DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,	
Complainant	PERB Case No. 07-U-24
v.	Slip Op. No. 1026
District of Columbia Metropolitan Police Department, Chief Cathy L. Lanier, Inspector Matthew Klein and Captain Rodney Parks	
Respondents.	

DECISION AND ORDER

I. Statement of the Case:

The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant", or "Union", or "FOP") filed an unfair labor practice complaint against the Metropolitan Police Department, Chief Cathy L. Lanier, Inspector Matthew Klein, and Captain Rodney Parks. ("Respondents" or "MPD"). The Complainant alleges that the Respondents violated D.C. Code § 1-617.04(a)(5)[1] by "unilaterally changing its drug screening policy" containing a reasonable suspicion standard, without bargaining with the Complainant. The Respondents filed an "Answer to the Unfair Labor Practice Complaint" ("Answer") denying that it violated the Comprehensive Merit Personnel Act ("CMPA").

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[1] D.C. Code § 1-617.04(a)(5) provides as follows:

(a) The District, its agents, and representatives are prohibited from:

(5) Refusing to bargain collectively in good faith with the exclusive representative.

A hearing was held in this matter. In his Report and Recommendation ("R&R"), Hearing Examiner Sean Rogers found that MPD changed the "reasonable suspicion" standard for ordering a drug test. However, since there was no evidence that the Union requested impact and effects bargaining, he concluded that the Respondents' failure to bargain did not result in a violation of the CMPA.

The Respondents did not take exception to the Hearing Examiner's conclusion that there was no violation of the CMPA. However, the Respondents filed Exceptions to the Hearing Examiner's determination that MPD changed the "reasonable suspicion" standard found in General Order 1002.4. The Complainant filed an Opposition to the Respondents' Exceptions.

The Hearing Examiner's R&R, the Respondents' Exceptions and the Complainant's Opposition are before the Board for disposition.

II. Hearing Examiner's Report

On January 9, 1998, MPD issued General Order 1002.4 ("G.O. 1002.4") concerning the Department's Drug Screening Program stating as follows: "The Medical Services Division will conduct urinalysis testing for narcotic, controlled and illegal substance use by any member of the force suspected of such drug use . . . Accordingly, urine specimen testing shall be conducted in the following instances for all members of the department as approved by the Chief of Police: ... **When Ordered for Reasonable Suspicion.**" (emphasis in the original).[2]

The Hearing Examiner found that "[o]n November 1, 2006, while off-duty in his personal vehicle, MPD Officer Richard Perkins was stopped for exceeding the posted speed limit in Charles County, Maryland.... Perkins consented to a field sobriety test and a breathalyzer test, which he failed. The breathalyzer results showed that Perkins had a blood alcohol concentration of .08. Perkins was not drug tested by the Charles County Sheriff's Department.... He was arrested and charged with driving while under the influence of alcohol, assaulting a law enforcement officer, and exceeding the maximum speed limit." The arrest was recorded by a video camera on the dashboard (Dashcam) of the arresting Deputy's cruiser." (R&R at p. 2).

"[The same day,] Captain Rodney Parks, [MPD] Internal Affairs Division ("IAD"), Police Misconduct Section, was notified of Perkins' arrest.... [Captain] Parks reviewed the Dashcam video of Perkins' arrest several times.... On or about November 2, 2006, [Captain] Parks ordered MPD IAD Agent Denise Garrett to conduct an investigation of Perkins' arrest, including a reasonable suspicion drug test.... On November 22, 2006, Garrett escorted Perkins to a reasonable suspicion drug test by the MPD Medical Services Section.... The drug test, for seven substances, was negative." (R&R at pgs. 2-3).

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2 (See Complainant's Post-Hearing Brief at p. 7).

