

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ELLWOOD CITY POLICE WAGE AND POLICY UNIT :
:
v. : Case No. PF-C-06-116-W
:
ELLWOOD CITY BOROUGH :

PROPOSED DECISION AND ORDER

On July 13, 2006, the Elwood City Police Wage and Policy Unit (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Borough of Ellwood City (Borough) violated sections 6(1)(a) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) by unilaterally "adopt[ing] a total tobacco products ban, applicable to all enclosed areas on Borough owned property, in Borough owned buildings, facilities, and vehicles." On August 4, 2006, the Secretary of the Board issued a complaint and notice of hearing assigning the charge to conciliation and directing that a hearing be held on September 28, 2006, if conciliation did not resolve the charge by then. The hearing was held as scheduled. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On November 27, 2006, the Borough filed a brief. On December 4, 2006, the Union filed a brief.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. The Borough employs police officers who are members of a bargaining unit that is represented by the Union. (N.T. 8)

2. Prior to June 19, 2006, the Borough allowed its police officers to smoke and to use tobacco products in its buildings, vehicles and equipment. (N.T. 9-11)

3. On June 19, 2006, the Borough's council adopted a resolution (# 2006-10) providing as follows:

"PROHIBITING THE USE OF ALL TOBACCO PRODUCTS IN ANY AND ALL BOROUGH OWNED BUILDINGS, VEHICLES, AND EQUIPMENT

WHEREAS, various studies have demonstrated the danger of tobacco products to users and persons affected second hand by the use of tobacco;

WHEREAS, indicators show tobacco use is rising dramatically;

WHEREAS, it is the desire of the Council of the Borough of Ellwood City to provide a tobacco free environment on and in all municipally owned buildings, vehicles, and equipment to promote the health and welfare of its employees and citizens.

NOW THEREFORE BE IT RESOLVED, as follows:

1. The use of all tobacco products on or in Borough owned buildings, vehicles and equipment is forbidden.
2. Any person found guilty of violating any provision of this Resolution shall be subject to a fine not to exceed \$300.00"

(Joint Exhibit 2)

4. By memorandum dated June 20, 2006, the Borough's mayor (Donald Clyde) wrote to "ALL PERSONNEL" as follows:

"AT LAST NIGHT[']S MEETING COUNCIL PASSED A RESOLUTION PROHIBITNG THE USE OF ANY TOBACCO PRODUCT IN BOROUGH BUILDINGS, VEHICLES, AND EQUIPMENT. EVERYONE MUST COMPLY WITH THIS RESOLUTION."

(Joint Exhibit 2)

5. On August 21, 2006, council adopted an ordinance (# 2397) providing as follows:

"PROHIBITING THE USE OF ALL TOBACCO PRODUCTS IN ANY AND ALL BOROUGH OWNED BUILDINGS, VEHICLES, AND EQUIPMENT

WHEREAS, various studies have demonstrated the danger of tobacco products to users and persons affected second hand by the use of tobacco;

WHEREAS, indicators show tobacco use is rising dramatically;

WHEREAS, it is the desire of the Council of the Borough of Ellwood City to provide a tobacco free environment on and in all municipally owned buildings, vehicles, and equipment to promote the health and welfare of its employees and citizens.

NOW THEREFORE BE IT RESOLVED, as follows:

1. The use of all tobacco products on or in Borough owned buildings, vehicles and equipment is forbidden.
2. Any person found guilty of violating any provision of this Resolution shall be subject to a fine not to exceed \$300.00"

(Joint Exhibit 2)

6. The Borough did not bargain with the Union before council passed the resolution and adopted the ordinance. (N.T. 10, 35)

DISCUSSION

The Union has charged that the Borough committed unfair labor practices under sections 6(1)(a) and 6(1)(e) by unilaterally "adopt[ing] a total tobacco products ban, applicable to all enclosed areas on Borough owned property, in Borough owned buildings, facilities, and vehicles." According to the Union, the Borough allowed its police officers to use tobacco products without restriction before then. The Union cites Lebanon County, 27 PPER ¶ 27260 (Final Order 1996), for the proposition that the use of tobacco products by police officers is a mandatory subject of bargaining.

