

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :  
OFFICERS ASSOCIATION :  
 :  
 v. : Case No. PERA-C-02-81-E  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF CORRECTIONS :  
 WAYNESBURG SCI<sup>1</sup> :

**FINAL ORDER**

The Commonwealth of Pennsylvania, Department of Corrections (Commonwealth) filed exceptions on July 3, 2002 with the Pennsylvania Labor Relations Board (Board) from a June 14, 2002 Proposed Decision and Order (PDO) in which the hearing examiner concluded that the Commonwealth violated Section 1201(a)(1) and (3)<sup>2</sup> of the Public Employee Relations Act (PERA) by unilaterally implementing a ban on smoking in the "A" block at the State Correctional Institution at Waynesburg (Waynesburg SCI). Following the grant of an extension of time, the Commonwealth timely filed its brief in support of the exceptions on August 5, 2002. On August 26, 2002, the Pennsylvania State Corrections Officers Association (Association) filed its brief in response to the exceptions.

On February 14, 2002, the Association filed a Charge of Unfair Practices with the Board alleging that the Commonwealth violated Section 1201(a)(1) and (5) of PERA on January 14, 2002, by unilaterally imposing a no smoking policy on the bargaining unit at Waynesburg SCI. The hearing examiner found that prior to January 14, 2002, corrections officers assigned to the "A" block could smoke at their posts, and that after January 14, 2002, they were no longer permitted to do so. (Finding of Facts 8 and 9). The Commonwealth presented evidence at the hearing that the ban on smoking was in connection with a plan to make the "A" block a "therapeutic community" for the treatment of inmates undergoing drug and alcohol rehabilitation. The Commonwealth argues that the ban on smoking by corrections officers was necessary, since corrections officers were role models for inmates in the "therapeutic community" and that the purpose of the "therapeutic community" was to help inmates recover from addictions including smoking.

Relying on Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1994), the hearing examiner noted that smoking is a mandatory subject of bargaining and the fact that the work site is a prison does not

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<sup>1</sup> The charges filed against Greensburg SCI were withdrawn at the hearing on April 30, 2001, and therefore, the caption has been amended as set forth herein.

<sup>2</sup> The hearing examiner's conclusion regarding the violation of 1201(a)(3) was excepted to as a typographical error and is addressed infra in this order.

relieve the employer from that bargaining duty. Furthermore, because the "therapeutic community" had not been implemented as of the date of the hearing, the hearing examiner determined that under the stated policy concerns existing prior to January 14, 2002, the Commonwealth had not established an effect on its overall core functions that outweighed the employees' interests in smoking. Accordingly, the hearing examiner concluded that the Commonwealth had violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing the ban on smoking in the "A" block at Waynesburg SCI.

In its exceptions, the Commonwealth notes that it is the actual impact on employees' interests that must be weighed against the probable effects on the Commonwealth's basic policy. PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975). The Commonwealth contends that the State College balancing test must be performed on a case-by-case basis. Therefore, the Commonwealth asserts that the hearing examiner erred in relying on Crawford County to find an obvious effect on employe working conditions, and that there was no substantial evidence establishing that the no smoking policy had any actual effect on employees' interests in working condition at Waynesburg SCI.

Section 701 of PERA provides, in relevant part, that

[c]ollective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment ...

Section 702, on the other hand, provides that

[p]ublic employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of service, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel.

In recognizing the balance that must be struck between these two provisions, the Pennsylvania Supreme Court in State College Area School District, 337 A.2d at 268, stated that

where an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms or conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

The State College balancing test has been previously applied in several cases involving similar restrictions on smoking in the workplace.

Under PERA, smoking is ordinarily regarded as a mandatory subject of bargaining. Commonwealth of Pennsylvania (Venango County Board of Assistance) v. PLRB, 74 Pa. Commonwealth Ct. 1, 459 A.2d 452 (1983). An exception to that general rule exists where a smoking policy transcends a working condition issue and becomes an extension of the employer's managerial policy. See Chambersburg Area School District v. PLRB, 60 Pa. Commonwealth Ct. 29, 430 A.2d 740 (1981), allocatur granted, September 23, 1981, appeal denied, June 7, 1982...

