COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION	:	
v.	:	Case No. PERA-C-03-378-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS FAYETTE SCI	:	

FINAL ORDER

On June 9, 2004, the Commonwealth of Pennsylvania, Department of Corrections, Fayette State Correctional Institution (Commonwealth) timely filed with the Pennsylvania Labor Relations Board (Board) exceptions, and a brief in support thereof, to a Proposed Decision and Order (PDO) issued May 24, 2004. In the PDO, the Hearing Examiner concluded that the Commonwealth engaged in unfair practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to bargain a smoking policy with the Pennsylvania State Corrections Officers Association (Union) for the new state correctional institution at Fayette (Fayette), wherein tobacco use by employes and inmates has not been permitted at any time since its opening. On June 30, 2004, the Union timely filed a brief in support of the PDO.

AMENDED AND ADDITIONAL FINDINGS OF FACT

7. A wing of the recently closed Waynesburg SCI contained a therapeutic community where inmates with alcohol and substance abuse problems were not permitted to smoke. Corrections officers assigned to that wing were permitted to smoke. There were no incidents with or unrest by the inmates in the therapeutic community at Waynesburg. (N.T. 22).

8. At Pittsburgh SCI, there was no area that was restricted to smoking or tobacco use by corrections officers. Fayette was built to replace Waynesburg SCI and Pittsburgh SCI. While Fayette was opening, Waynesburg was closing. Corrections officers from Waynesburg SCI and Pittsburgh SCI were assigned to Fayette. (N.T. 5-7).

DISCUSSION

In late 2002 or early 2003, the Commonwealth assigned a transition team to open Fayette. Members of the bargaining unit were on the transition team. In July 2003, John Miller, a business agent for the Union, forwarded a request to bargain the use of tobacco at Fayette SCI to Deputy Superintendent Krysevic. Mr. Krysevic did not respond to Mr. Miller's July 2003 request. In mid-August 2003, Mr. Miller reiterated his request of Mr. Krysevic who then denied the request. A wing of the recently closed Waynesburg SCI contained a therapeutic community where inmates with alcohol and substance abuse

problems were not permitted to smoke. Corrections officers assigned to that wing were permitted to smoke. There were no incidents with or unrest by the inmates in the therapeutic community at Waynesburg. At Pittsburgh SCI, there was no area that was restricted to smoking or tobacco use by corrections officers. Fayette was built to replace Waynesburg SCI and Pittsburgh SCI. While Fayette was opening, Waynesburg was closing. Corrections officers from Waynesburg SCI and Pittsburgh SCI were assigned to Fayette.

In its exceptions, the Commonwealth argues that Finding of Fact No. 7 is unsupported by substantial evidence because it implies that all inmates throughout Waynesburg SCI were prohibited from smoking where the record shows that only the inmates in the therapeutic community at Waynesburg were prohibited from smoking. Findings of fact must be supported by substantial, legally competent evidence. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Substantial evidence is "`relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Kaufman, 29 A.2d at 92 (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)). Finding of Fact No. 7 indeed indicates that inmates throughout the entire facility at Waynesburg were not permitted to smoke, and a review of the record clearly establishes that the prohibition against inmate smoking at Waynesburg was limited to the wing containing the therapeutic community. (N.T. 22). Accordingly, Finding of Fact No. 7 has been amended to reflect the substantial evidence of record.

The Commonwealth next contends that the Examiner erred in failing to make certain findings of fact. The Board's hearing examiners are required to set forth only those facts that are necessary to support their decisions. They do not have to set forth facts or findings not necessary to the decision or make findings that would support another decision, even if there is substantial evidence to support such findings. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). The Commonwealth argues that the Examiner should have found that the Deputy Secretary for Administration, John Shaffer, forwarded a letter to the Union on October 24, 2002 informing the Union that "SCI-Fayette, targeted for activation in early 2003, is intended to be tobacco free," and "[i]n keeping with our previous position on this matter we do not believe there is a requirement to negotiate." (Commonwealth Exhibit 1). Based upon such a proposed finding, the Commonwealth maintains, as it did before the Examiner, that the Union's charge, which was filed on September 5, 2003, was untimely filed beyond the four-month statute of limitations contained in Section 1505 of PERA.