The Borough contends that the charge should be dismissed because it had the managerial prerogative to adopt the ban. According to the Borough, the ban implicates an interest it has in protecting the health, safety and welfare of children that substantially outweighs any interest that its police officers may have in the matter. The Borough cites Chambersburg Area School District v. PLRB, 430 A.2d 740 (1981), for the proposition that a ban on the use of tobacco products by police officers in order to promote the health, safety and welfare of children is a managerial prerogative.

An employer commits unfair labor practices under sections 6(1)(a) and 6(1)(e) if it unilaterally changes a mandatory subject of bargaining, Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998), but not if it changes a managerial prerogative. South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002). A matter is a mandatory subject of bargaining rather than a managerial prerogative if the matter is rationally related to employe duties and if the employer's interest in the matter does not substantially outweigh the employes' interest in the matter. Plumstead Township.

In Lebanon County, *supra*, the Board found that the use of tobacco products by police officers is a mandatory subject of bargaining. As the Board explained:

"In its third exception, the County argues that the changed smoking policy is essential to the basic mission of the County and therefore a protected managerial prerogative. In advancing this argument in its exceptions, the County contends that its action was a reasonable approach to the problem of smoking and further contends that smoking is harmful, poses a fire risk and the County's action is supported by certain state and federal legislation. These arguments have been advanced before the Board and the courts previously and have been universally rejected. Commonwealth [of

Pennsylvania v. [Commonwealth of Pennsylvania,] PLRB [], 459 A.2d 452 (Pa. Cmwlth. 1983);^[1] Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1995).^[2]"

27 PPER at 589. By contrast, in Chambersburg Area School District, supra, the court held that a ban on smoking by the employes of a school district is a matter of inherent managerial policy under the Public Employe Relations Act.

Initially, it is noted that the Borough's reliance on Chambersburg Area School District is misplaced because the rationale underlying the holding in that case only applies when a school district is the employer. As the court explained in Commonwealth of Pennsylvania, supra:

"We recently held in Chambersburg Area School District v. Pennsylvania Labor Relations Board, 60 Pa. Commonwealth Ct. 29, 430 A.2d 740 (1981), allocatur granted, September 23, 1981, appeal denied, June 27, 1981, that the peculiar characteristics of public education as an enterprise including the necessity that teaching employees serve as role models to the students, rendered private sector authorities concerning employee smoking bans unserviceable in the context of charges filed against a school district employer who sought to impose such a ban. The Commonwealth does not rely on the Chambersburg Area School District case and we do not believe that its authority, so expressly grounded in the characteristics of the enterprise of public education, is applicable to this employer."

456 A.2d at 455-466 n. 1. Of course, the Borough, like the Commonwealth of Pennsylvania, is not engaged in the enterprise of public education as a school district is, so Chambersburg Area School District is inapplicable here as well. See also Crawford County, supra, where the Board explained that "the smoking ban [in Chambersburg Area School District] was justified as an exception to the collective bargaining obligation because it was essential to the school district's basic mission of education." 659 A.2d at 1082.

As set forth in finding of fact 2, the record shows that prior to June 21, 2006, the Borough allowed its police officers to smoke and to use tobacco products in its buildings, vehicles and equipment.³ As set forth in findings of fact 3-5, the record shows that by resolution and by ordinance the Borough thereafter prohibited its police officers from smoking and using tobacco products in its buildings, vehicles and equipment. As set

¹ In Commonwealth of Pennsylvania, the court explained as follows:

"The subject of whether employees may smoke at their workplaces appears to us to be at the center of those subjects properly described as 'conditions of employment' and to be entirely unrelated to those entrepreneurial or managerial judgments fundamental to the basic direction of the enterprise and removed from the scope of mandatory bargaining by PERA Section 702, 43 P.S. § 1101.702."

459 A.2d at 455 (footnote omitted).

² In Crawford County, the court explained as follows:

"As relevant to the work environment, while it is true that employee smoking does not affect the hours they work, the amount they will earn for their work or alter their job descriptions, the County has always permitted its guards and employees to smoke in all areas of the jail, including but not limited to the work areas, break rooms and hallways. One 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."

