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SHOULD THERE BE COLLECTIVE BARGAINING FOR DRUG TESTING OF FEDERAL EMPLOYEES?

The possibility of drug testing confronts most employees today.[1] Drug testing is of major concern to athletes[2] and private sector employees.[3] The nation's employers, encouraged by the government, seek to halt drug abuse and save additional employment costs.[4] Commentators cite four major reasons for implementing drug testing programs: the increased health care costs to employers from employee drug abuse;[5] the legal risk intoxicated employees represent to employers;[6]

1. *See, e.g., The Enemy from Within,* TIME, Sept. 15, 1986, at 58; *Should Employers Be Able to Test for Drug Users,* N.Y. Times, Apr. 17, 1986, at B7, col. 1; Stille, *Drug Testing: The Scene Is Set for a Dramatic Legal Collision Between the Rights of Employees and Workers,* National Law Journal, Apr. 7, 1986, at 1, col. 1; Stille, *Some Judges "Say No" to Drug Tests,* National Law Journal, Oct. 6, 1986, at 1, col. 3.

2. *See, e.g., Testing Plan Is Disclosed,* N.Y. Times, Apr. 7, 1986, at B2, col. 6 (Baseball Commissioner Peter Ueberroth discloses plans for testing baseball players); *N.C.A.A. Drug Ruling,* N.Y. Times, May 7, 1986, at D28, col. 4 (drug testing program adopted by the National Collegiate Athletic Association); *N.F.L. Plans Random Drug Tests; Players Face Risk of Suspension,* N.Y. Times, July 8, 1986, at A1, col. 1 (N.F.L. Commissioner Pete Rozelle announces new drug testing program).

3. Chapman, *The Ruckus Over Medical Testing,* FORTUNE, Aug. 19, 1985, at 57 (focuses on accuracy of drug testing); Waldholz, *Drug Testing in the Workplace: Whose Rights Take Precedence?,* Wall Street Journal, Nov. 11, 1986, at 35, col. 3 (debate between an executive whose company utilizes drug testing and another executive whose company does not use drug testing); Trost, *For Firms That Do Test, The Pitfalls Are Numerous,* Wall Street Journal, Nov. 11, 1986, at 35, col. 3 (choosing the right type of test).

4. *See generally Bureau of National Affairs, Inc., Alcohol & Drugs in the Workplace: Costs Controls and Controversies* (1986) [hereinafter *Workplace*] (report surveying current issues regarding drug and alcohol abuse, including legal developments and case studies of employers utilizing some form of drug testing or survey system).

5. Lehr & Middlebrooks, *Work-Place Privacy Issues and Employer Screening Poli-*

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the internal and external security risks for the employer from employee drug use;[7] and the role of employees as an employer's public representative.[8] President Ronald Reagan included these reasons in a recent Executive Order[9] imposing mandatory drug testing on executive branch workers[10] employed in sensitive positions.[11]

A. *Drug Testing Unilaterally Ordered*

Citing the erosion of public confidence,[12] President Reagan's Executive Order encourages drug testing in public employment.[13] Under the order, drug testing is permissible in the public sector if a reasonable suspicion of drug use exists, during an accident investigation, or as a follow-up to rehabilitation.[14] The Executive Order also requires agencies to test new applicants for employment.[15] Since the Executive Order became effective immediately, employee unions could not bargain over the implementation of the drug testing program or its procedures.[16]

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cies, 11 EMPL. REL. L.J. 407 (1985) (evaluation of drug and alcohol testing and their suggestions regarding testing programs).

6. *Id.*

7. *Id.*

8. *Id.*

9. Exec. Order No. 12564, Drug-Free Federal Workplace, 22 WEEKLY COMP. PRES. DOC. 1188 (Sept. 22, 1986) [hereinafter cited as Executive Order]. Moreover, preceding the text of the Executive Order is the text of President and Mrs. Reagan's September 14, 1986 address to the nation regarding the national campaign against drug abuse. Their appeal to fight drug abuse extended not only to employers, but also to unions, schools, professional athletes, and clergy. Address by President Reagan and Mrs. Reagan, 22 WEEKLY COMP. PRES. DOC. 1183, 1186 (Sept. 22, 1986).

10. Employees subject to the president's order include employees of executive federal agencies. The order excludes armed forces, employees of the United States Postal Service, and executive employees in the legislative and judicial branches. Executive Order, *supra* note 9, at 1191.

11. "Sensitive employees" include employees designated as such by agency head, law enforcement officers, or presidential appointees. *Id.* at 1191-92. Also included are employees with access to classified information, and employees in other positions designated by the agency head as sensitive because the position involves significant considerations of trust and confidence. *Id.*

12. *Id.* at 1189.

13. *Id.* at 1190.

14. *Id.*

15. *Id.*

16. *Id.* at 1192.

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Federal union employees face mandatory drug testing. The Federal Labor Relations Authority[17] (FLRA) is presently considering whether federal agencies must negotiate with employee unions[18] regarding drug testing proposals.[19] Among other concerns,[20] the FLRA believes that bargaining over drug testing might excessively interfere with management's employment rights.[21] As part of its evaluation of the bargaining

17. The Federal Labor Relations Authority has three members, each appointed by the President for a five year term subject to confirmation by the Senate. 5 U.S.C. § 7104(a), (b), (c) (1982). The FLRA's many duties include determination of appropriate collective bargaining units, the staging of representation elections, and determination of management rights and needs for certain rules, bargaining issues and unfair labor practice hearings. 5 U.S.C. § 7105(a) (2) (A)-(I) (1982).