On March 20, 2007, the Complainant filed the unfair labor practice complaint in this matter alleging a violation of § 1-617.04(a)(5) of the CMPA by unilaterally changing its drug screening policy without bargaining with the Complainant. The Complainant asserted that "Captain Parks created a new drug test policy when ordering Officer Perkins' drug test." (Compl. at ¶ 19). The Complainant also alleged that "[t]he Union requested an opportunity to negotiate the implementation and effects of Captain Parks' new policy." (Compl. at ¶ 15). As a remedy, the Complainant requested *inter alia* that the Board: (a) find that the Respondents' actions are in violation of D.C. Code § 1-617.04(a)(5); and (b) grant costs to the Complainant. In its Answer, MPD countered that there was no change in the reasonable suspicion standard and no failure to bargain.

A hearing was held in this matter. Before the Hearing Examiner, Captain Parks, who ordered Officer Perkins to submit to a drug test, testified that he relied on the totality of the circumstances standard when determining whether to order a drug test. (See R&R at p. 2). Captain Parks also stated that he was not aware of any other case where a reasonable suspicion drug test was requested by the IAD based solely on viewing a videotape and could not recall ordering a reasonable suspicion drug test in situations involving alcohol-related factors only. (See R&R at p. 3). FOP asserted that Perkins' reliance on a totality of the circumstances constituted a change in the past practice and in the reasonable suspicion standard found in G.O. 1002.4. (See R&R at p. 6).

MPD countered that "[r]easonable suspicion requires an evaluation of the totality of the circumstances...[and] [a] management official must look at the totality of the circumstances under G.O. 1002.4 as a means to determine reasonable suspicion...." (R&R at p. 8). Therefore, MPD argued that it "did not commit an unfair labor practice; did not implement a new drug testing policy, and [was] not required to bargain with the Complainant." (See R&R at p. 8).

The Hearing Examiner determined that the "gravamen of FOP's complaint is that when Parks applied the totality of the circumstances standard to ... order Perkins to a reasonable suspicion drug test pursuant to G.O. 1002.4, MPD changed the Parties' past practice regarding the implementation of reasonable suspicion drug testing which, FOP agrees, is a management right. [The Hearing Examiner stated that] FOP argues that this change was unilateral and effected without bargaining in violation of § 1-617.04(a)(5). In response, MPD asserts that the totality of the circumstances standard is not a change in the implementation of and procedures in G.O. 102.4, but is part of and subsumed within the reasonable suspicion standard. MPD argues that since there was no change in working conditions, it had no duty to bargain." (R&R at p. 10).

The Hearing Examiner found that "an agency is entitled to implement a drug testing program without being required to bargain with the Union in regard to the Union's proposal that such testing be conducted only upon reasonable suspicion...." (R&R at p. 9). He stated that the

Board has held that issues such as procedural aspects of drug testing are negotiable[3] and that the effects and impact of a non-bargainable management decision upon terms and conditions of employment, are bargainable only upon request. The Hearing Examiner noted that "absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate D.C. Code § 1-61[7].04(a)(5) and (1) by unilaterally implementing a management right under D.C. Code § 1-61[7].08(a) without notice or bargaining."[4] (R&R at pgs. 9-10).

The Hearing Examiner then compared the reasonable suspicion standard as applied to a stop-and-frisk in the *Terry* case[5] with the reasonable suspicion standard as applied in work place drug testing and concluded that "the foundation and application of the standards are entirely different." Furthermore, the Hearing Examiner opined that the reasonable suspicion standard is an objective standard and the totality of the circumstances is a subjective standard. He opined that "the effect of combining the totality of the circumstances standard with the reasonable suspicion standard is to dilute and to taint the reasonable suspicion standard to the point of making the management official's decision on drug testing unreviewable by a third party." (R&R at p. 12). He therefore concluded that "MPD unilaterally changed the working conditions in G.O. 1002.4 when it applied the totality of the circumstances standard to a reasonable suspicion drug test procedure and based its determination on a Dashcam video of Perkins' off-duty arrest for driving under the influence of alcohol." (R&R at p. 12).

