COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

APSCUF	:	
	:	
v.	:	Case No. PERA-C-08-373-E
	:	
STATE SYSTEM OF HIGHER EDUCATION	:	

PROPOSED DECISION AND ORDER

On September 25, 2008, the Association of Pennsylvania State College and University Faculties (APSCUF) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Pennsylvania State System of Higher Education (PASSHE) violated either sections 1201(a)(1) and (5) or 1201(a)(1) and (9) of the Public Employe Relations Act (PERA) by unilaterally "issu[ing] a total ban on smoking on 'the entire campus of each of our fourteen universities'" and "stat[ing] that effective September 10, 2008, all current local agreements and/or practices related to smoking on any PASSHE campus will be considered null and void." On November 13, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on December 23, 2008. The hearing was held as scheduled. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On February 6, 2009, each party filed a brief by deposit in the U.S. Mail.

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 Board has certified APSCUF as the exclusive representative of bargaining units that include faculty and coaches employed by PASSHE. (Case Nos. PERA-R-755-C, PERA-R-1354-C and PERA-R-97-451-E)

2. Prior to September 8, 2008, PASSHE allowed faculty and coaches to smoke indoors and outdoors subject to local restrictions at its various campuses. (N.T. 12-13, 23-24, 33, 38-39, 42-43; APSCUF Exhibit 5)

3. By letter dated September 8, 2008, PASSHE's assistant vice chancellor for labor relations (Michael A. Mottola) wrote to the president of APSCUF (Dr. Stephen Hicks) as follows:

> "As you may be aware, the governor signed into law the Pennsylvania Clean Indoor Air Act (Senate Bill No. 246) on June 13, 2008. The statute, which prohibits smoking in the workplace, takes effect on September 11, 2008. This is to notify you that the Pennsylvania State System of Higher Education's (PASSHE's) position is that smoking is now prohibited on the entire campus of each of our fourteen universities and at the Dixon University Center.
>
> Under the statute, there is no exemption for workplaces with occupants covered by a collective bargaining agreement or similar binding local agreement related to smoking in the workplace. Therefore, effective with the close of business September 10, 2008, all current local agreements and/or practices related to smoking on any PASSHE campus will be considered null and void.
>
> Should you wish to schedule a meeting on this matter or if you have additional questions and/or concerns, please contact me at [phone number omitted]."

(N.T. 8, 52; APSCUF Exhibit 3, Respondent Exhibit 4)

4. PASSHE did not bargain with APSCUF before prohibiting smoking anywhere on its campuses. (N.T. 9, 54-55)

DISCUSSION

APSCUF has charged that PASSHE committed unfair practices under sections 1201(a)(1) and (5) or 1201(a)(1) and (9) by unilaterally "issu[ing] a total ban on smoking on 'the entire campus of each of our fourteen universities'" and "stat[ing] that effective September 10, 2008, all current local agreements and/or practices related to smoking on any PASSHE campus will be considered null and void."

APSCUF contends that PASSHE was under an obligation to bargain or to meet and discuss before imposing the ban and voiding the local agreements and/or practices related to smoking because a smoking ban is a mandatory subject of bargaining. APSCUF cites Commonwealth of Pennsylvania v. Commonwealth of Pennsylvania, PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983), and Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1995), as support for its contention.

In Commonwealth of Pennsylvania, our Commonwealth Court held that the Commonwealth of Pennsylvania violated section 1201(a)(5) by unilaterally imposing a smoking ban. In so holding, the Court reasoned that the smoking ban was a mandatory subject of bargaining under section 701 of the PERA rather than a matter of inherent managerial policy under section 702 of the PERA. As the Court explained:

> "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).

The Court also reasoned that Chambersburg Area School District v. Commonwealth of Pennsylvania, PLRB, 459 A.2d 452 (Pa. Cmwlth. 1981), where it held that a smoking ban by a public school district was not a mandatory subject of bargaining under section 701, was inapposite. As the Court explained, "we do not believe that its authority, so expressly grounded in the characteristics of the enterprise of public education, is applicable to this employer." Id. at 455 n. 1.

In Crawford County, our Commonwealth Court again held that an employer violated section 1201(a)(5) by unilaterally imposing a smoking ban. In so holding, the Court again reasoned that the smoking ban was a mandatory subject of bargaining under section 701 rather than a matter of inherent managerial policy under section 702. As the Court explained:

> "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. Compare Borough of Ellwood City v. PLRB, 941 A.2d 728 (Pa. Cmwlth. 2008), appeal granted, 2008 Pa. Lexis 1652, 958 A.2d 492 (2008), where the Court held that a borough had the right to impose a smoking ban pursuant to its police powers.