18. The administrative body overseeing private sector labor relations is the NLRB. The Board consists of five members, all appointed by the President for five year terms and approved by the Senate. 29 U.S.C. § 153(a) (1982). The Board also can determine bargaining units, outcomes of representation elections and, most significantly, unfair labor practices. 29 U.S.C. § 159, 160 (1982).

19. *FLRA Offers Opportunity to Comment in Drug Test Negotiability Cases,* [July-Dec.] *Government Employee Rel. Rep.* (BNA) Vol. 24, No. 1178, 1184 (Sept. 1, 1986) [hereinafter *Opportunity to Comment*] (general request for amicus briefs).

20. *Opportunity to Comment, supra* note 19, at 1184. Other issues for consideration include: (1) security sensitive positions and negotiability of drug testing; (2) negotiating over drug test reliability; (3) whether drug testing is an exercise of management's right to provide internal security; (4) negotiating over the consequences of positive test results; and (5) the effect of random drug testing on negotiability. *Id.*

21. *Id.* Management rights listed in 5 U.S.C. § 7106(a) (1982) are limited. The prologue of subsection (a) states that management rights are "subject to subsection (b) of this section." Subsection (b) states, among other things, that a labor organization is free to negotiate "procedures which management officials of the agency will observe in exercising any authority under this section," 5 U.S.C. § 7106(b)(2) (1982), and "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." 5 U.S.C. § 7106(b)(3) (1982). Presumably, under either the "procedures" or the "appropriate arrangements" exception, a labor union would be able to tie the hands of management by forcing management to negotiate drug testing proposals. *See* American Fed'n of Gov't Employees Local 2782 v. FLRA, 702 F.2d 1183 (D.C. Cir. 1983) (an "appropriate arrangement" proposed under paragraph (b)(3) of § 7106 is not *ipso facto* invalidated by conflicting with a specific management right in subsection (a), because the rights in (a) are "subject to" the negotiating rights in (b)).

Specific management rights are:

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, lay off, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

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issue,[22] the FLRA should examine the extent to which collective bargaining over drug testing occurs in the private sector.[23] This Recent Development will address these issues, explore whether collective bargaining is permissible, and describe what specific issues are subject to bargaining.

B. *Determination of Negotiable Issues*

Unlike collective bargaining in the private sector, collective bargaining in the public sector is fairly new and more restricted.[24] Negotiable issues between the government employer and employee cannot unduly infringe upon management rights to control the agency's operations,[25] nor conflict with federal government rules and regulations.[26] Yet,

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(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source, and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

5 U.S.C. § 7106(a) (1982).

22. *Opportunity to Comment, supra* note 19.

23. Public employee bargaining is narrower than bargaining in the private sector. *See Developments in the Law-Public Employment*, 97 HARV. L. REV. 1611, 1680, 1682-1700 (1984) (article presents an analytical contrast between private sector and public sector bargaining). Private parties have a duty to bargain over mandatory subjects which include "wages, hours and other terms and conditions of employment," National Labor Relations Bd. v. Wooster Div. of Borg-Warner, 356 U.S. 342, 349 (1958); *see* 29 U.S.C. § 158(d) (1982). If collective bargaining over drug-testing in the private sector is minimal, then *a fortiori* collective bargaining over drug-testing will be even less likely in the public sector.

Unlike the Federal Labor Relations Act, the National Labor Relations Act does not specifically enumerate management rights. Refusal to bargain is an unfair labor practice. 29 U.S.C. § 158(a)(5), (b)(3) (1982). The parties can choose to bargain over any subject not considered mandatory. *Borg-Warner*, 356 U.S. at 349. Since no specific codification of management rights exists, the Board and courts must analyze the case law to discern mandatory, permissive, and exclusive management rights. Public sector bargaining is to the contrary. *See supra* notes 19-22 and accompanying text.

24. *See* H. ROBINSON, NEGOTIABILITY IN THE FEDERAL SECTOR 1-8 (1981) (brief review of public sector bargaining rights). Although management rights are impermissible subjects for bargaining in the private sector, employers' rights are not codified. *See generally Developments, supra* note 23 (classification of management rights in the private sector) and *supra* note 21 (management rights in the public sector).

25. *See supra* note 21 and accompanying text.

26. 5 U.S.C. § 7117 (1982). Unions may bargain over proposals that are subject to a

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management rights are not absolute.[27] Employees adversely affected[28] by the exercise of management rights can negotiate over appropriate arrangements to mitigate the harm.[29] The FLRA approach for evaluating a union proposal considers whether the proposal is appropriate or an excessive interference with management rights. The agency examines the arrangement and, if appropriate, weighs benefits to employees against management rights.[30]

1. Direct Interference Test

The FLRA adopted this new approach after the United States Court of Appeals for the District of Columbia overruled the FLRA's previous application of a "direct interference"[31] test in *American Federation of Government Employees, Local 2782 v. FLRA.*[32] In *Local 2782*, the union proposed that the Bureau of the Census consider demoted employees for available vacancies in their previous positions.[33] The agency refused to bargain because the proposal was contrary to govern-

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government rule or regulation if the FLRA finds no "compelling need" for the rule or regulation. *Id. See also* 5 U.S.C. § 7105(a)(2)(D) (1982).