After finding that there was a change in the standard for ordering a drug test, the Hearing Examiner determined that "when FOP learned of Perkins' drug test on November 22, 2006, the FOP never requested to bargain over the change in the implementation of and procedures in G.O. 1002.4. Moreover, in its March 20, 2007 unfair labor practice complaint, the FOP did not affirmatively plead that it had requested bargaining over MPD changes in the implementation of and changes in G.O. 1002.4. Finally, at hearing, the FOP produced no evidence of a bargaining request.... For these reasons, the Hearing Examiner [found] that the FOP never requested to bargain [over] MPD's changes in the implementation of and procedures in G.O. 1002.4." (R&R at p. 13). Since the record established that FOP never requested to bargain, the Hearing Examiner found that MPD did not refuse to bargain over its changes to G.O. 1002.4. (R&R at p. 13).

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[3] Citing *Drivers, Chauffeurs and Helpers Local Union No. 639, et al. v. District of Columbia, et al.*, 631 A.2d 1205, 1216 (1993).

[4] Citing *American Federation of Government Employees, Local Union No. 383, AFL-CIO v. District of Columbia Department of Human Services*, 49 DCR 770, Opinion No. 418, PERB Case No. 94-U-09 (1995). (Without citations). See *also, Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections*, PERB Case No. 01-U-28, Opinion No. 671, 49 DCR 821 (2001).

[5] *Terry v. Ohio*, 392 U.S. 1 (1968).

The Hearing Examiner also found that "it is the use of the Dashcam video in this case which has caused the MPD to assert the totality of the circumstances standard as the grounds for sending Perkins for a reasonable suspicion drug test. . . . [He stated that the] Dashcam video recording constitutes new technology which was unknown [by] the [p]arties at the time they negotiated their current collective bargaining agreement and unknown to the MPD at the time it drafted and implemented G.O. 1002.4. . . .Therefore, [he found that] the review of the Dashcam video constitutes a new, different and changed procedure for management officials to determine whether a bargaining unit employee should be ordered for a reasonable suspicion drug test." (R&R at p. 12).

The Hearing Examiner noted that absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate § 1-617.04(a)(5) by unilaterally implementing a change in an area circumscribed by management rights under D.C. Code § 1-617.08(a) without notice or bargaining. (See R&R at p. 13). Therefore, he recommended that the Complainant's unfair labor practice complaint be dismissed with prejudice. (R&R at p. 13). He made no findings concerning the Complainant's request for costs.

III. The Respondents' Exceptions and the Complainant's Opposition to the Exceptions

MPD asserts that the "Hearing Examiner erroneously interpreted the 'reasonable suspicion' standard and mistakenly found the phrase 'totality of circumstances' to be a separate, subjective standard, rather than the means of establishing 'reasonable suspicion'." (Exceptions at p. 1). MPD contends that "[f]irst, the Hearing Examiner is under the mistaken belief that the 'reasonable suspicion' standard is different in the context of a *Terry*[6] investigatory...search and [work place] drug-testing.... [MPD maintains that] ... the 'reasonable suspicion' standard, irrespective of whether it is being applied in the context of a *Terry* stop or a [work place] drug test, has as its foundation the Fourth Amendment's prohibition against unreasonable searches and seizures. The taking of blood or urine for drug-testing is a search under the Fourth Amendment. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (blood-testing procedures and urinalysis are searches under the Fourth Amendment)."

MPD maintains that drug testing cases often cite to *Terry* and/or other investigatory stop cases as precedent to explain what constitutes "reasonable suspicion". MPD cites the case of *Imme v. Fed. Express Corp.*, 193 F. Supp. 2d 519, 525 (D. Conn. 2002), where the United States District Court for the District of Connecticut applied the reasonable suspicion analysis of several Supreme Court cases in the context of a [work place] drug-testing case.[7] In *Imme* the Court

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6 Under *Terry v. Ohio*, 392 U.S. 1 (1968), "to conduct a brief, investigatory stop of a person in keeping with the Fourth Amendment, a police officer must have a reasonable, articulable suspicion that criminal activity may be afoot." *Wilson v. United States*, 802 A.2d 367, 369 (D.C. 2002).