In Officer of the Upper Gwynnedd Township Police Dept. v. Upper Gwynnedd Township, 32 PPER ¶ 32101 (Final Order, 2001), the Board examined the operation of the statute of limitations under PLRA.[1] The

[1] Aside from the differences in the actual time limits, the mandatory language in Section 1505 of PERA is identical to the language in Section 9(e) of the PLRA. State Conference of State Police Lodges of Fraternal Order of Police v. Commonwealth of Pennsylvania, 16 PPER ¶ 16055 (Final Order, 1985). Accordingly, the Board's policies regarding the applications of both statutes of limitations under PLRA and PERA are identical and interchangeable. Id.

Upper Gwynnedd Board stated that "the nature of the unfair practice claim alleged frames the limitations period for that cause of action." Upper Gwynnedd, 32 PPER at 264. The charge alleged that on August 25, 2003, the Commonwealth refused to negotiate a smoking policy for the new Fayette SCI in response to the Union's July and August 2003 demands to bargain conditions of employment there. The charge did not allege that Mr. Shaffer's October 24, 2002 letter constituted a refusal to bargain. The September 5, 2003 charge alleging an August 25, 2003 refusal to bargain a mandatory subject is within the four-month limitations period established by Section 1505 of PERA. Accordingly, the charge is timely filed.

Also, Mr. Shaffer's letter did not constitute an invitation to bargain a smoking policy triggering the Union's bargaining obligation in October, 2002. Indeed, Mr. Shaffer's letter states "we do not believe there is a requirement to negotiate. We are, however, offering and are willing to meet and discuss . . . on this matter." (Commonwealth Exhibit 1). Furthermore, to the extent that the Commonwealth is arguing that Shaffer's letter constitutes a change in policy, "the Board normally looks to the date of implementation of a unilateral change in evaluating timeliness of a claim that a policy was unlawfully, unilaterally implemented." Upper Gwynnedd, 32 PPER at 264. Implementation occurs "when the directive becomes operational and serves to guide the conduct of employes, even though no employes may have been disciplined or corrected for failure to abide by the directive." Id. The mere revelation of an employer's plans or intentions does not constitute the requisite implementation giving rise to a cause of action because plans can be changed and have yet to govern the conduct of employes. Id.

Mr. Shaffer's letter merely informed the Union of "our plans to continue to classify our new facilities as tobacco free" and that SCI Fayette[] . . . is intended to be tobacco free." (Commonwealth Exhibit 1)(emphasis added). Accordingly, Mr. Shaffer's letter did not constitute the unilateral implementation of a smoking policy and, therefore, did not give rise to a cause of action triggering the four-month statute of limitations. As a mere plan for a non-operational facility, the Commonwealth's proposed tobacco policy for Fayette was subject to change and did not govern the conduct of employes. Because the charge was timely filed and Mr. Shaffer's October 24, 2002 letter did not give rise to a cause of action, any findings regarding the letter are unnecessary to support the examiner's conclusions. The Examiner, therefore, did not err in omitting such a finding.

The Commonwealth also contends that the Examiner erred in failing to find that the Department of Corrections (DOC) has other recently opened no-tobacco facilities to create a healthier environment for inmates and that allowing corrections officers to use tobacco products when inmates cannot would be disruptive and could create a volatile situation. A Union does not waive its statutory bargaining rights simply because it chose not to demand bargaining the same subject matter in the past. Fairview Township Police Ass'n v. Fairview Township, 31 PPER ¶ 31,019 (Final Order, 1999). Accordingly, the existence of no-tobacco policies at other institutions is neither relevant nor determinative here.

Furthermore, these proposed findings are unnecessary to support the Examiner's conclusions as required by Page's Dept. Store, supra. The Examiner concluded that the Commonwealth engaged in unfair practices by refusing to bargain a tobacco policy for a new facility and simply ordered the Commonwealth to bargain. The Examiner did not conclude that the Commonwealth unilaterally changed a tobacco policy and he, therefore, did not order the Commonwealth to permit tobacco use at Fayette. At present there is no tobacco use at Fayette, and the Commonwealth has simply been ordered to bargain. Assuming, for purpose of this argument only, that the Commonwealth demonstrated with substantial evidence that all tobacco use, including chewing tobacco, by corrections officers was unhealthy to inmates and caused disruptive volatile behavior, such findings are unnecessary and irrelevant to the conclusion that Commonwealth bargain a tobacco use policy which could address these concerns. Under Section 702 of PERA, the Commonwealth does not have to concede or agree to Union demands. As long as the Commonwealth bargains in good faith, it can bargain for a no-tobacco policy anywhere in Fayette SCI or it can bargain for a limited tobacco policy that contemplates its concerns for a healthful environment and reducing alleged, potential volatile reactions from inmates by permitting tobacco use in a limited, separately ventilated location out of view or detection from inmates. Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1995).