27. Management rights are subject to the following negotiable issues:

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7106(b) (1982).

28. Adverse impact refers to the effect on the employee of management's decision to exercise its right of management authority. *See, e.g.*, National Ass'n of Gov't Employees, Local R14-87 and Kansas Army National Guard, 21 F.L.R.A. 24, 33 (1986) (FLRA noted that loss of one's job imposes a severe impact). *See also Executive Order, supra* note 9 at 1190 (employee termination for continued use of drugs and refusal to obtain drug counseling).

29. 5 U.S.C. § 7106(b)(3) (1983). *See infra* notes 34-38 and accompanying text.

30. 21 F.L.R.A. 24, 31-32 (1986). *See infra* notes 39-50 and accompanying text.

31 A union proposal that "directly interferes" with management rights is nonnegotiable Department of Defense v. FLRA, 659 F.2d 1140, 1159 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). *See infra* note 34 and accompanying text (noting rejection of the direct interference test).

32. 702 F.2d 1183 (D.C. Cir. 1983).

33. *Id.* at 1184. The affected employees were those demoted through a reduction-in-force program. *Id.* Reduction-in-force establishes a priority order for a layoff system *See* 5 U.S.C. § 3318 (1982) (Civil Service application of employee selection).

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ment policy.[34] The FLRA agreed, noting that the proposal conflicted with management's right to fill positions from any appropriate source.[35] Upon review, the District of Columbia Circuit held that a proposal advancing the interests of affected employees may be negotiable although it interferes with management rights.[36] The court, however, cautioned against excessive interference with management rights,[37] and held that appellate courts should give FLRA decisions substantial weight.[38]

2. Excessive Interference Test

In *National Association of Government Employees, Local R14-87 and Kansas Army National Guard*[39] the FLRA set forth its "excessive interference" test.[40] The test first evaluates whether a proposal is an ap-

34. 702 F.2d at 1184. *See also* American Fed'n of Gov't Employees, Local 2782 and Dep't of Commerce, Bureau of the Census, 7 F.L.R.A. 91 (1981).

35. 702 F.2d at 1185. The FLRA stated the proposal conflicted with 5 U.S.C. § 7106(a)(2)(C), which gives management the right to select employees from any appropriate source. 702 F.2d at 1185. *See also supra* note 21.

36. *Id.* at 1188. The court rejected the direct interference test used by the FLRA because it inadequately evaluated whether a proposal is appropriate, pursuant to 5 U.S.C. § 7106(b)(3). The direct interference test originally evaluated proposals regarding agency procedure, and determined whether the proposal was merely procedural, or related to a substantive management decision. For these situations, the court noted, a direct interference with management right test is appropriate. 702 F.2d at 1186.

The direct interference test inadequately evaluates whether a proposal is appropriate because the test deprives the statute of its meaning. *Id.* The court noted: "It is difficult to conceive of any 'appropriate arrangements for employees adversely affected' which (1) would be invalid unless exempted from subsection (a); (2) do not directly affect management prerogatives; *and* (3) are not themselves procedures so that paragraph (b)(3) would not entirely duplicate paragraph (b)(2))." *Id.* (emphasis in original). To avoid depriving the statute of effect, the court recognized that a proposal can interfere with management rights if its purpose is to aid adversely affected employees. The court cited congressional debate indicating that Congress intended such a result. *Id.* at 1187-1188 (citing 124 CONG. REC. 29,198-29,199, 38,715 (1978) (remarks of Reps. Udall and Ford)).

37. 702 F.2d at 1188. The court refused to speculate as to which subjects would constitute excessive interference. *Id.*

38. *Id.* The court, as in cases where NLRB rulings are challenged, will defer to the administrative board results because of its experience and knowledge in the labor area. *Id. See also* Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 97 (1983) (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)); American Fed'n of Gov't Employees, Local 1931 v. FLRA, 802 F.2d 1159 (9th Cir. 1986).

39. 21 F.L.R.A. 24 (1986).

40. *Id.* at 31-33.

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propriate arrangement intended to benefit adversely affected employees.[41] If the proposal intends to mitigate the adverse effects of management rights on employees, the FLRA will determine whether the proposal excessively interferes with management rights.[42] The FLRA makes this determination by weighing the benefits to the employees against the effects on management. The FLRA will consider: the nature and extent of the proposal's impact on the employee;[43] the employee's ability to control adverse effects;[44] the type and amount of management rights affected;[45] the manner in which the proposal will affect management rights;[46] whether the balance of interests between employees and management is disproportionate;[47] and the effects of the proposal on government operations.[48] Despite this list of factors,[49] the FLRA noted that a decision will depend on each particular situation.[50]

Since *Kansas Army National Guard*, the FLRA issued several decisions involving proposals for repromotions of demoted employees,[51]

41. *Id.* at 31-32. In Local 2782, the union proposed that if the agency chose to fill positions previously held by employees demoted through a reduction-in-force program, the agency should select the most qualified demoted employee. The agency disputed the directive to select the employee with the "highest retention standing" among competing demoted employees. *Id.* at 27-28.

