



Michigan Employment Relations Commission

City of Oak Park,
Respondent-Public Employer,
and
Police Officers Association of Michigan,
Charging Party-Labor Organization

Docket No. C95 J-204

10 MPER (*LRP*) P28,024
1997 MPER (*LRP*) Lexis 12

April 8, 1997, Decided

Decision and Order

On December 4, 1996, Administrative Law Judge Bert H. Wicking issued his Decision and Recommended Order in the above case, finding that the Public Employer violated the Public Employment Relations Act by requiring an employee, under penalty of discharge, to sign a waiver of his right to sue a psychologist retained by the Respondent to examine him. The Administrative Law Judge concluded that there was an existing departmental policy under which Respondent could order employees to undergo psychological evaluations. However, he also concluded that requiring an employee to sign waivers in connection with this evaluation constituted a new condition of employment which must be considered a mandatory subject of bargaining. The Decision and Recommended Order recommended that the Respondent be ordered to cease and desist from requiring police officers to sign waivers and releases from any psychological testing in regards to the disciplinary, process. It also recommends that the City of Oak Park take affirmative action to notify the Police Officers Association of Michigan that it is either abandoning psychological testing or that it will not require employees to sign waivers in connection with this testing.

On January 13, 1997, Respondent filed timely exceptions to the Decision and Recommended Order of the Administrative Law Judge. Charging Party filed a timely brief in support of the Decision and Recommended Order on January 23,

1997.

Facts

On September 1, 1995, Deputy Director of Public Safety Steven Fairman advised Public Safety Officer Donald Gundy that he was under investigation for alleged misconduct in connection with his failure to wear body armor while working the park detail on August 13, 1995, and for refusing to obey a direct order from his sergeant to wear the body armor in violation of Department and City rules.

On September 22, 1995, Deputy Director Fairman issued a memo ordering Officer Gundy to appear for a duty fitness evaluation at the office of the Department's psychologist, Dr. Roger Wittrup, on September 25, 1995. Officer Gundy complied with the order and presented himself at Dr. Wittrup's office. The evaluation did not take place on September 25 because Officer Gundy refused to sign a waiver of his right to sue Dr. Wittrup.¹

Statement of Services

I, (print name) do hereby understand that Dr. Roger G. Wittrup has been retained to do an expert evaluation of me and there has been no guarantee issued or implied regarding confidentiality, and any and all information procured during the evaluation or in contact with me will and may be utilized as a part of the evaluation process and be shared with the individual, city, or corporation which has retained him.

I also understand that the evaluation will be sent directly to that individual city, or corporation that has retained him and any copies will have to be procured from that agency, since they have paid for the evaluation. I will so instruct my attorney, union or representative, if I have one, and guarantee no request will be made for records, copies of reports, or appearances on my behalf.

I have also been told that the evaluation in no way is an offering of treatment, and, in fact, may be stressful in and of itself, and I accept responsibility for that stress as voluntary.

I have read the above and hold harmless Dr. Roger G. Wittrup, Ed.D Inc. from his recommendation to the city, the individual, or corporation that has retained him. As an applicant, grievant, applicant for promotion, or litigant, I understand that this is a part of the process and do accept the risk involved in being a part of the evaluation process and have been informed to that fact.

Interviewee
Date

On September 26, 1995, Officer Gundy was given written notice of disciplinary action in connection with his failure to wear body armor and his failure to obey the direct order of his sergeant. Officer Gundy was suspended from duty as a Public Safety Officer for 20 working days commencing September 28, 1995. The written notice included an order to report to Dr. Wittrup for a duty fitness evaluation and to cooperate fully with Dr. Wittrup to complete the evaluation. Return to work after the suspension was made contingent upon satisfactory completion of the evaluation and certification by Dr. Wittrup of fitness for duty.

On September 28, 1995, a grievance was filed protesting the suspension. The grievance also complained that there was no just cause for requiring Officer Gundy to undergo a psychological evaluation. The union also sent a letter dated September 29 to the Respondent claiming that the Respondent had imposed mandatory psychological testing without bargaining and demanding to bargain on the issue and its effect on the entire bargaining unit. Respondent did not reply to the Union's demand to bargain.

After receiving the notice of disciplinary action, Officer Gundy presented himself at Dr. Wittrup's office, signed the waiver document set out above, and was examined by Dr. Wittrup on October 1. On October 10, 1995, Dr. Wittrup issued a report verifying Gundy's fitness for duty.

Public Safety Officer Gundy, who is the President of the Oak Park Police Officers Association, participated in the negotiation of the current collective bargaining agreement. Gundy testified that the bargaining agreement did not provide for psychological testing and that there had been no bargaining over the issue during negotiations. Gundy also testified that he could recall one or two instances where other officers involved in disciplinary matters had been sent for psychological evaluation. Gundy indicated that he believed that Public Safety Director Seifert had issued a memorandum or informational order regarding psychological testing. Gundy testified that he did not know employees were required to sign waivers in connection with this psychological testing.

Discussion and Conclusions of Law

Respondent claims that the underlined portions of the Administrative Law Judge's recommended order as follows are unclear, and asks us to clarify their meaning.