7 In *Imme,* two supervisors observed the behavior of an employee, Bryan H. Imme, and ordered him to take a drug test based on reasonable suspicion that he was under the influence of drugs. Imme refused and was terminated

found the analysis for reasonable suspicion analogous to the Supreme Court's analysis in criminal cases. In *Imme*, the District Court noted as follows:

> The primary areas in which the standard of "reasonable suspicion" is applied under the Fourth Amendment are (1) in cases similar to this one, where the government seeks to impose a urinalysis test or strip search upon, or otherwise invade the privacy of, a government employee or other person, and (2) where a law enforcement officer makes an investigative stop.
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> "While reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification...." *Illinois v. Wardlow*, 528 U.S. 119, 123 ... (2000). See also *Alabama v. White*, 496 U.S. 325, 330 ... (1990). ("Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.")
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> The Supreme Court has described reasonable suspicion in the context of an investigative stop "simply as a particularized and objective basis for suspecting the person stopped of criminal activity...." *Ornelas v. United States*, 517 U.S. 690, 696 ... (1996). (internal quotation marks and citations omitted)....

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from his employment. He challenged the termination to the U.S. District Court for the District of Connecticut stating that it was in violation of Section 31-51x of the Connecticut General Statutes which states as follows:

> No employer may require an employee to submit to a urinalysis drug test unless the employer has **reasonable suspicion** that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance. [emphasis added].

The Court noted that "the Connecticut legislature intended to adopt the Fourth Amendment standard of individualized suspicion in order to protect the privacy interests of employees." (*Id.* at p. 524). The defendant, Federal Express Corporation, filed a Motion for Summary Judgment claiming that reasonable suspicion had been established factually, and no genuine issue of material fact remained. The Court in *Imme* stated that the "question is not whether Imme actually was under the influence of drugs or alcohol on the night [in question] but only whether [Supervisors] Finan and/or McKiernan had reasonable suspicion that he was." See *Imme v. Fed. Express Corp.*, 193 F. Supp. 2d 519, 524 (D. Conn. 2002).

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.
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> *Ornelas*, 517 U.S. at 696.

[The Court in *Imme* stated that] [r]ecently, the Supreme Court emphasized the importance, in the context of an investigatory stop, of evaluating reasonable suspicion in light of the totality of the circumstances:

> *When discussing how reviewing courts should make a reasonable-suspicion determination, we have said repeatedly that they must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing....* [emphasis added]. Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

United States v. Arvizu, 122 S. Ct. 744, 750-51 (2002) (internal quotation marks and citations omitted). The Court in *Arvizu* overturned a Ninth Circuit ruling, holding that the lower court's "evaluation and rejection of [certain] factors in isolation from each other [did] not take into account the totality of the circumstances, as our cases have understood that phrase." *Id.* at 751. The Court stated that the Ninth Circuit:

> appeared to believe that each observation by [the detaining officer] that was by itself readily susceptible to an innocent explanation was entitled to no weight. *Terry v. Ohio*, ... however, precludes this sort of divide-and-conquer analysis. The officer in *Terry* observed the petitioner and his companions repeatedly walk back and forth, look

> into a store window, and confer with one another. Although each of the series of act was perhaps innocent in itself, we held that, taken together, they warranted further investigation. *Id.* at 751 (internal quotation marks and citations omitted).
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> Thus, the question here is not whether each of the behaviors observed by [Supervisors] Finan and McKiernan on the night in question, taken separately, could have created a reasonable suspicion that Imme was under the influence of drugs. Rather, the question is whether all of these observations, taken together, and viewed in the context of Finan and McKiernan's own experiences and knowledge as manager and their experiences with Imme, was sufficient to created such a reasonable suspicion. *Imme* at 525. (Exceptions at pgs. 3-6).