42. *Id.* at 31-33. "[A] union must articulate how employees will be detrimentally affected by management's actions and how the matter proposed for bargaining is intended to address or compensate for the actual or anticipated adverse effects of the exercise of the management right or rights." *Id.* at 31. The FLRA will weigh "the competing practical needs of employees and their managers." *Id.* at 31-32.

43. *Id.* at 32. "[T]hat is, what conditions of employment are affected and to what degree?" *Id.*

44. *Id. See also* American Fed'n of Gov't Employees and Dep't of Commerce, Bureau of the Census, 14 F.L.R.A. 801 (1984) (employees demoted without fault); National Labor Relations Bd. Union and NLRB, Office of the General Counsel, 18 F.L.R.A. 320 (1985) (employees affected based on job performance).

45. 21 F.L.R.A. at 32.

46. *Id.*

47. *Id.* at 33. "Is the negative impact on management's rights disproportionate to the benefits to be derived from the proposed arrangement?" *Id.*

48. *Id.* "What is the effect of the proposal on effective and efficient government operations, that is, what are the benefits or burdens involved?" *Id.*

49. *Id.*

50. *Id.*

51. Proposals involving employees affected by a reduction in force program include: National Fed'n of Fed. Employees, Local 1450 and U.S. Dep't of Housing and Urban Dev., 23 F.L.R.A. 3 (1986); Department of the Air Force, Air Force Logistics Command Wright-Patterson Air Force Base and American Fed'n of Gov't Employees, 22 F.L.R.A. 15 (1986); National Ass'n of Gov't Employees and Dep't of the Army, Kansas

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training and retraining programs.[52] work performance standards,[53] uniform requirements,[54] furloughs,[55] disciplinary actions[56] and work station relocations.[57] Consistent with *Local 2782*, these decisions hold that a union proposal is not excessive interference if it influences management decision-making,[58] but fails to totally eliminate management's authority[59] to select an appropriate course of action. Imposing a drug testing program in the federal sector implies that management has a right to assure internal security. Thus, examination of other proposals

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National Guard, 21 F.L.R.A. 905 (1986); National Treasury Employees and Dep't of the Treasury, 21 F.L.R.A. 667 (1986); AFSCME, Local 2830 and Dep't of Justice, 21 F.L.R.A. 1039 (1986); Fed. Union of Scientists and Engineers and Dep't of the Navy, Naval Underwater Systems, 22 F.L.R.A. 731 (1986); National Fed'n of Fed. Employees, Local 29 and U.S. Army Corps of Engineers, 21 F.L.R.A. 630 (1986); National Ass'n of Gov't Employees, Local R14-87 and The Adjutant General of Kansas, 21 F.L.R.A. 313 (1986); American Fed.n of Gov't Employees and Dep't of Health and Human Services, 21 F.L.R.A. 117 (1986).

52. *See* American Fed'n of Gov't Employees and Dep't of the Army, Aberdeen Proving Ground, Maryland, 22 F.L.R.A. 574 (1986) (proposal to select volunteers for a training program); American Fed'n of Gov't and Dep't of Housing and Urban Dev., 21 F.L.R.A. 354 (1986) (proposal to perform a cost study of a furlough retraining program instead of an immediate reduction in force program).

53. *See* Department of the Air Force, Air Force Logistics Command Wright-Patterson Air Force Base and Am. Fed'n of Gov't Employees, 21 F.L.R.A. 609 (1986) (job performance appraisal methods); American Fed'n of Employees Local 1923 and Dep't of Health and Human Services, 21 F.L.R.A. 178 (1986) (proposal affecting employees who fail to improve job performance).

54. *See* American Fed'n of Gov't Employees, Local 217 and Veterans Admin. Medical Center, Augusta, Georgia, 21 F.L.R.A. 62 (1986) (proposal for type of uniforms worn is negotiable).

55. *See* American Fed'n of Gov't Employees, Local 32 and Office of Personnel Management, 22 F.L.R.A. 307 (1986) (request that employee furloughs be continuous to enable employees to qualify for unemployment).

56. *See* National Fed'n of Employees and U.S. Dep't of the Interior, U.S. Geological Survey Eastern Mapping Agency, 21 F.L.R.A. 1105 (1986) (effective date of disciplinary action).

57. *See* American Fed'n of Gov't Employees, Local 3231 and Social Security Admin., 22 F.L.R.A. 868 (1986) (proposal for job training if relocated); Nat'l Treasury Employees Union and Internal Revenue Service, 22 F.L.R.A. 314 (1986) (change in employee working conditions); Am. Fed'n of Gov't Employees, Local 644 and U.S. Dep't of Labor, 21 F.L.R.A. 658 (1986) (relocation of library is nonnegotiable).

58. *See supra* notes 51-57.

59. The proposal must avoid forcing management to undertake a certain course of action, or eliminate a management decision. *See supra* notes 51-57. *Cf. Local 2782, supra* note 37 (court's analysis of the F.L.R.A. legislative history and conclusion that Congress allowed unions to negotiate over more than just mere procedures on behalf of adversely affected employees).

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that also affect internal security measures may provide guidelines applicable to drug testing issues.