1.Cease and desist from requiring that its police officer be require to sign waivers and releases from any psychological testing in regards to the disciplinary process.
[sic]

2. It is further recommended that the City of Oak Park take affirmative action to notify the Police Officers Association of Michigan that it is either abandoning psychological testing or that requires waivers of immunity in the discipline process in any of its police officers. [sic]

Respondent contends that it isn't clear what specific waivers and releases are referred to in the recommended order. According to Respondent, if the order means that Respondent must cease requiring employees to sign waivers of the patient-psychologist privilege and waivers of confidentiality, Respondent can no longer require that it receive a copy of the psychologist's report. The purpose of the examination, to assure Respondent of the officer's fitness for duty, will therefore be negated. According to Respondent, the recommended order therefore essentially prohibits Respondent from continuing its past practice of requiring psychological examinations when an officer's behavior indicates the need for such. Respondent points out that Officer Gundy did not object to signing these two waivers. Moreover, the charge itself mentions only the waiver of Officer Gundy's right to sue the psychologist, not the other waivers which Officer Gundy was required to sign.

Respondent also argues that waivers of the right to sue or agreements to hold harmless are justified to protect the public safety and that employees have other remedies available if they suffer adverse consequences from the psychologist's evaluation.

Finally, Respondent argues that the decision erroneously rejects Respondent's contention that the dispute between the parties is a bona fide contractual dispute and as such is not subject to the Commission's unfair labor practice jurisdiction.

Absent specific contract language waiving the Union's rights, a requirement that already-hired employees submit to fitness for duty requirements such as drug and alcohol testing, psychological testing, or physical examination as a condition of employment is a mandatory subject of bargaining. City of Detroit, 1989 MERC Lab Op 788, aff'd 184 Mich App 551 (1990); City of Detroit, 1990 MERC Lab Op 67; County of Allegan (Sheriff's Department), 1992 MERC Lab Op 134; LeRoy Machine Co., 147 NLRB 1431, 56 LRRM (BNA) 1369 (1964).

In the instant case the Administrative Law Judge held that there was no specific collective bargaining provision covering psychological testing. He concluded, however, that there was a standing policy or practice allowing this procedure. That is, when Respondent ordered Officer Gundy to undergo a psychological evaluation it did not change the existing terms or conditions of employment. Neither party has taken exception to the Administrative Law Judge's findings on this point. We

conclude therefore that Respondent had no duty to notify the Union and give it an opportunity to bargain before ordering Officer Gundy to undergo psychological testing.

Respondent's argument that this charge simply involves a good faith dispute over the interpretation of the collective bargaining agreement is without merit. There is no language in the contract regarding psychological testing, and the pending grievance argues only that there was no just cause for the discipline, including psychological testing, imposed in this case. However, we agree with Respondent that since the charge in this case mentioned only the waiver of the right to bring civil actions against the psychologist, our analysis should be limited to this type of waiver.

We conclude that there is no evidence that there was an established policy or term or condition of employment that an employee sign a waiver of his right to bring civil litigation against the psychologist in connection with undergoing a psychological examination. Officer Gundy, as the president of the Oak Park POAM, testified that he knew that the Respondent had previously required psychological examinations of other officers but that he was completely unaware that there was a requirement that the employee waive his right to sue the psychologist. We agree with the Administrative Law Judge that the requirement that an employee sign a waiver of his right to sue the psychologist is separate from the requirement that the employee undergo psychological evaluation as a condition of continued employment. We also agree with his conclusion that Respondent has a duty to bargain over the requirement that an employee sign a waiver of his right to sue the psychologist. The fact that Respondent might have difficulty finding a psychologist willing to provide services to Respondent without this waiver has no bearing on Respondent's obligation to bargain this issue with the Union.

We conclude that the record supports a finding that Respondent violated its duty to bargain under PERA by unilaterally requiring employees to sign waivers of their right to sue the psychologist in connection with their undergoing psychological examinations to determine their fitness for duty. In accord with the discussion and conclusions above, we issue the following order:

Order

Respondent City of Oak Park, its officers and agents, shall:

1. Cease and desist from unilaterally changing working conditions of its employees by imposing a requirement that its police officers be required to sign a waiver of their right to bring civil actions against the psychologist as a result of any mandatory psychological testing ordered by the Respondent, until such time as

Respondent has satisfied its obligation to bargain over this issue.

2. Upon demand, bargain with the Police Officers Association of Michigan over any requirement that employees sign waivers of their right to bring civil actions against the psychologist as a result of any mandatory psychological testing ordered by the Respondent.

3. Post the attached notice to employees in conspicuous places on the Respondent's premises for a period of 30 consecutive days.

Swift, Commission Chair; and Bishop and Ott
Commission Members

Endnote:

1. Officer Gundy testified that he signed waivers of all the rights set out in the document quoted here, except for the right to sue Dr. Wittrup as set out in the last paragraph. However, no other waiver document appears in the record. Although the record is not entirely clear, it appears that by the time Officer Gundy returned to Dr. Wittrup's office on October 1 the various waivers had been incorporated into the single document which appears here.