The Commonwealth also argues that the Examiner erred in determining that it failed to demonstrate on this record that its core managerial interests outweighed the employes interests. The Commonwealth maintains that it demonstrated a managerial interest that relates to the mission of the DOC to warrant a departure from precedent regarding tobacco use in the workplace and an independent application of the balancing test espoused in PLRB v. State College Area Sch. Dist., 461 Pa. 494, 337 A.2d 262 (1975).

The record, however, lacks substantial, competent evidence to support the Commonwealth's conclusory statements that a no-tobacco policy would be healthier for inmates or prevent disruptive or volatile behavior. Indeed, this record is devoid of any facts warranting a departure from established precedent regarding the tobacco use. In support of its position, the Commonwealth directs the Board's attention to two conclusory statements from the testimony of the Fayette Superintendent wherein he states the following:

> Q. Is there any particular reason why the Department would not want inmates using tobacco products?
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> A. Well, one of the objectives is to create a healthier environment for inmates to live, if at all possible. Healthcare costs are extremely high these days, and hopefully through the absence of tobacco products, it's possible long term, healthcare costs for inmates would be reduced. Basically, I think that's the primary reason at this point.
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> Q. And based on your experience with the Department of Corrections, what impact, if any, would there be on the institution by allowing staff members like corrections officers to use tobacco products when the inmates cannot?

> A. Well, I think it would be extremely disruptive to the institution. Inmates who previously had had the opportunity to use tobacco products would no longer—no longer be able to use it, but in the presence of inmates, staff would, I think that would be extremely disruptive to the institution in creating a potentially volatile situation.

(N.T. 18-19). The first answer speculates that "hopefully" it is possible that long-term inmate healthcare costs could improve if inmates did not use tobacco products. The issues in this case, however, do not concern a prohibition on inmate tobacco use. The second answer also speculates that tobacco use by the officers in the presence of inmates who formerly used tobacco would be "disruptive" and "potentially volatile" without evidence from prison employes to support this conclusory statement with historical fact.

The Commonwealth did not offer evidence that inmates negatively react from witnessing officers use tobacco products or that officers' tobacco use has caused volatile behavior different from ordinary routine inmate outbursts or threats to security. Also, the Commonwealth did not offer any evidence regarding the inmates' use of tobacco products while outdoors or in the prison yard. Inmates permitted to use tobacco outdoors may not be as taunted or inclined to react negatively by witnessing others using tobacco, as alleged, as compared to inmates who are completely prohibited from using tobacco. Additionally, permitting inmates to smoke outdoors would undermine the Commonwealth's alleged concerns regarding inmate healthcare costs. Also, given the breadth of the no-tobacco policy at Fayette, the Commonwealth has failed to establish that chewing tobacco by officers in the presence of inmates would have any affect on the health or taunting of inmates. The Commonwealth presented no evidence regarding the environmental conditions at Fayette, such as ventilation systems or inmate proximity to guards' stations, to support the finding that smoking tobacco was harmful to inmates. Therefore, the record lacks substantial evidence to support the Commonwealth's proposed findings or its proposed departure from established precedent.

As recognized by the Examiner, the Board and the courts have, on numerous occasions, determined that smoking and tobacco policies in the workplace have a demonstrable impact on employes interest that outweigh the core managerial interests of public employers such that tobacco and smoking policies have consistently been determined to be a mandatory subject of bargaining. Crawford County, supra; Commonwealth of Pennsylvania, Venango County Board of Assistance v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983); Commonwealth of Pennsylvania, Department of Corrections, Waynesburg SCI, 33 PPER ¶ 33178 (Final Order, 2002); AFSCME, Council 13 v. Commonwealth of Pennsylvania, Department of Education, 23 PPER ¶ 23008 (Final Order, 1991). Accordingly, a hearing examiner does not commit error in relying on precedent without applying the State College balancing test in every case where facts are similar. Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002). The burden was on the Commonwealth here to demonstrate on this record with new facts that its core managerial interests outweighed the employes interests such that the State College balancing test should be reapplied and a new result reached in this otherwise negotiable matter. Id. The Commonwealth's speculative and conclusory statements concerning the alleged health of inmates and

possible disruptive behavior as a result of employe tobacco use, including chewing tobacco, are simply not supported by the record. Accordingly, the Commonwealth has not offered substantial, competent evidence that its core managerial interests outweigh the interests of employes in using tobacco products as previously held by the Board and the courts.