659 A.2d at 1081.

³ The Borough previously adopted a policy for its police officers providing at section 15.18 (SMOKING/CHEWING TOBACCO ON DUTY) as follows:

"1. Smoking on duty shall be allowed in an appropriate place as long as courtesy is shown toward non smokers.

2. The image officers reflect upon impressionable children shall be taken into consideration when choosing to use tobacco products.

3. Chewing tobacco in public while performing any official police function is prohibited."

(Joint Exhibit 1). No finding of fact has been made in this regard, however, because the Borough never enforced the policy (N.T. 9, 26, 30). When an employer does not enforce a policy, past practice controls. Stroudsburg Area School District, 24 PPER ¶ 24100 (Final Order 1993), aff'd, 24 PPER ¶ 24160 (Court of Common Pleas of Monroe County 1993).

forth in finding of fact 6, the record shows that the Borough imposed the prohibition without bargaining with the Union.⁴

On that record, it is apparent that the Borough unilaterally changed a mandatory subject of bargaining in violation of sections 6(1)(a) and 6(1)(e) unless the Borough presented additional facts warranting a departure from the precedent set forth in Lebanon County, supra. As the Board explained in City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order 2002):

"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 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 the 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."

33 PPER at 192.

In support of its contention that it had the managerial prerogative to impose the ban, the Borough established the following facts: that the mission of a police department should be to promote the health and safety of children (N.T. 15), that council previously passed a resolution (# 1990-11) designating council chambers and the conference room as nonsmoking areas (Employer Exhibit 2), that council previously adopted an ordinance (# 2360) prohibiting the possession and use of tobacco products by minors (Employer Exhibit 1) and that its police officers enforce ordinance # 2360 (N.T. 13-14). Notably, however, as set forth in findings of fact 3 and 5, the record shows that the resolution and the ordinance imposing the ban do not reference the health and safety of children in particular; rather, the record shows that the resolution and the ordinance reference the health and safety of employes and citizens in general. Thus, the ban is no different from the ban the Board found to be a mandatory subject of bargaining in Lebanon County. Moreover, inasmuch as the resolution and the ordinance do not reference the health and safety of children in particular, it is apparent that the ban is not narrowly tailored to promote as much in any event. An action that is not narrowly tailored to meet an employer's interest in a matter will not support a finding that the matter is a managerial prerogative. Edwardsville Borough, 37 PPER 108 (Final Order 2006). Furthermore, how the ban will promote the health and safety of children is not apparent from the facts established by the Borough. Conclusory evidence will not support a finding that a ban on the use of tobacco products by employes implicates an interest an employer may have in the matter. Commonwealth of Pennsylvania, Department of Corrections, Fayette SCI, 35 PPER 84 (Final Order 2004). Accordingly, the facts established by the Borough do not warrant a departure from the precedent set forth in Lebanon County, supra.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Borough is an employer under section 3(c) of the PLRA.
2. The Union is a labor organization under section 3(f) of the PLRA.
3. The Board has jurisdiction over the parties.

⁴ The Union acquiesced to the previously adopted policy (N.T. 12, 35). No finding of fact has been made in this regard, however, because the Union's acquiescence is irrelevant. As the court explained in Crawford County, supra, "[a] union's acquiescence to an employer's previous unilateral implementation of a bargainable subject matter does not operate as a waiver of its right to bargain over such changes for all time." 659 A.2d at 1083 (citations omitted).

4. The Borough has committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Borough shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA.

2. Cease and desist from refusing to bargain collectively with the representative of its employes.

3. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PLRA.

(a) Rescind resolution # 2006-10 and ordinance # 2397 insofar as they pertain to its police officers;

(b) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98 within twenty (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-first day of December 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

DONALD A. WALLACE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ELLWOOD CITY POLICE WAGE AND POLICY UNIT :
:
v. : Case No. PF-C-06-116-W
:
ELLWOOD CITY BOROUGH :

AFFIDAVIT OF COMPLIANCE

The Borough hereby certifies that it has ceased and desisted from its violations of sections 6(1)(a) and 6(1)(e) of the PLRA, that it has rescinded resolution # 2006-10 and ordinance # 2397 insofar as they pertain to its police officers, that it has posted the proposed decision and order as directed and that it has served a copy of this affidavit on the Union.

Signature/Date

Title

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

Signature of Notary Public