C. *Drug Testing as Protection of Internal Security*

In *American Federation of Government Employees, Local 644 and U.S. Department of Labor*,[60] the FLRA held that a union proposal for relocation of a library excessively interfered with management rights and thus was nonnegotiable.[61] The FLRA noted that the benefits to employees of larger office space did not outweigh the agency's security interest in selecting the library location.[62]

The FLRA also found excessive interference with internal security measures in *National Treasury Employees Union, Chapter 153 and Department of the Treasury*.[63] The FLRA struck down the union's proposal to eliminate agency investigation or documentation of public reports concerning non-criminal conduct by United States Customs employees.[64] The agency sought to implement a public hotline for reports of suspected criminal conduct by Customs employees.[65] The FLRA concluded that although the union's proposal would benefit employees engaged in noncriminal conduct,[66] the proposal failed to outweigh management's right to protect internal security and unauthorized disclosures because agency investigation of non-criminal

60. 21 F.L.R.A. 658 (1986).

61. *Id.* at 661-62. Among other union proposals under review, the FLRA considered a proposal to relocate a library/conference room and utilize the space for offices. The agency alleged that the proposal conflicted with management's right to "determine the technology, methods and means of performing its work [5 U.S.C. § 7106(b)(1)(1982)] and under section 7106(a)(1) to determine its internal security practices." 21 F.L.R.A. at 661.

62. *Id.* at 662. The F.L.R.A. weighed the benefit to the employees of more office space against the agency's objective of controlling theft and maintaining security, concluding that the employee's benefit did not outweigh the security objective. *Id.*

63. 21 F.L.R.A. 841 (1986).

64. *Id.* at 841-42. The agency engaged in "impact bargaining" with the union over an agency proposal to establish a hotline for the public to report criminal activity of customs employees. The union proposed that the agency not document non-criminal matters reported; that a press release advising the public of the hotline mention the aforementioned proposal; and the agency advise the union of non-criminal matters reported. *Id.*

65. *Id.*

66. *Id.* at 845. The court noted that employees would be subject to disciplinary actions. *Id.*

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conduct might lead to a discovery of criminal conduct.[67] Also, the proposal would not promote effective and efficient government operations.[68]

Drug testing appears more controversial and important than library location[69] and equally as serious as criminal activity.[70] Since employees involved in drug testing may face possible disciplinary actions, proposals to assure the least harmful effects of a drug testing program will be beneficial. Yet, government agencies have a significant interest in preventing dissemination of unauthorized classified information held by security-sensitive employees and protecting their own property and employees. Perhaps the effects of drug testing on negotiability in the private sector may provide an impetus for drug testing negotiation in the public sector.[71]

D. *Drug Testing and Negotiability in the Private Sector*

1. *The Railroad Cases*

The FLRA is interested in whether drug testing is negotiable in the private sector.[72] Two courts addressed whether drug testing can be unilaterally imposed prior to private sector bargaining.[73] The cases involved the Railway Labor Act (RLA)[74] and the railroad industry's Rule 6,[75] prohibiting on-duty use or possession of drugs or alcohol, or

67. *Id.* The particular conduct concerns the agency's "enforcement of customs laws and other related laws against the smuggling of contraband; for the assessment, collection and protection of revenue by levying import duties and taxes; and for the control of carriers, persons and articles entering or departing the United States." *Id.* at 844.

68. *Id.* at 845.

69. *See supra* notes 61-62 and accompanying text.

70. *See supra* notes 64-68 and accompanying text.

71. *See supra* notes 19, 22-23 and accompanying text.

72. *Id.*

73. *See infra* notes 85-95 and accompanying text.

74. 45 U.S.C. §§ 151-164, 181-188 (1981).

75. Rule 6 provides as follows:

> The use of alcoholic beverages, intoxicants and narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty, or on Company property is prohibited. Employees must not report for duty under the influence of any alcoholic beverage, intoxicant, narcotic, marijuana, or other controlled substance or medication, including those prescribed by a Doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

Excerpted in Brotherhood of Maintenance Way Employees v. Burlington Northern

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reporting to work under the adverse effects of drugs or alcohol.[76]

The Railway Labor Act and subsequent judicial interpretations[77] distinguish between minor[78] and major[79] labor disputes.[80] Minor disputes involve labor conflicts arising from a condition in the collective bargaining agreement or involving past practices, while major disputes involve conditions not previously agreed upon or contemplated by the parties.[81] To promote the free flow of commerce, the RLA requires dispute settlement rather than immediate employee strikes.[82] The employer may implement only minor changes in working conditions prior to negotiations.[83] Major changes in working conditions require bargaining prior to implementation.[84]

In *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*[85] the United States Court of Appeals for the Eighth Circuit held that post-incident and post-furlough drug testing are mi-

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R.R. Co., 802 F.2d 1016, 1018 (8th Cir. 1986). *See infra* note 85 and accompanying text.

76. *See infra* notes 90 and 95 and accompanying text.

77. *See* Elgin, Joliet & Eastern R.R. Co. v. Burley, 325 U.S. 711 (1945) (defining major and minor disputes); Switchmen's Union of North Am. v. Southern Pacific Co., 398 F.2d 443 (9th Cir. 1968) (court taking a different approach to defining major and minor disputes focusing on "arguably justified" terms embodied in the collective bargaining agreement). *See also* Cases Noted, 46 COLUM. L. REV. 992 (1946); Recent Cases, 59 HARV. L. REV. 992 (1946); Comments on Recent Cases, 31 IA. L. REV. 436 (1946) (all comment on *Elgin*).