Given that a smoking ban is a mandatory subject of bargaining under section 701, however, the charge does not state a cause of action under sections 1201(a)(1) and (9). See Philadelphia School District, 25 PPER ¶ 25090 (Final Order 1994)(an employer is under no obligation to meet and discuss over a mandatory subject of bargaining). Accordingly, the charge as filed under sections 1201(a)(1) and (9) must be dismissed at the outset.

PASSHE does not dispute that it imposed the smoking ban unilaterally. Nor does it dispute that a smoking ban is a mandatory subject of bargaining under section 701. PASSHE nevertheless contends that the charge should be dismissed. According to PASSHE, the Clean Indoor Air Act prohibits smoking anywhere on its campuses, so it was under no obligation

to bargain over the smoking ban. PASSHE cites Borough of Pleasant Hills, 23 PPER ¶ 23069 (Proposed Decision and Order 1992), and Cheltenham Township v. Cheltenham Township Police Department, 312 A.2d 835 (Pa. Cmwlth. 1973), as support for its contention.

In Borough of Pleasant Hills, the hearing examiner noted that an employer may change a term and condition of employment without violating its bargaining obligation enforceable under the Pennsylvania Labor Relations Act as read in pari materia with Act 111 of 1968

> "if agreement on the particular term or condition of employment is prohibited by law, City of Bradford, 21 PPER ¶ 21168 (Final Order, 1990), citing Washington Arbitration Case, 436 Pa. 168, 259 A.2d 437 (1969), unless agreement has been reached, in which case the employer is bound by the agreement despite any illegalities. Steelton Borough, 22 PPER ¶ 22014 (Final Order, 1990), citing FOP v. Hickey, 499 Pa. 194, 452 A.2d 1005 (1982), and Grottenthaler v. Pennsylvania State Police, 488 Pa. 19, 410 A.2d 806 (1980)."

23 PPER at 157.

In Cheltenham Township, our Commonwealth Court wrote that under Act 111 of 1968

> "there must be excluded from the scope of the Act and necessarily outside of the definition of bargainable issues, any subject which would require the government employer to perform any duty or to take some action which is specifically or impliedly prohibited by the statutory law governing its affairs."

312 A.2d at 838.

In further support of its contention, PASSHE submits that its interpretation of the Clean Indoor Air Act to mean that smoking is prohibited anywhere on its campuses is not subject to review by the Board. According to PASSHE, because the Clean Indoor Air Act provides that the Department of Health is to issue regulations regarding its implementation, only the Department of Health has jurisdiction to review PASSHE's interpretation of the Clean Indoor Air Act.

PASSHE also submits that its interpretation of its enabling statute to mean that it is an educational institution covered by the Clean Indoor Air Act is entitled to deference. PASSHE cites Eagle Environmental II, LP v. Commonwealth of Pennsylvania, Department of Environmental Protection, 584 Pa. 494, 884 A.2d 867 (2005), as support for its contention. In that case, our Supreme Court quoted Anela v. Pennsylvania Housing Finance Agency, 547 Pa. 425, 428, 690 A.2d 1157, 1159 (1997), for the proposition that "an agency's interpretation of its enabling statute is entitled to great weight and will not be overturned unless it is clearly erroneous." 584 Pa. at 510, 884 A.2d at 878.

In addition, PASSHE contends that the charge should be dismissed because,

> "even after the [Clean Indoor Air] Act was implemented by PASSHE, PASSHE continued to attempt to work with APSCUF to determine whether there were available alternatives that would lessen the impact of the smoking ban on union members while still complying with the implementation of the Act. (N.T. at 60-61; see also PASSHE Ex. 1, 2)."

Brief at 8.

APSCUF does not dispute that the Clean Indoor Air Act applies to PASSHE but contends that PASSHE's reading of the Clean Indoor Air Act is too broad. According to APSCUF, "[a]n act entitled the Clean Indoor Air Act cannot reasonably be interpreted to include a ban on smoking in outdoor areas." Brief at 16 (emphasis in original). APSCUF also submits that "[t]he Clean Indoor Air Act expressly pertains to enclosed areas that serve as workplaces or to which the public is invited." Id. (emphasis in original). APSCUF further submits that "[n]owhere does the legislation mention outdoor areas." Id. APSCUF cites Lebanon County, 27 PPER ¶ 27260 (Final Order 1996), and Erie County, 28 PPER ¶ 28021 (Proposed Decision and Order 1996), in support of its contention.