Thus, MPD asserts that the "reasonable suspicion" standard of proof in *Terry* is the same as that applied in drug testing cases. MPD takes exception to the Hearing Examiner's conclusion that the phrase "totality of the circumstances" is a subjective standard separate and distinct from an objective "reasonable suspicion" standard. (See Exceptions at p. 6). MPD submits that "the 'totality of the circumstances' is merely a catch phrase to describe the requirement that officers and reviewing courts must consider all of the available circumstances in order to determine whether reasonable suspicion exists or existed.[8]

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[8] MPD quotes the Third Circuit in *United States v. Brown*, 448 F.3d 239 (3d Cir. 2006), as follows:

> In evaluating whether there was an objective basis for reasonable suspicion, we consider "the totality of the circumstances - the whole picture." *Cortez*, 449 U.S. at 417; *Robertson*, 305 F.3d at 167. As our court has observed,
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> [t]he Supreme Court has repeatedly recognized that a reasonable suspicion may be the result of any combination one or several factors: specialized knowledge and investigative inferences (*United States v. Cortez, id.*), personal observation of suspicious behavior (*Terry v. Ohio,* 392 U.S. 1 (1968)), information from sources that have proven to be reliable, and information from sources that - while unknown to the police- prove by the accuracy and intimacy of the information provided to be reliable at least as to the detail[s] contained within that tip (*Alabama v. White*, 496 U.S. 325, 330 (1990)).

(Exceptions at pgs. 6-8).

MPD contends that, in the present case, the "Complainant's witness, Vincent Tucci, testified that 'totality of the circumstances' is not a 'new drug testing policy,' but a means to determine reasonable suspicion ... [MPD states that] it is well established ... that the 'totality of circumstances' must be analyzed to determine if reasonable suspicion exists and is not in itself a separate standard." (Exceptions at p. 9). Thus, MPD maintains that there was no change in the implementation of its management right to order a drug test based on reasonable suspicion of drug use.

In addition, MPD challenges the "the Hearing Examiner's determination that ... use of the Dashcam video to order a reasonable suspicion drug screening is a change in the working conditions and procedure [found] in G.O. 1002.4. [citations omitted]. [MPD asserts that the] Hearing Examiner's finding is premised upon the fact that 'the Dashcam video recording constitutes new technology which was unknown [to] the [p]arties at the time they negotiated their current collective bargaining agreement and unknown to the MPD at the time it drafted and implement[ed] G.O. 1002.4'." [citations omitted] (Exceptions at p. 9).

MPD argues that first, "there is no evidence as to when the Dashcam video recording was introduced as a law enforcement tool ...[or] whether it was known or unknown to the parties at the time they negotiated the current agreement or whether it was contemplated at the time G.O. 1002.4 was drafted and implemented. Second, it is the information or the 'circumstances' recorded and later evaluated for 'reasonable suspicion' that is relevant and not the manner of the recordation. 'Reasonable suspicion' was not and cannot be established merely by the fact that the subject incident was recorded on Dashcam video. Rather, 'reasonable suspicion' in this case and any other drug screening case involving [a] video [recording] must be based upon 'a totality of the circumstances' observed on the video recording, i.e. the subject's gait, speech, demeanor, mood, behavior, etc. [MPD maintains that] [t]he Dashcam video is not a new procedure or working condition, instead it is a conduit for information which may or may not give rise to 'reasonable suspicion,' depending upon the quality and quantity of the information, much like an informant's tip. [MPD asserts, therefore, that] the Hearing Examiner erred in finding that MPD unilaterally changed the working condition in G.O. 1002.4 by reviewing and relying upon information contained in the Dashcam video recording.... [MPD requests] that the Board find that the Respondents did not unilaterally change G.O. 1002.4." (Exceptions at p. 10).