AFSCME v. Crawford County, 25 PPER ¶25001 at 2 (Final Order, 1993) (quoting Commonwealth, Department of Education, 23 PPER ¶23008 at 12 (Final Order, 1991), affirmed sub nom, Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1995). In affirming the Board's decision in Crawford County, the Commonwealth Court held that smoking is a working condition over which the employees have an actual interest. See Commonwealth of Pennsylvania (Venango County Board of Assistance) v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983). The Commonwealth Court recognized that "[o]ne may justifiably presume that those employees, who did smoke, did so in order to help pass the time while working or to relax during break periods. In these circumstances, the employees right to smoke was nothing less than a work related privilege." Crawford County, 659 A.2d at 1081.

With regard to the hearing examiner utilizing prior Commonwealth Court decisions as precedent to address the employees' interest, the Board has recently held that:

The Board properly relies on precedent to determine whether a matter constitutes a mandatory subject rather than reinventing the wheel by applying the rational relationship test merely to arrive at the same result as the established precedent. Teamsters Local 77 & 250 v. PLRB, 786 A.2d 299 (Pa. Cmwlth. 2001). Although the decision regarding the negotiability of a particular subject is in part a fact driven (i.e. balancing the relationship of the issue to Section 1 matters on one hand and core managerial interests on the other), once the Board has conducted this analysis the result is precedential for future cases on that same or similar facts. Of course where a party introduces new or different facts that may alter the weight the matter at issue bears on the interests of the parties, additional analysis may be warranted. The burden is on the party requesting departure from established precedent to demonstrate on the record facts warranting such departure.

Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 33 PPER ¶33087 at 192 (Final Order, 2002).

Although, Wilkes-Barre is a case arising under Act 111, the same principle applies under PERA where a similar balancing or weighing of interest occurs under the State College test for determining whether a bargaining duty applies. The negotiability of employe smoking under PERA has arisen on numerous occasions and, as indicated above, the

Board and the Commonwealth Court have upheld its negotiability in Commonwealth employment (Venango County, supra.) and prisons (Crawford County, supra.) settings. The hearing examiner's reliance on precedent in this regard was not in error. Wilkes-Barre, supra. Accordingly, the burden here was on the Commonwealth to demonstrate, on the facts of this case, that its core managerial interests outweighed the employees' interests in this otherwise negotiable matter.

The Commonwealth argues that the no smoking policy is in connection with establishing of a "therapeutic community" and asserts that the purpose and policy of the "therapeutic community" was to provide a rehabilitative atmosphere for inmates with drug and alcohol related offenses. The Commonwealth claims that it was allegedly necessary for correction officers not to smoke because they were role models for inmates within the therapeutic community.

The hearing examiner relied on Cheltenham Educators' Association v. Cheltenham School District, 19 PPER ¶19011 (Final Order, 1987) to determine that because the "therapeutic community" had not been implemented when the no smoking policy went into effect on January 14, 2002, and was not in effect at the time of the hearing,<sup>3</sup> there was no basis upon which to weigh the probable effects of the no smoking policy on the "therapeutic community."<sup>4</sup> At a minimum, it is necessary that an employer claiming that a new management policy encompasses the right to unilaterally alter an otherwise negotiable matter must have actually implemented the policy not merely alter an otherwise negotiable matter based on a stated intention to implement the managerial policy in the future.<sup>5</sup> For purposes of the State College balancing test the record shows that the Commonwealth did unilaterally ban smoking and had not, as of the date of the hearing, implemented the therapeutic community (which is the managerial interest alleged by the Commonwealth to outweigh the Section 701 matter). As such, there is no basis on this record to determine that there is an alleged managerial interest in the therapeutic community that outweighs the employees' interest in smoking at their posts.