78. 45 U.S.C. § 151a (4) (1982). *See Elgin*, 325 U.S. at 722-723 (major disputes involve negotiation of collective bargaining agreements). The court in *Elgin* stated, "They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Id.* at 723.

79. 45 U.S.C. § 151a (5) (1982). *Compare Elgin,* 325 U.S. at 722-723 (minor disputes involve grievances arising out of preexisting terms in a labor contract).

80. *See supra* notes 78-79 and accompanying text. For elaboration of the Railway Labor Act, *see* COX, BOK, GORMAN, CASES AND MATERIALS ON LABOR LAW, 79-87 (1986); GORMAN, BASIC TEXT ON LABOR LAW, 718 (1976); Ingle, *Railway Labor Legislation*, 18 TENN. L. REV. 359 (1944).

81. *Elgin*, 325 U.S. at 722-728. *See also infra* notes 85-91 and accompanying text (discussion of Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R. Co., 802 F.2d 1016 (8th Cir. 1986), and its application of *Elgin*).

82. 45 U.S.C. § 152 (1982) (affirmative duty to reach peaceful settlements on employers and employees).

83. Brotherhood of Maintenance Way Employees, Lodge 16 v. Burlington Northern R.R. Co., 802 F.2d 1016, 1017 (8th Cir. 1986).

84. *Id.*

85. 802 F.2d 1016 (8th Cir. 1986).

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nor disputes;[86] thus, the railroad company could unilaterally impose testing prior to bargaining. The railroad company imposed drug testing[87] on employees involved in human-error accidents and on employees returning from furlough.[88] Post incident testing was "minor" because the railroad company and the union previously engaged in a practice of investigating suspected drug use.[89] Post-furlough testing is a modern application of the railroad company's past practice of requiring physical examinations.[90] Similarly, in *Brotherhood of Locomotive Engineers v. Burlington Northern R.R. Co.*,[91] the court held that a railroad company's drug testing program,[92] arguably justified[93] by the col-

86. *Id.* at 1023. The court divided the opinion into two major issues. The majority opinion concentrates on the court's holding regarding post-incident testing. The concurring opinion states the court's position on post-furlough testing. *Id.* at 1017. Judge Arnold, dissenting from the majority opinion on post-furlough testing, acknowledged post-furlough medical examinations, including blood and urine testing, as a past company practice, but viewed the additional "drug screen" as a new procedure requiring bargaining before implementation by the railroad company. *Id.* at 1024-1025. Judge Arnold argued that the drug screen was not based on reasonable cause. *Id.* In addition, Judge Arnold did not believe the program assured employees of confidentiality. *Id.*

87. Drug testing detects the use of alcohol or drugs. *Id.* at 1017.

88. *Id.* Both tests were mandatory. *Id.* Prior to implementation of these tests, the railroad company required drug tests only upon finding probable cause for suspected drug use. *Id.* at 1018. The railroad company defined probable cause as "outward manifestation of intoxication." *Id. See also supra* note 75 and accompanying text (describing the railroad industry's Rule 6).

89. *Burlington*, 802 F.2d at 1023. In addition to testing for probable cause, the company required testing after an "accident, an on-the-job injury, a rule violation, or an unsafe act." *Id.* at 1019. *See also supra* note 88 (railroad company requires probable cause for drug testing). The court analyzed this issue utilizing the major/minor dispute presented in Elgin, Joliet & E. Ry. Co. v. Burley, 325 U.S. 711 (1945). *See supra* notes 78-85 and accompanying text. The court mentioned that the union did not object to previous testing, and this additional test represented "a more refined step, the urine test, to confirm the observation of the supervisor." *Burlington*, 802 F.2d at 1023. The court relied heavily on the fact that supervisors can test only an impaired employee. *Id.*

90. *Burlington*, 802 F.2d at 1024. Judge Fagg's concurrence emphasized the union's acceptance of Burlington's requirement of post-furlough medical exams for safety purposes. *Id.* The additional drug test also served the railroad company's purpose "to ensure all BN employees are fit for duty." *Id.* Thus, in the court's opinion, the rules have not substantially changed. *Id.* at 1023-1024.

91. 620 F. Supp. 173 (D. Mont. 1985), *appeal pending*, No. 85-4138 (9th Cir. argued July 8, 1986).

92. 620 F. Supp. at 175. The railroad company implemented drug testing to discourage on-the-job use of intoxicating substances. *Id.* at 174. In a companion case, the court held that the railroad company could not unilaterally implement a program utilizing dogs for the purpose of detecting drugs. Brotherhood of Locomotive Eng'rs. v. Burlington R.R. Co., 620 F. Supp. 163, 166, 173 (D. Mont. 1985). The court held that

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lective bargaining agreement, was not a major dispute.[94]

The analysis under the RLA as applied to the public sector is not decisive for two reasons. First, the RLA evaluates considerations that fail to address management rights.[95] Instead of distinguishing between major and minor disputes, public sector labor relations focuses on management rights.[96] Second, and more importantly, the Eighth Circuit in *Brotherhood of Maintenance* specifically rejected the railroad's argument that drug testing was nonnegotiable.[97] The issue of whether drug testing is negotiable, however, is still open.

