

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOP LODGE 12 CAPITAL POLICE :
 :
 v. : Case No. PF-C-06-111-E
 :
 CITY OF HARRISBURG :

PROPOSED DECISION AND ORDER

On July 13, 2006, Capital City Lodge No. 12, Fraternal Order of Police (FOP), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the City of Harrisburg (City) violated sections 6(1)(a) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) by unilaterally adopting a ban on smoking and the use and possession of ashtrays by its police officers. On August 29, 2006, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on November 9, 2006, if conciliation did not resolve the charge by then. On September 27, 2006, the City filed an answer alleging that the charge should be dismissed because it had restricted smoking and the use of ashtrays since April 1, 1997, and because it had requested bargaining with the FOP "regarding the new smoking policy." A hearing examiner thereafter continued the hearing upon the request of the FOP and without objection by the City.

On January 26, 2007, a hearing was held. The parties submitted the case on stipulated facts and made closing arguments. Neither party has filed a brief.

The hearing examiner,¹ on the basis of the stipulations presented at the hearing, makes the following:

FINDINGS OF FACT

1. The City has recognized the FOP as the exclusive representative of a bargaining unit that includes police officers employed by the City. (Joint Exhibit 1, Stipulations 1-2)

2. From 1997 through June 27, 2006, the City had a policy regarding smoking as follows:

"Smoking Prohibited Areas:

(a) Areas in which a fire hazard exists

(b) Common Indoor Areas including:

1st Floor Atrium
3 Reception Areas outside Mayor's Office
1st & 2nd Floor Public Areas of McCormick Building
Bureau of Human Resources
Law Bureau
Elevators
Stairwells
Copier Rooms
Mail Rooms
Auditoriums
Customer Service Area
Employee Lounges
Restrooms
Computer Areas
Production and Manufacturing Areas
Conference Room

¹ The Board reassigned this case to the hearing examiner on February 27, 2007.

(c) Private offices to the extent designated as non-smoking by occupant

(d) City Vehicles when non-smoker is present."

(Joint Exhibit 1, Stipulation 4)

3. On June 27, 2006, the City's council passed an ordinance establishing "a new smoking policy" as follows:

"(A) Prohibition of employee smoking in:

- (1) All Private Offices, regardless of occupant designation.
- (2) Patrol areas of the McCormick Building
- (3) CID Suites in McCormick Building
- (4) Police Vehicles
- (5) Police Substations
- (6) Evidence Room
- (7) Outdoor areas of City Hall and McCormick Building, and generally within 15 feet of any entrance to any enclosed area of any City owned, leased or operated building.
- (8) Police Locker Room
- (9) Radio Room
- (10) AFSCME Break Room
- (11) And otherwise within any enclosed area in any City owned, leased or operated building.
- (12) City Island and its structures
- (13) City Playgrounds

(B) Prohibition against possession of ashtrays in all areas indicated in (A)."

(Joint Exhibit 1, Stipulation 5)

4. The City did not bargain with the FOP before council passed the ordinance.

(Joint Exhibit 1, Stipulation 6)

DISCUSSION

The FOP has charged that the City committed unfair labor practices under sections 6(1)(a) and 6(1)(e) by unilaterally adopting a ban on smoking and the use and possession of ashtrays by its police officers. According to the FOP, the City changed a mandatory subject of bargaining when it did so. The FOP relies on Lebanon County, 27 PPER ¶ 27260 (Final Order 1996), where the Board found that a smoking policy for police officers is a mandatory subject of bargaining.

The City contends that the charge should be dismissed because it had the managerial prerogative to adopt the ban. According to the City, current science supports a finding that it has an interest in banning smoking and the use and possession of ashtrays by its police officers that substantially outweighs any interest its police officers may have in the matter.

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).

Recently, in Ellwood City Borough, Case No. PF-C-06-116-W (Final Order, February 20, 2007), the Board reaffirmed its finding in Lebanon County that a smoking policy for police officers is a mandatory subject of bargaining. As the Board explained:

"The law is well-settled that, generally, the use of tobacco products by members of bargaining units is a mandatory subject of collective bargaining. Commonwealth v. PLRB (Venango County Board of Assistance), 459 A.2d 452 (Pa.

Cmwlth. 1983); Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1995), petition for allowance of appeal dismissed as having been improvidently granted, 543 Pa. 482, 672 A.2d 1318 (1996). Additionally, in Lebanon County Detectives Association v. Lebanon County, 27 PPER ¶ 27260 (Final Order, 1996), the county argued that changing the smoking policy was essential to the basic mission of the county and therefore a managerial prerogative. The county further argued that smoking was harmful, posed a fire risk and that its actions were supported by state and federal legislation. In response to these arguments, the Board held that:

These arguments have been advanced before the Board and the courts previously and have been universally rejected. Commonwealth v. PLRB (Venango County Board of Assistance), 459 A.2d 452 (Pa. Cmwlth. 1983); Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1995)[, petition for allowance of appeal dismissed as having been improvidently granted, 543 Pa. 482, 672 A.2d 1318 (1996)]. Simply stated, the various state and federal legislation which promote clean air and warning of the risks of tobacco smoking do not amount to a bar to negotiations of this issue under Act 111.

Id. at 589.

The cases of Lebanon County, Crawford County and Venango County are precedents which hold that the use tobacco products in the workplace is a mandatory subject of bargaining. To successfully argue that these precedents should not be followed, the Borough would have to show that there are facts unique to this case which would distinguish it from these prior cases. See Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002)."

(Slip opinion at 1-2).

As set forth in the findings of fact, the record shows that prior to June 27, 2006, the City had a policy regarding smoking that prohibited smoking in certain areas, that on June 27, 2006, the City's council passed an ordinance establishing "a new smoking policy" that prohibited smoking and the use of ashtrays in additional areas and that the City did not bargain with the FOP before its council passed the ordinance.

On that record, it is apparent that the City committed unfair labor practices as charged unless, as the Board explained in Ellwood City Borough, supra, there are facts unique to this case that would distinguish it from Lebanon County, Crawford County and Venango County.

In support of its contention that it had the managerial prerogative to ban smoking and the use of ashtrays by its police officers, the City presented the following facts: (1) that in a 1992 study the U.S. Environmental Protection Agency determined that secondhand smoke is a human lung carcinogen, (2) that in 2000 the National Institute of Health formally included second hand smoke on its list of known human carcinogens and (3) that in 2006 the Surgeon General, the U. S. Department of Health and Human Services and the Centers for Disease Control released a study detailing the adverse health consequences of involuntary exposure to secondhand smoke (Joint Exhibit 1, Stipulations 8-10). As noted above, however, the Board has found and the courts have held that the harmful effects of smoking do not provide a basis for finding that a smoking policy is a managerial prerogative. Thus, the facts presented by the City provide no support for its contention.

CONCLUSIONS

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

1. The City is an employer under section 3(c) of the PLRA.
2. The FOP is a labor organization under section 3(f) of the PLRA.

3. The Board has jurisdiction over the parties.

4. The City 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 City 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 the ordinance its council passed on June 28, 2006, to the extent that the ordinance applies to members of the bargaining unit;

(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 eighth day of March 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

DONALD A. WALLACE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The City 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 the ordinance its council passed on June 27, 2006, to the extent that the ordinance applies to members of the bargaining unit, that it has posted the proposed decision and order as directed and that it has served a copy of this affidavit on the FOP.

Signature/Date

Title

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

Signature of Notary Public