In Lebanon County, 27 PPER ¶ 27260 (Final Order 1996), the Board found that the predecessor to the Clean Indoor Air Act did not prohibit bargaining over smoking. In Erie County, 28 PPER ¶ 28021 (Proposed Decision and Order 1996), Hearing Examiner Thomas P. Leonard reached the same result. See also City of Reading, 28 PPER ¶ 28191 (Proposed Decision and Order 1997), where Hearing Examiner Timothy Tietze reached the same result.

In further support of its contention, APSCUF submits that the Commonwealth of Pennsylvania has allowed employes to smoke in outdoor areas and thus has not interpreted the Clean Indoor Air Act as broadly as PASSHE and that PASSHE itself has been willing to consider allowing smoking in "undeveloped parts of the campus" (Complainant Exhibit 8).

APSCUF also contends that PASSHE did not meet its obligation to bargain by attempting to work with APSCUF after it imposed the smoking ban. According to APSCUF, the parties were at best working on a settlement of the charge at the time. APSCUF also submits that as a matter of law PASSHE could not have met its obligation to bargain by attempting to work with APSCUF after it imposed the smoking ban. APSCUF cites PLRB v. Williamsport Area School District, 486 Pa. 375, 380, 406 A.2d 329, 332 (1979), for the proposition that "[g]ood faith collective bargaining would be impossible if the status quo as to the terms and conditions of employment were not maintained while the employes continue to work." See also Snyder County Prison Board v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006)(an employer may not force an exclusive bargaining representative to bargain out from under a fait accompli).

The first question to be addressed is whether or not the Board has jurisdiction to interpret the Clean Indoor Air Act. As noted above, PASSHE contends that only the Department of Health has such jurisdiction. The law, however, provides otherwise.

In PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975), our Supreme Court held that the Board has jurisdiction to decide in the first instance if an item in dispute is a mandatory subject of bargaining under section 701 or a matter of inherent managerial policy under section 702. In so holding, the Court also observed that in making such a decision due regard must be given to section 703 of the PERA, which provides that

> "[t]he parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of municipal home rule charters."

43 P.S. § 1101.703. As the Court explained,

> "items bargainable under section 701 are only excluded under section 703 where other applicable statutory provisions explicitly and definitively prohibit the public employer from making an agreement as to that specific term or condition of employment."

337 A.2d at 270. Thus, in exercising its jurisdiction to decide if an item in dispute is a mandatory subject of bargaining under section 701 or a matter of inherent managerial policy under section 702, the Board necessarily has jurisdiction to interpret other applicable statutory provisions, including the Clean Indoor Air Act, in deciding whether or not a smoking ban is excluded from bargaining under section 703. See also SSHE, 32 PPER ¶ 32036 (Proposed Decision and Order 2001), 32 PPER ¶ 32084 (Final Order 2001), where former hearing examiner Peter Lassi's exhaustive research disclosed a host of cases where the Board interpreted other applicable statutory provisions in deciding whether or not an item was excluded from bargaining under section 703.

The next question to be addressed is whether or not the Board should give any deference to PASSHE's interpretation of its enabling statute to mean that it is an educational institution covered by the Clean Indoor Air Act. As noted above, PASSHE contends that the Board should. As also noted above, however, there is no dispute that PASSHE is an educational institution covered by the Clean Indoor Air Act. Moreover, as further noted above, the Board has jurisdiction to interpret the Clean Indoor Air Act in deciding whether or not a smoking ban is excluded from bargaining under section 703. Thus,

the Board need not give any deference to PASSHE's interpretation of its enabling statute to mean that it is an educational institution covered by the Clean Indoor Air Act.

The next question to be addressed is whether or not the Board should give any weight to the Commonwealth of Pennsylvania's interpretation of the Clean Indoor Air Act or to PASSHE's willingness to consider allowing smoking in "undeveloped parts of the campus." As noted above, APSCUF contends that the Board should. As also noted above however, the Board has jurisdiction to interpret the Clean Indoor Air Act on its own, so the Commonwealth of Pennsylvania's interpretation of the Clean Indoor Air Act is hardly noteworthy and certainly not dispositive. Moreover, PASSHE's willingness to consider allowing smoking in "undeveloped parts of the campus" was expressed during apparent settlement discussions of the charge and therefore may be given no weight under Pa.R.E. 408. Thus, the Board need not give any weight to the Commonwealth of Pennsylvania's interpretation of the Clean Indoor Air Act or PASSHE'S willingness to consider allowing smoking in "undeveloped parts of the campus."

The next question to be addressed is whether or not the Clean Indoor Air Act explicitly and definitively prohibits PASSHE from making an agreement to allow smoking anywhere on its campuses. As noted above, PASSHE in essence contends that it does, while APSCUF in essence contends that it does not. A close review of the Clean Indoor Air Act reveals that it does.