In its Opposition, FOP counters that the Hearing Examiner correctly interpreted the reasonable suspicion drug test standard in "finding that the totality of the circumstances was never part of the past practice between the parties in making reasonable suspicion drug test determinations." (Opposition at p. 3). FOP argues that testimony by FOP Chairman Kristopher Baumann establishes that "he is only aware of the Department issuing reasonable suspicion drug testing orders to police officers that (1) have been found with drugs (and or drug paraphernalia) or (2) have disclosed to someone that they are using drugs. (Opposition at p. 4). He also testified that "quite a few" officers are arrested each year for drunk driving, and they are routinely charged administratively with using alcohol, either on or off duty, but they are not asked to take a drug test. (Opposition at p. 4). FOP asserts that "the established past practice

between the parties ... now controls what the Department can and cannot do concerning reasonable suspicion drug testing." (Opposition at p. 5). FOP relies on *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 579, 581-582 (1960),[9] for the proposition that MPD may not change an established past practice. (Opposition at p. 5). FOP contends that the Respondents "failed to notify the FOP of the changes to the drug screen policy which is a long-standing practice." (R&R at p. 7).

FOP agrees with the Hearing Examiner's finding that "the focus of the reasonable suspicion standard for drug testing is on whether the management official who ordered the drug test had articulable, factual grounds to order the drug test." [citations omitted] (Opposition at p. 6). "[FOP cites] the [Hearing] Examiner's ruling that a 'reasonable suspicion drug test standard is an objective standard which requires a management official to articulate the grounds for a determination that an employee is to be drug tested." (Opposition at p. 7). FOP asserts that Captain Parks "had no objective, articulable factors, merely personal opinions" when he used the totality of the circumstances test as the basis for ordering the drug test. (See Opposition at p. 8-9).

Finally, FOP asserts that the Hearing Examiner correctly determined that the Dashcam video "is a new procedure that is neither contained within the reasonable suspicion drug testing policy nor the past practice between the parties" and "use of the Dashcam unilaterally changed the working conditions of General Order 1002.4." (Opposition at p. 10).

III. Discussion

In *Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 38 DCR 3313, Slip Op. No. 274 at pgs. 1-2, PERB Case Nos. 90-N-02, 90-N-03 and 90-N-04 (1991), the Board held that "the standard for imposition of drug testing is nonnegotiable" as it is closely related to the right to implement a drug testing program. (*Id.* at p. 1).[10] In the present case, "the standard for imposition of drug testing" is found in General Order 1002.4. Therefore, G.O. 1002.4, which contains a reasonable suspicion standard for the imposition of drug testing, is a management right.

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[9] FOP cited *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 579 (1960), stating that the Supreme Court held that "[t]he collective bargaining agreement covers the whole employment relationship.... [T]he industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement although not expressed in it. See also *Consolidated Rail Corp. v. Railway Labor Executives Ass'n.*, 491 U.S. 299, 311... (1989), for the proposition that collective bargaining agreements may include implied as well as express terms"). (Opposition at p. 5).

[10] See also, *Teamsters, Local 639 v. DC Public Schools*, Slip Op. 239 at p. 3, PERB Case No. 89-U-17 (1990), where the Board held that DCPS' decision to implement its drug testing policy is "plainly a management decision."

In its Exceptions, MPD opposes the Hearing Examiner's findings and asserts that there has been no change to the reasonable suspicion standard in G.O. 1002.4.