Further, notwithstanding implementation of the therapeutic community, the Commonwealth's claim that the no smoking ban lies at the core of managerial policy lacks merit. The Commonwealth claims that the smoking policy had in fact been implemented, and had an asserted probable effect on the Commonwealth's stated policy since the no smoking policy on "A" block was to assist in rehabilitating inmates from all addictions, including tobacco.

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<sup>3</sup> The Commonwealth alleges in its brief that the therapeutic community was scheduled to begin on the A block at Waynesburg SCI on May 8, 2002.

<sup>4</sup> In Cheltenham School District, the Board dismissed a charge where the alleged unlawfully policy had not been implemented since, without implementation, there was no basis to weigh the impact on the employees.

<sup>5</sup> Under the Commonwealth's asserted view, it may make unlimited changes to Section 701 issues based on speculation about its future intentions. Those changes would take effect regardless of whether the Commonwealth's intentions were implemented or whether they were materially altered prior to implementation.

While it may be a legitimate policy to provide a recovery program for inmates convicted because of addictions to illegal substances, the Commonwealth did not establish that rehabilitating inmates from smoking has any real effect on the policy of providing opportunities for them to become law-abiding citizens. While correction and rehabilitation for criminal activity lies at the core of the managerial interest of the Commonwealth, smoking is not a crime, and although quitting smoking may be beneficial, for purposes of the State College balancing test, it does not lie at the core of the correction system. Inmates may become law-abiding citizens regardless of whether they smoke. In fact, the no smoking policy implemented by the Commonwealth allows inmates, including those residing in "A" block, to purchase tobacco and smoke outside of the "A" block housing unit. Furthermore, it is questionable whether smoking or not smoking by corrections officers at their posts would have any effect on their being perceived as law-abiding role models by the inmates. As such, there is no indication, in the record or otherwise, that smoking by corrections officer at their posts has any effect on the ability of the Commonwealth to provide a secure environment or opportunities for inmates to become law-abiding citizens.

On the other hand, as noted above, under long standing Board and court precedent, smoking at correctional facilities by employees is a term and condition of employment in which the employees have an interest. Venango County, supra, Crawford County, supra. Accordingly, because any probable effects, if any, on the Commonwealth's established basic policy concerns on this record are outweighed by the employees' interest, the impact of the January 14, 2002 policy prohibiting smoking on the "A" block has a greater effect on the employee's working conditions for purposes of the State College balancing test. As such, the no smoking policy for the "A" block at Waynesburg SCI is a mandatory subject of bargaining, and the employer's unilateral implementation of the policy on January 14, 2002 violated Section 1201(a)(1) and (5) of PERA.

In addition, the Commonwealth points out a typographical error in the Proposed Decision and Order, wherein the hearing examiner found a violation of Section 1201(a)(3), but the charge alleged a violation of 1201(a)(5) of PERA. This exception will be sustained, and the PDO will be amended accordingly. Therefore, after a thorough review of the exceptions and all matters of record, the exceptions are dismissed in part, and sustained in part. The hearing examiner's Proposed Decision and Order of June 14, 2002 is sustained, as amended herein.

#### CONCLUSIONS OF LAW

CONCLUSIONS number 1 through 3, as set forth in the Proposed Decision and Order, are affirmed and incorporated herein by reference and Conclusion number 4 is vacated.

5. That the Commonwealth has committed unfair practices within the meaning of section 1201(a)(1) and (5) of the Act.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order of June 14, 2002 are hereby sustained in part, and dismissed in part, and the Proposed Decision and Order, as amended herein, is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and L. Dennis Martire, Member, this fifteenth day of October, 2002. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

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**AFFIDAVIT OF COMPLIANCE**

The Commonwealth hereby certifies that it has ceased and desisted from its violation of section 1201(a)(1) and 1201(a)(5) of the act, that it has rescinded the prohibition on smoking by corrections officers assigned to posts in A block at SCI-Waynesburg, that it has posted a copy of the final order and proposed decision and order as directed and that it has served a copy of this affidavit on PSCOA.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

SWORN AND SUBSCRIBED TO before me  
the day and year aforesaid.

\_\_\_\_\_  
Signature of Notary Public