2. The Utility Industry

Although the utility industry is also concerned with safety, courts are unwilling to allow unilateral implementation of drug testing. In *IBEW v. Metropolitan Edison Co.*,[98] the court ordered an injunction against an employer-imposed drug testing program[99] at the Three Mile Island nuclear power plant, pending the results of an arbitration.[100]

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such a procedure is a major dispute, realizing the severe impact that canine surveillance would have on employer-employee relations. *Id.* at 173.

93. The court referred to its analysis in the canine surveillance case for the appropriate method of determining whether an implied contract condition involved a major or minor dispute. *Id.* at 175. The implied contract condition was adherence to company Rule G prohibiting use of intoxicants. *Id.* The court used the following test: "Is the position of at least one of the parties *arguably* predicated on the terms of an agreement?" *Id.* (emphasis in original). If so, the dispute is minor, and employers can unilaterally implement a change in working condition, subject to later negotiation. *Id.* at 171. *See also* Switchmen's Union of North America v. Southern Pac. Co., 398 F.2d 443 (9th Cir. 1968) (relied on by court in *Burlington* to support use of arguably justified test).

94 620 F. Supp. at 175. The court noted that drug testing is not as offensive as the canine surveillance in *Burlington's* companion case and was arguably justified by the terms of the collective bargaining agreement.

95. *See supra* notes 77-84 and accompanying text.

96. *See supra* notes 77-84 and accompanying text.

97. Brotherhood of Maintenance of Way Employees v. Northern R.R. Co., 802 F.2d 1016, 1021 (8th Cir. 1986).

98 Slip op. No. 86-4426 (E.D. Pa. Aug. 14, 1986).

99 *Id.* Metropolitan Edison sought to implement a drug and alcohol testing program which would require testing in the following circumstances: reasonable suspicion of drug use, during regular physical examinations, after rehabilitation for drug use, and random. *Id.*

100. *Id.* The union was unable to resolve the drug testing issue. Despite scheduling the dispute for arbitration, Metropolitan Edison chose to unilaterally implement drug testing. *Id.*

The court recognized that it could not order preliminary injunctions in labor disputes, unless the dispute was arbitrable. *Id.* (citing Boys Market, Inc. v. Retail Clerks

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The arbitrator then prohibited Metropolitan Edison from imposing a drug testing program without bargaining.[101] The union persuaded the arbitrator by emphasizing the significant infringement upon employee privacy interests, notwithstanding possible dangers from on-the-job drug use at nuclear plants.[102]

3. Professional Sports

Highly publicized disputes over drug testing occur in the field of professional sports.[103] Baseball management and players are currently involved in mediation over mandatory drug testing.[104] Recently, an arbitrator prohibited the National Football League (NFL) from imposing random drug testing without bargaining.[105] The collective bargaining agreement allowed drug testing in pre-season physicals,[106] and, among other changes to the drug testing program,[107] Commissioner

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Union, Local 770, 398 U.S. 235 (1979)). The court concluded that the underlying dispute was arbitrable and, utilizing the Third Circuit's analysis for preliminary injunctions, concluded that arbitration would not be futile. The court held that the labor union's interests outweighed the interests of Metropolitan Edison and the public in the safe operation of a nuclear power plant. *See supra* note 98, *IBEW*, slip op. at 5. *See also* Nursing Home & Hospital Union No. 434 v. Sky Vue Terrace, Inc., 759 F.2d 1094 (3d Cir. 1985) (Third Circuit test for preliminary injunction in labor cases). The court noted that Metropolitan Edison already maintained a drug testing program, and employees subject to the new program could be irreparably harmed. *Id.*

101. Arbitration Panel Bars Random Drug Tests At Three Mile Island Nuclear Power Plant, *Daily Lab. Rep.* (BNA) No. 199, at A-5 (Oct. 15, 1986). The arbitrator concluded that the collective bargaining agreement did not permit unilateral imposition of a drug testing program. *Id.*

102. *Id.* " 'Manifestly all of us have an interest in eliminating drugs and alcohol in the work place, but I believe such an invasion of the privacy of the innocent in order to discover the guilty establishes . . . [a] dangerous . . . precedent.' " *Id. See also* Murray v. Brooklyn Union Gas Co., 122 L.R.R.M. (BNA) 2057 (1986) (court also ordered injunction pending arbitration between the employer and the union regarding the employer's drug testing program).

103. *See supra* note 2 and accompanying text.

104. *Tom Roberts, Baseball's Impartial Arbitrator, Holds Hearing Into Grievance Filed By Baseball Players Association,* N.Y. Times, May 1, 1986, at B14, col. 2.

105. *In re* Nat'l Football League Players Ass'n and Nat'l Football League Management Council and the Nat'l Football League, *Daily Lab. Rep.* (BNA) No. 209 at D-1 (Oct. 29, 1986).