The Clean Indoor Air Act provides with certain exceptions not applicable here that "an individual may not smoke in a public place." 35 P.S. § 637.3(a). It defines a "public place" as "[a]n enclosed area which serves as a workplace, commercial establishment or an area where the public is invited or permitted." 35 P.S. § 637.2. Consistent with its title, it defines a "workplace" as "[a]n indoor area serving as a place of employment, occupation, business, trade, craft, profession or volunteer activity. " Id. (emphasis added). Without restriction, however, it includes "an area where the public is invited or permitted" within the definition of a "public place." It also includes "[a] facility which provides education, food or health care-related services" within the definition of a "public place." Id.

Given the Clean Indoor Air Act's prohibition on smoking in a "public place" and its definition of a "public place" as including not only "[a]n indoor area serving as a place of employment" but also "an area where the public is invited or permitted" and "[a] facility which provides education, food or health care-related services," it is apparent that the Clean Indoor Air Act explicitly and definitively prohibits PASSHE from making an agreement to allow smoking anywhere on its campuses. Accordingly, the charge as filed under sections 1201(a)(1) and (5) also must be dismissed.

Support for dismissal of the charge may be found in City of Pittsburgh v. Commonwealth of Pennsylvania, PLRB, 539 Pa. 535, 653 A.2d 1210 (1995), where our Supreme Court employed the same analysis in likewise dismissing a refusal to bargain charge. In that case, an employer changed a mandatory subject of bargaining by unilaterally revising a pension plan for newly-hired employes. Noting that the employer was subject to Act 205, the Court observed that Act 205 provides as follows:

> "A revised benefit plan for newly hired municipal employees shall be developed with consultation with representatives of the collective bargaining unit applicable to the affected type of municipal employee, if any, and shall be within the scope of collective bargaining pursuant to the applicable law subsequent to the establishment of the revised benefit plan."

The Court then reasoned that, in light of Act 205's reference to the obligation to consult rather than to bargain over a revised benefit plan for newly-hired employes, the employer was explicitly and definitively prohibited by Act 205 from agreeing in bargaining to a revised benefit plan for newly-hired employes.

The Clean Indoor Air Act is at least as explicit and definitive in prohibiting smoking in public places as Act 205 is in prohibiting bargaining over a revised benefit plan for newly-hired employes of an employer subject to Act 205. Thus, the same result as in City of Pittsburgh obtains.

Further support for dismissal of the charge may be found in Scranton Federation of Teachers, Local 1147 v. Scranton School District, 407 A.2d 61 (Pa. C. 1979), appeal denied, 497 Pa. 346, 440 A.2d 1190 (1982), where our Commonwealth Court employed a similar analysis in reversing a grievance arbitration award granting a school district's employes additional pay for days rescheduled because of a weather emergency. The Court held that an amendment to the Public School Code of 1949 providing that "[n]o employe of any school closed by reason of the Weather Emergency of 1977 shall receive more or less compensation than that to which the employe would otherwise have been entitled to from the school district . . . had the Weather Emergency of 1977 not occurred" prohibited the granting of additional pay under the circumstances. See also Allegheny Valley School District v. Allegheny Valley Educational Association, 360 A.2d 762 (Pa. Cmwlth. 1976), where the Court held that section 1169 of the Public School Code of 1949 providing that "[t]he person on leave of absence shall receive one half of his or her regular salary during the period he or she is on sabbatical leave" prohibited the granting of full-pay to a teacher on sabbatical leave.

Neither Lebanon County, supra, nor Erie County, supra, compels a contrary result. The law in effect when those cases were decided provided that "[n]o person shall smoke in an area designated nonsmoking by the proprietor or person in charge of a public place or at a public meeting." 35 P.S. § 1230.1(c). When those cases were decided, then, employers had the discretion to designate an area as non-smoking but were not compelled to do so as they are under the present day Clean Indoor Air Act. Those cases are, therefore, inapposite.

Given that the charge must be dismissed because the Clean Indoor Air Act explicitly and definitively prohibits PASSHE from agreeing to allow smoking anywhere on its campuses, there is no need to address whether or not PASSHE's conduct after it imposed the smoking ban provides a defense to the charge.

CONCLUSIONS

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

1. PASSHE is a public employer under section 301(1) of the PERA.

2. APSCUF is an employe organization under section 301(3) of the PERA.

3. The Board has jurisdiction over the parties.

4. PASSHE has not committed unfair practices under sections 1201(a)(1), (5) or (9) of the PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

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 third day of March 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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DONALD A. WALLACE, Hearing Examiner