The Commonwealth further argues that the Examiner erred in concluding that the Union met its burden of establishing that the no-tobacco policy at Fayette has a demonstrable impact on employes where smoking has never been permitted at Fayette. The Union, argues the Commonwealth, did not offer the testimony of any employes to establish whether any employes were affected by the no-tobacco-use policy. The Commonwealth maintains that the State College balancing test is a fact-based inquiry, which must be done on a case-by-case basis. As such, the Commonwealth contends that the Union failed to meet its burden of establishing that the no-tobacco policy had an impact or effect on the Fayette employes as determined by the hearing examiner in PSSU v. Commonwealth, DOC, Cresson SCI, 32 PPER ¶ 32063 (Proposed Decision and Order, 2001) and that precedent cannot supply the requisite showing of such an impact.

First, Cresson was a hearing examiner decision which is not binding upon the Board absent a showing that it is part of a consistent trend among hearing examiners with which the Board has not interfered. FOP, Star Lodge No. 20 v. PLRB, 522 A.2d 697 (Pa. Cmwlth. 1987). Also, this case is distinguishable from Cresson. Cresson SCI was comprised of several separate buildings in which smoking was permitted. There were seven unions representing the different types of employes at Cresson. PSSU, the claimant union, represented only 13-14 of 390 represented employes. Cresson management unilaterally required no smoking in two of the buildings. The examiner concluded that PSSU failed to establish on the record that any of its represented employes ever entered the two affected buildings such that the employes were adversely affected by the unilateral change in the smoking policy. Contrary to Cresson, the Union here established that its represented employes were in fact assigned to Fayette from two institutions where tobacco use was permitted and that the entire interior of Fayette was affected by the no-tobacco-use policy there.

Moreover, the Commonwealth's argument that there can be no impact on employes at Fayette because there has never been tobacco use at Fayette is without merit. In Dormont Borough Police Ass'n and Dormont Desk Officers/Fire Apparatus Officers v. Dormont Borough, 33 PPER ¶ 33032, (Final Order, 2000), aff'd sub nom., 794 A.2d 402 (Pa. Cmwlth. 2002), the Commonwealth Court affirmed the Board's conclusion that a public employer possesses a duty to bargain a change in conditions of employment resulting from a transfer of employes to a new facility. The Dormont Board concluded that, where lockers at the old municipal building for police and fire officers were large enough to securely contain all necessary uniforms, equipment and footwear required of officers for their job, the borough committed unfair labor practices by unilaterally providing smaller lockers in the new municipal building for officers that were inadequate to securely contain all same items. Consequently, the Board ordered the borough to negotiate with the union a resolution to the inadequate locker space in the new building. Similarly, the record in this case clearly establishes that corrections

officers at Fayette were transferred from Pittsburgh SCI and Waynesburg SCI, where tobacco use was permitted, to Fayette, where tobacco use is not permitted. Accordingly, the change in conditions of employment resulting from the reassignment of personnel from a tobacco-use facility to a non-tobacco-use facility effectuated an impact on conditions of employment for the reassigned officers, Dormont Borough, supra, which has been determined herein to constitute a mandatory subject of bargaining.

In reaching this result, it is noted that, although an unfair practice was found, the employer is ordered to bargain. The Examiner did not direct rescission of the policy currently in place, which prohibits smoking at Fayette, but rather directed the employer to bargain prospectively, and no party has challenged the remedy directed by the Examiner. Accordingly, the employer is not under an obligation to rescind the policy at this time in furtherance of the fulfillment of its bargaining duty.

After a thorough review of the exceptions, response thereto and all matters of record, the Board shall dismiss the exceptions, in part and sustain the exceptions, in part, and sustain the Proposed Decision and Order of the Hearing Examiner consistent with this Order.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed, in part and sustained, in part; and that the Proposed Decision and Order is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Member and Anne E. Covey, Member, this twentieth day of July, 2004. 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 violations of Section 1201(a)(1) and (5) of the Public Employe Relations Act; submitted to the Pennsylvania State Corrections Officers Association in writing an offer to bargain a smoking policy for members of the bargaining unit at Fayette SCI; posted the proposed decision and order as directed therein; posted the final order in the same manner and served a copy of this affidavit of compliance upon the Pennsylvania State Corrections Officers Association.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
The day and year aforesaid

_____
Signature of Notary Public