directed that any employee recalled from layoff who tested positive in the drug and alcohol screen would be subject to discipline and/or referral to the Employee Assistance Program (EAP).

It is undisputed on this record that ECMCC imposed the at-issue policy unilaterally and that no such policy existed either at ECMCC or other County facilities prior to the adoption of ECMCC's policy in December 2004. It is further undisputed that ECMCC does not impose random drug and/or alcohol screening on current employees at ECMCC, except in situations where there is a reasonable suspicion of impairment on the job. Substance abuse problems are dealt with through the contractual disciplinary process and result in referrals to EAP.

County employees transferring among certain departments within the County are, in some circumstances, subject to certain testing or background checks. Drug testing has been required only for applicants without prior County service hired into positions at the County Correctional Facility. Also, employees holding Commercial Drivers' Licenses are subject to drug testing, pursuant to federal law, and in accordance with procedures which have been negotiated with AFSCME.

The County Sheriff's Office has performed criminal background checks on all County employees transferring into the Sheriff's Office, including AFSCME and CSEA unit members, since at least 1999. Criminal background checks are also conducted on employees hired into or transferring into the Probation and Youth Detention

Departments and those assigned to buildings under the regulation of the Office of Court Administration

The Erie County Employee Handbook includes the following language regarding employees transferring from one County department to another:

> If employees change positions (transfer, promotion, etc.) without a break in service, they do not need to be examined [physical examinations that do not include drug and/or alcohol screening] unless the duties of the new position will make greater physical demands on the employees.

ECMCC's Policies and Procedures additionally include a pre-employment physical for every position at ECMCC, an annual physical for all employees, return to work physicals or medical re-evaluations following a break in employment of 30 days or more,[7] and, for employees assigned to the Adolescent Unit, a screening by the NYS Office of Children and Family Services State Central Register Database.[8]

ECMCC argues that there are public health and safety concerns that ECMCC further asserts that its new policy requiring drug and alcohol screening and criminal background checks for new employees was adopted partly in anticipation of JCAHO Standard HR.1.20, §5 and 6, which was to become effective in 2006. That standard, however, requires only that the hospital verify "Information on criminal background if

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[7] None of these physicals included a drug or alcohol screening component prior to December 2004.

[8] Respondent's Exhibits 7(e) - (n).

required by law and regulation or critical access hospital policy", and "[c]ompliance with applicable health screening requirements established by [ECMCC]."[9]

As a result of a change in regulations by the NYS Department of Health applicable to prospective employees in skilled nursing facilities, on April 1, 2005, ECMCC instituted an additional policy, which is not challenged in this proceeding, requiring a criminal background check for all prospective employees, in the County Home and the skilled nursing facility located within the hospital, who provide direct patient care.[10]

DISCUSSION

The ALJ correctly found that AFSCME's improper practice charge, filed on March 10, 2005, was timely, as it was filed within four months of ECMCC's adoption of the drug/alcohol testing policy in December 2004.[11] Likewise, CSEA's charge was properly found to be timely filed within four months of the implementation of ECMCC's new drug and alcohol testing on CSEA's unit employees on April 14, 2005.[12]

ECMCC's arguments are based on two assertions: one, County employees transferring into ECMCC's facilities are "new" employees for whom there is no

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[9] Respondent's Exhibit 4.

[10] 10 NYCRR 400.23, 763.13, 766.11, and 18 NYCRR 505.14. [Respondent's Exhibit 7(b)].

[11] Rules of Procedure, §204.1(a).

[12] *Middle Country Teachers Assn*, 21 PERB ¶3012 (1988).

bargaining obligation as to drug and alcohol testing and background checks and, two, ECMCC employees are in "safety-sensitive" positions, with a greater need for testing that balances against the duty to negotiate and Constitutional obligations.

Public Authorities Law, §§3629(2) and §3629.5(a),directs that, for purposes of the Act, employees of ECMCC are deemed to be County employees, that ECMCC employees remain within their respective collective bargaining units of County employees, and that nothing in the legislation shall be construed to affect the rights of the employees pursuant to a collective bargaining agreement.

ECMCC excepts to the ALJ's determination that County employees transferring into ECMCC and employees returning from being laid-off are not "new" employees based upon the provisions of the Public Authorities Law and the operating agreement between the County and ECMCC.[13] ECMCC argues that notwithstanding these provisions, County employees transferring into ECMCC are subject to the rules and regulations governing hospitals and that numerous State and Federal regulations mandate its actions in instituting drug and alcohol testing. However, the regulations referred to require hospitals to maintain the public health and safety, but generally leave to the facility the discretion to determine the manner and means to be used to comply.[14] Further, ECMCC has not instituted such testing for any current employees, only "new"

[13] An employer has no Taylor Law obligation to bargain regarding pre-employment testing or background checks.