106. *Id.* AD-3 - D-4, Article XXXI, Section 5, 6, and 7 of the 1982 collective bargaining agreement documents the parties' current drug testing program. *Id.* In addition to pre-season physicals, the parties jointly agreed on a facility to conduct educational testing and treatment, and a confidentiality clause. *Id.*

107. *Id.* at D-5. Alvin "Pete" Rozelle is Commissioner of the National Football

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Rozelle[108] sought to unilaterally impose additional unscheduled tests.[109] The arbitrator addressed the issue of whether the drug testing provision in the League's 1982 collective bargaining agreement conflicted with Rozelle's drug testing program.[110] Resolution of this issue was necessary to determine whether management could unilaterally exercise rights to protect the integrity of the game by implementing drug testing.[111]

The arbitrator found that the parties negotiated and codified drug testing procedures[112] in the 1982 agreement. While leaving much of Rozelle's plan intact,[113] the arbitrator found that the unscheduled drug

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League. *Id.* at D-1. Rozelle selected Dr. Forest S. Tenant to supervise the drug testing program and Smith-Kline Laboratories to perform testing and increased the penalties for violation of confidentiality. *Id.* The National Football League Player's Association (NFLPA) opposed these moves because they violated terms of the current collective bargaining agreement; the NFLPA asserted that Rozelle lacked authority to impose any program once the parties had negotiated the subject matter. *Id.* at D-5 - D-6. *See supra* note 106 and accompanying text.

108. Among the Commissioner's responsibilities are dispute resolution between the players and the League, establishing policy and procedures necessary to maintain the integrity of League and implementing disciplinary actions when necessary. *Id.* at D-2 (citing Article VIII of the 1985 N.F.L. Constitution and By-Laws).

109. *Id.* at D-5. Rozelle's drug program required two unscheduled drug tests during the season. *Id.*

110. *Id.* at D-10. The Management Council argued that the Commissioner had plenary authority to maintain discipline to protect the integrity of the game, and that therefore NFLPA is the party altering the collective bargaining agreement. *Id.* at D-8. The NFL asserted Rozelle's management rights to implement a more effective program when the management and the NFLPA fail to take appropriate action. *Id.* at D-7. In addition to past practice of the Commissioner, "[t]he NFL further point[ed] out that Commissioner Rozelle was deeply concerned about the career-ending and life-threatening potential of drug use, as well as the erosion of public confidence in the game itself, with consequent harm to the interests of both players and clubs." *Id.*

111. *Id.* at D-14. The arbitrator concluded that the Commissioner's powers were not plenary. The collective bargaining agreement allowed individual clubs to have rules and regulations that were not contrary to NFL rules, and the Commissioner's role was similar to an employer. *Id.* at D-13. Thus, the arbitrator stated that the collective bargaining agreement limited the Commissioner's rulemaking authority. *Id.*

112. *Id.* at D-13.

113. *Id.* at D-15. The arbitrator recognized that the Commissioner could exercise some authority. *Id.* at D-14. "The parties bargained about a chemical dependency program, testing and confidentiality. Interestingly, they did not include in their bargain subjects such as 'prohibited substances,' 'amphetamines,' 'anabolic steroids;' the specifics of after care for players who test positive for drugs; the status of players hospitalized for drug treatment and/or their entitlement to pay or the extent to which, if any, players would be disciplined for improper drug involvement." *Id.* The arbitrator upheld the Commissioner's right to appoint Dr. Forest S. Tenant as Drug Advisor and Smith-

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test conflicted with the collective bargaining agreement.[114] Since the parties agreed on appropriate occasions for drug testing,[115] the Commissioner could not unilaterally implement any changes to that agreement.[116]

The NFL arbitration indicates the desirability of negotiation over drug testing. Management must be able to freely function in its duties.[117] Furthermore, labor-management disputes should be resolved in a peaceful manner.[118] Moreover, privacy interests are important and may even outweigh safety concerns if an immediate resolution to a labor dispute is possible.[119] Finally, management should refrain from altering existing collective bargaining terms because the parties' mutual agreement supercedes management rights.[120]

E. *Conclusion*

Application of the aforementioned themes to the federal public sector clashes with a literal reading of applicable statutes.[121] Physical safety and well-being are significant interests, but national security may pose a greater threat to the American public. This threat certainly supports federal managers in their efforts to establish effective internal security procedures. These procedures, however, will erode labor relations,[122] and contravene congressional intent for amicable labor relations. When weighing and balancing the interests of employers and employees, the FLRA should consider the unique circumstances of this infringement and the potential harm to employees.

Drug testing is controversial and federal employers should carefully

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Kline Laboratories, testing of draft-eligible players, designation of specific prohibited drugs and confidentiality requirements. *Id.* at D-15 - D-16.

114. *Id.* at D-15. " '[U]nscheduled testing' is not addressed, contemplated or permitted by Article XXXI of the collective bargaining agreement." *Id.* The arbitrator commented that the NFLPA resisted attempts to implement drug testing, but later agreed only to the terms in the present collective bargaining agreement. *Id.*

115. *Id.*

116. *Id.* The arbitrator considered that the negotiators did not contemplate unscheduled drug testing when negotiating the 1982 collective bargaining agreement. *Id.*

117. *See supra* notes 24-51 and accompanying text.

118. *See supra* notes 74-97 and accompanying text.

119. *See supra* notes 98-102 and accompanying text.

120. *See supra* notes 103-116 and accompanying text.

121. *See supra* notes 21 and 27 and accompanying text.

122. *See* Wollett, *The Bargaining Process in the Public Sector: What is Bargainable?*, 51 OR. L. REV. 177, 182 (1971).

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evaluate any program prior to implementation. The arbitrator in *Metropolitan Edison* commented that employers are over-anxious to implement such programs.[123] Parties should thus be afforded the opportunity to reasonably negotiate a mutual drug testing agreement.[124]

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123. *See supra* notes 98-102 and accompanying text.

124 *Id.*

* J.D. 1987, Washington University.

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