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STATE'S HIGHEST COURT RULES 6-0, UPHOLDING THE POLICE COMMISSIONER'S AUTHORITY TO CHOSE THE OFFICIAL METHOD FOR DRUG TESTING

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New York, Dec. 17, 2009 – The New York State Court of Appeals ruled unanimously (6-0) today that "the New York City Police Commissioner's disciplinary authority over the NYPD vests him [or her] with discretion to choose the scientific methodology to be used for drug testing, and the circumstances prompting testing." This decision affirms the Police Commissioner's authority to maintain discipline and an *esprit de corps* among police officers while maintaining the public's confidence in the Department.

"It is an important decision for the good order and discipline of the Department," said Commissioner Ray Kelly of the New York City Police Department.

"We are pleased with the decision, as it reaffirms our view that the Police Commissioner must have the authority to use the most effective method of drug detection within the Department in order to ensure its effectiveness," said Michael A. Cardozo, Corporation Counsel of the New York City Law Department, which litigated the matter on behalf of the City.

The Court of Appeals, the state's highest court, has seven members, but Chief Judge Jonathan Lippman recused himself in this case, leaving the resulting 6-0 majority.

Case History

On August 1, 2005, the NYPD expanded the use of Hair Testing such that it would replace urine analysis as the method of testing for drugs. The police unions then filed "improper practice petitions" with the Board of Collective Bargaining (BCB), claiming that the expansion of Hair Testing was a subject over which collective bargaining was required.

The Mayor's Office of Labor Relations (OLR) responded by noting that Hair Testing had already been in place at the NYPD, and that the Court of Appeals' holding in *Patrolmen's Benevolent Assocation v. Public Employment Relations Board, 6 N.Y.3d 563 (2006),* made such testing a prohibited subject of bargaining.

The BCB rejected OLR's position, and on Dec. 4, 2006, issued adverse decisions and orders prohibiting the expanded use of Hair Testing. The NYPD received these decisions on December 12th of that year, and immediately complied with the BCB orders.

On Jan. 3, 2007, the City filed an Article 78 proceeding – which challenges an administrative decision – and sought reversal of the BCB decision. On Dec. 5, 2007, Supreme Court Justice Lottie E. Wilkins reversed the Collective Bargaining Board, holding that the Commissioner was not required to engage in collective bargaining over drug testing methods, as it would impair his or her ability to maintain discipline within the Department.

Then on Oct. 16, 2008, a midlevel appeals court -- the Appellate Division, First Department -- reversed the trial court.

Today's Court Ruling

Finally, the Court of Appeals today reversed the First Department and reinstated the Supreme Court's ruling, thereby permitting the resumption of random hair testing. The Court of Appeals found that the intermediate appellate court, the First Department, had misinterpreted the *Patrolmen's Benevolent Association v. Public Employment Relations Board, 6 N.Y.3d 563 (2006)* case and unambiguously stated that the Police Commissioner's power to investigate members of his or her own department was not predicated on the lodging of formal charges against an officer.

"The Police Commissioner's disciplinary authority under [New York City Charter Section] 434 (a) and [New York City Administrative Code Section] 14-115 (a) is not limited to the formal disciplinary process; i.e., situations where allegations of misconduct have been made or are being adjudicated against identified officers," the Court of Appeals wrote in today's ruling. "Moreover, the detection and deterrence of wrongdoing within the NYPD -- particularly crimes, such as illegal drug use -- is a crucial component of the Police Commissioner's responsibility to maintain discipline within the force."

The City's Legal Team

The case was argued by Senior Counsel Julian L. Kalkstein of the New York City Law Department's Appeals Division. "This critical decision re-establishes the Commissioner's authority to use the best methods available for detecting drug use within the Department," Kalkstein said. He noted that urine testing is only good for a small window (about 72 hours), whereas hair testing has a longer time frame (about 90 days).

Larry Sonnenshein of the Appeals Division offered supervisory input on the appellate level, and William Fraenkel of the Labor & Employment Law Division, with input from Division Chief Georgia Pestana, successfully handled the matter in the trial court.

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