[14]10 NYCRR §§405.3(5) and 405.3 (b)(10) (2006).

employees, regardless of their prior employment history with the County or the positions to which they are transferring. If ECMCC is mandated to ensure that all its employees test drug and alcohol free, in order to maintain the public health and safety, then all current employees, not just County employees transferring into ECMCC, would be required to be tested. That is not the case. ECMCC makes no cogent argument as to why only "new" employees are subject to its drug and alcohol testing policy or to criminal background checks.

ECMCC further argues that even if its decision to implement drug and alcohol testing is not foreclosed from bargaining because of regulatory mandate, the balancing of its interests with the interests of the unit employees weighs in its favor. We disagree. In *Arlington Central School District*[15], we determined that a balance of interests between the privacy, reputation and job security interests of employees and the managerial interests of a public employer in its mission and the safety of its clientele weighed in favor of requiring negotiations over the decision to implement random drug testing, absent evidence that off-duty use of drugs impaired an employee's ability to perform job duties safely.

ECMCC argues that because the positions in issue here are "safety-sensitive" positions, our holding in *Arlington*, does not apply. We find, however, that these positions are not properly characterized as "safety-sensitive" positions simply because

[15] 25 PERB ¶3001 (1992).

they are located in a hospital. ECMCC apparently fails to treat other positions at ECMCC, such as physicians, nurses, pharmacists and laboratory personnel, as "safety-sensitive" and require the same drug and alcohol testing that it now requires for these titles, which do not, on this record, have direct patient-care responsibilities or access to controlled substances.

The cases cited by ECMCC in support of its assertion that any positions in a hospital are safety-sensitive and, therefore, subject to drug and alcohol testing, are not relevant in that ECMCC does not apply that standard to its current employees, either in these positions or any other positions.[16] Neither do the safety concerns articulated by ECMCC rise to the level of public safety considerations, as found by the Court of Appeals, which warrant a finding that such testing is constitutionally permissible.[17]

Further, even if the decision to unilaterally subject these employees to drug and alcohol testing as a condition for transfer into ECMCC was not mandatorily negotiable, the procedures for the implementation of such testing and the consequences therefor, are mandatory subjects of negotiations.[18]

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[16] *See Patchogue-Medford Congress of Teachers v Bd of Education of the Patchogue-Medford Union Free Sch Dist*, 70 NY2d 57, 20 PERB ¶7505 (1987); *Dozier v New York City*, 130 AD2d 128, 20 PERB ¶7513 (2d Dept 1987). *See also Jennings v Leon*, 31 AD3d 762 (2d Dept 2006).

[17] *Id.*

[18] *County of Nassau (Police Dept)*, 27 PERB ¶3054 (1994).

Finally, the criminal background checks unilaterally implemented by ECMCC on County employees transferring into ECMCC or returning from being laid-off are also mandatorily negotiable. In balancing the interests of the employees against the interests articulated by ECMCC, the same conclusion must be reached as with the drug and alcohol testing.[19] These are neither new employees nor employees in safety-sensitive positions. Nor has it been demonstrated that such checks are required by any State or Federal law or regulation.

Based on the foregoing, we find that the unilateral implementation of drug and alcohol testing and criminal background checks on AFSCME or CSEA represented County employees covered by Case Nos. U-25769 and U-26164, transferring into ECMCC facilities or returning to ECMCC after being laid-off from positions at ECMCC violates §209-a.1(d) of the Act.[20]

We, therefore, deny ECMCC's exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the County of Erie and Erie County Medical Center Corporation:

1. Cease and desist from subjecting current County employees in the AFSCME and CSEA bargaining units to drug and alcohol screening and

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[19] *State of New York (Dept of Transportation)*, 27 PERB ¶3056 (1994).

[20] AFSCME alleged that the Employer's action also violated §209-a.1(a) of the Act. However, there was no evidence submitted in support of the allegation, and the ALJ did not reach it. No exceptions have been taken with respect to the alleged §209-a.1(a) allegation and we do not, therefore, reach that aspect of AFSCME's charge.

criminal background checks pursuant to the policy applicable to prospective or returning ECMCC employees;

2. Immediately remove and destroy any reports and documents maintained in the Employer's files relating to drug and alcohol screening and criminal background checks performed on current County employees in the AFSCME or CSEA bargaining units since December 2004 pursuant to the policy applicable to prospective or returning ECMCC employees;
3. Make whole any AFSCME or CSEA bargaining unit employee refused a position at ECMCC or otherwise negatively impacted as a result of the imposition of the policy on drug and alcohol testing and criminal background checks, with interest at the maximum legal rate; and
4. Sign and post the attached notice for a period of 30 days at all locations normally used to communicate with unit employees.

DATED: December 20, 2006
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member