The Hearing Examiner opined that MPD relied on a totality of the circumstances for ordering a drug test and that this created a change in the reasonable suspicion standard found in G.O. 1002.4. We note that the Hearing Examiner provided no legal basis for his conclusion that MPD's reliance on a totality of the circumstances creates a change in the reasonable suspicion standard. When analyzing whether there exists reasonable suspicion to conduct a search in the workplace,[11] the Courts look to case law developed in criminal cases. Furthermore, the Courts use a totality of the circumstances analysis to determine if there is reasonable suspicion to conduct a search that does not violate the Fourth Amendment protection against unreasonable searches and seizures. (See *Imme v. Fed. Express Corp.*, 193 F. Supp. 2d 519, 525 (D. Conn. 2002), and cases cited therein). Therefore, we reject the Hearing Examiner's findings to the extent they differ from established case law.[12] We find that in the present case, MPD's reliance on the totality of the circumstances to determine if there was reasonable suspicion to order drug testing, did not constitute a change in the reasonable suspicion standard set forth in G.O. 1002.4.[13]

Also, the Courts have held that a determination of reasonable suspicion must be made on a case-by-case basis, i.e., "on the totality of the circumstances of each case." (*United States v. Arvizu*, 122 S. Ct. 744, 750-51 (2002)). Here, the technology pertaining to the Dashcam video in Officer Perkins' case belongs to the Maryland police, not MPD. MPD was merely the recipient of this information. Also, the video was part of the totality of the circumstances in Officer Perkins' case. The Courts rely on the totality of the circumstances in each case to determine reasonable suspicion, as did MPD in this case. We find insufficient evidence in the record to support the Hearing Examiner's conclusion that viewing a Dashcam video constitutes a new

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11 In 1986 President Ronald Reagan signed Executive Order No. 12564, Fed. Reg. 32,889-93 (Sept. 17, 1986) ("Drug-Free Federal Workplace"), requiring the establishment of drug testing programs in federal agencies for government employees in sensitive positions. The reasonable suspicion standard is contained in the Executive Order and is widely accepted by the courts. Many states have adopted work place drug testing policies, including the reasonable suspicion standard.

12 Specifically, the Board rejects the Hearing Examiner's findings to the extent that they conflict with case law establishing that a totality of the circumstances analysis is the accepted means of determining reasonable suspicion.

13 Even if there had been a change to the reasonable suspicion standard, the Board has held that an employer does not violate D.C. Code [§ 1-617.04](a)(1) and (5) by making a unilateral change with respect to matters over which it is not obligated to bargain under the CMPA. See, *Washington Teachers Union, Local 6, AFL - CIO v. District of Columbia Public Schools*, Slip Op. No. 144, PERB Case No. 85-U-28 (1986), *aff'd*; *PERB v. Washington Teachers' Union*, 556 A.2d 206 (1989) and *Washington Teachers' Union, Local 6, AFL-CIO v. District of Columbia Public Schools*, 38 DCR 2650, Slip Op. No. 258, PERB Case No. 90-U-13 (1991).

procedure for determining reasonable suspicion resulting in a change to G.O. 1002.4.[14] Rather, the Board finds that MPD was exercising its management right under G.O. 1002.4 to determine if there was reasonable suspicion to order drug testing, under the facts presented in Perkins' case.

The Board has consistently held that "management's rights under [D.C. Code § 1-617.08] do not relieve [management] of its obligation to bargain...over the impact or effects of, and procedures concerning the implementation of...management right decisions." *American Federation of Government Employees, Local 383 v. D.C. Department of Human Services*, 49 DCR 770, Slip Op. No. 418 at p. 4, PERB Case No. 94-U-09 (2002). However, the effects and impact of a non-bargainable management right decision upon terms and conditions of employment, are bargainable only upon request. Moreover, an Employer does not bargain in bad faith by merely unilaterally implementing a management right. The violation arises from the failure to provide an opportunity to bargain over the impact and effects once a request is made. See *Fraternal Order of Police/MPD v. D.C. Metropolitan Police Department*, 47 DCR 1449, Slip Op. No. 607 at p. 3, PERB Case No. 99-U-44 (1999). Therefore, in the present case, the impact and effects of implementing G.O. 1002.4, is bargainable only upon a request by FOP for impact and effects bargaining.[15]

In the present case, the Hearing Examiner found no evidence that FOP requested to bargain over an alleged change in policy once MPD ordered Officer Perkins to submit to drug testing, nor at any other time. We find that the Hearing Examiner's findings that FOP did not request impact and effects bargaining is reasonable and based on the record. We adopt the Hearing Examiner's finding and conclude that MPD was under no duty to bargain. We therefore find that MPD's failure to bargain over the impact and effects of implementing G.O. 1002.4 did not result in a violation of the CMPA.

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[14] See n. 13, above. Also, there is no evidence that the Union requested bargaining over the use of the Dashcam video.

[15] FOP cites *United Steelworkers of America v. Warrior and Gulf Navigation Co. ("United Steelworkers")*, 363 U.S. 574, 579, 581-582 (1960) for the proposition that MPD may not change an established past practice. (Opposition at p. 5). In *United Steelworkers*, the employer contracted out maintenance work that was previously performed by bargaining unit employees. The Union filed a grievance alleging a violation of the collective bargaining agreement. The Supreme Court held that this matter was subject to arbitration notwithstanding a contractual provision that matters which were strictly a function of management should not be subject to arbitration. The Court refrained from making any finding concerning the outcome of the grievance. FOP has failed to show how these facts, the contents of the referenced pages, or the Supreme Court's holding that this issue was arbitrable, are applicable to FOP's argument that MPD was required to bargain over implementing a management right.

FOP also cites *Consolidated Rail Corp. v. Railway Labor Executives Assn.*, 491 U.S. 299, 311 (1989). That case originated in the Railway Labor Act. The Court addressed the narrow issue of whether the employer's change to the drug testing policy was a "minor" or a "major" (substantial) change in working conditions, finding that it was "minor" and therefore eligible for consideration by Conrail's adjudicatory Board. The Court refrained from reaching any conclusion on the arguments of the parties pertaining to drug testing. FOP has failed to identify how this case is applicable to the facts of the present case.

IV. Costs

The Complainant requests that reasonable costs be awarded. The Board believes that the Hearing Examiner's failure to address this issue was an oversight. D.C. Code § 1-617.13(d) provides that "[t]he Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." In *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pgs. 4-5, PERB Case No. 98-U-02 (2000), the Board has articulated an interest of justice criteria for awarding costs.[16] In the present case, the Complainant failed to establish that it made a request to bargain over the impact and effects of the implementation of a nonbargainable subject, i.e., "the standard for imposition of drug testing". Therefore, there is no basis to conclude that MPD committed an unfair labor practice by failing to bargain. As a result, the Complainant did not prevail in this matter. We find that an award of cost is not in the interest of justice and we deny the Complainant's request for reasonable costs.

V. Conclusion

In sum, we find that find that MPD relied on a totality of the circumstances to determine whether there was reasonable suspicion to order Officer Perkins to submit to drug testing, and this did not change the reasonable suspicion standard in G.O. 1002.4. The Board also finds that MPD was exercising a management right when it ordered drug testing under G.O. 1002.4, giving rise to impact and effects bargaining only upon request. Since FOP did not request to bargain over the impact and effects of the exercise of this management right, MPD's failure to bargain was not a violation of the CMPA. We hereby dismiss the Complaint in this matter and deny FOP's request for reasonable costs.

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[16] In *AFSCME, Council 20*, the Board addressed the criteria for determining whether costs should be awarded, stating as follows:

> First, *any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part.* Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice. [emphasis added].
>
> Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. . . . What we can say here is that among the situations in which such an award *is* appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonable foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

ORDER

IT IS HEREBY ORDERED THAT:

1. We adopt the Hearing Examiner's findings to the extent they are consistent with the Board's analysis. The unfair labor practice complaint filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP) against the District of Columbia Metropolitan Police Department (MPD) is dismissed for the reasons set forth in this Decision and Order.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

August 19, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-24 was transmitted via Fax and U.S. Mail to the following parties on this the 19th day of August 2010.

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