

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE :
COLLEGE AND UNIVERSITY FACULTIES :
:
v. : Case No. PERA-C-08-373-E
:
PENNSYLVANIA STATE SYSTEM OF :
HIGHER EDUCATION :

FINAL ORDER

The Association of Pennsylvania State College and University Faculties (APSCUF) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (PERA) on March 23, 2009, challenging a March 3, 2009 Proposed Decision and Order (PDO) dismissing its Charge of Unfair Practices under Section 1201(a)(1), (5) and (9) of the Public Employe Relations Act (PERA). The Pennsylvania State System of Higher Education (PASSHE) filed a timely response to the exceptions and a supporting brief on April 14, 2009.

The facts of this case are not in dispute. APSCUF is the certified representative of bargaining units that include faculty and athletic coaches employed by PASSHE. Prior to September 8, 2008, PASSHE allowed APSCUF bargaining unit members to smoke indoors and outdoors subject to local restrictions at its various campuses. 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].

PASSHE did not bargain with APSCUF before prohibiting smoking anywhere on its campuses.

In the PDO, the Board Hearing Examiner found that PASSHE did not violate Section 1201(a)(1), (5) or (9) of PERA by unilaterally implementing a smoking ban in all indoor and outdoor areas of PASSHE's campuses in response to the Clean Indoor Air Act, Act of June 13, 2008, P.L. 182, No. 27, 35 P.S. §§ 637.1 - 637.11.

The Clean Indoor Air Act provides in relevant part as follows:

Section 1. Short Title.

This act shall be known and may be cited as the Clean Indoor Air Act.

* * *

Section 2. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

"PUBLIC PLACE." An enclosed area which serves as a workplace, commercial establishment or an area where the public is invited or permitted. The term includes:

(1) A facility which provides education, food or health care-related services.

* * *

(4) A public facility. This paragraph includes a facility to which the public is invited or in which the public is permitted and a private home which provides child-care or adult day-care services.

(5) A sports or recreational facility, theater or performance establishment.

* * *

Section 3. Prohibition.

(a) GENERAL RULE.-- Except as set forth under subsection

(b) [setting forth exceptions not relevant here], an individual may not engage in smoking in a public place. Nothing in this act shall preclude the owner of a public or private property from prohibiting smoking on the property.

PASSHE does not dispute that, generally, smoking by faculty and coaches employed on PASSHE'S various campuses would be a mandatory subject of bargaining under Section 701 of PERA. Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 459 A.2d 452 (Pa. Cmwlth. 1983); Crawford County v. Pennsylvania Labor Relations Board, 659 A.2d 1078 (Pa. Cmwlth. 1995), *appeal dismissed*, 543 Pa. 482, 672 A.2d 1318 (1996). PASSHE claims, however, that the Clean Indoor Air Act prohibits it from allowing anyone to smoke anywhere on its campuses.

APSCUF, on the other hand, claims that the Clean Indoor Air Act, while prohibiting smoking indoors, does not prohibit PASSHE from bargaining with APSCUF and agreeing to permit employes to smoke outside while on campus.

Section 703 of PERA 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 ...

43 P.S. § 1101.703. In applying Section 703, the Pennsylvania Supreme Court stated as follows:

The mere fact that a particular subject matter may be covered by legislation does not remove it from collective bargaining under section 701 if it bears on the question of wages, hours and conditions of employment. We believe that section 703 only prevents the agreement to and implementation of any term which would be in violation of or inconsistent with any statutory directive. The distinction between this view and that expressed by the majority of the Commonwealth Court (as we understand it) is best illustrated by an example. Under section 1142 of the Public School Code, a minimum salary scale is set forth. Section 1151 provides that school boards may pay salaries in excess of the minimum salary. Framing the issue in accordance with the formulation suggested by the majority in the Commonwealth Court, section 1142 created a duty not to pay below the minimum scale and section 1151 granted the employer the prerogative to pay more than the minimum rate. Clearly, the parties are precluded from agreeing to a rate lower than the minimum scale but even though the statute vested in the public employer the prerogative to pay a higher rate, to do so as a result of collective bargaining is not "in violation of, or inconsistent with, or in conflict with" the statute in question. The mere fact that the General Assembly granted the prerogative to the employer does not exclude the possibility that the decision to exercise that prerogative was influenced by the collective bargaining process.

* * *

We therefore conclude that 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.

Pennsylvania Labor Relations Board v. State College Area School District, 461 Pa. 494, 508-510; 337 A.2d 262, 269-270 (1975). Upon review of the Clean Indoor Air Act, we agree with APSCUF that no

provision of that legislation explicitly and definitively prohibits PASSHE from making an agreement with respect to smoking outside on its campuses.

The Hearing Examiner properly recognized that the Board may review statutes, such as the Clean Indoor Air Act, to determine whether the General Assembly intended to prohibit collective bargaining within the meaning of Section 703 of PERA. State College Area School District, supra; Association of Pennsylvania State College and University Faculties v. State System of Higher Education, 32 PPER ¶ 32036 (Proposed Decision and Order 2001), 32 PPER ¶ 32084 (Final Order 2001). In fulfilling this role, "[e]very statute shall be construed, if possible, to give effect to all its provisions" and "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. §1921 (a) and (b). Even "[w]hen the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, [among other things] ... [t]he object to be attained[,] [t]he former law ... [,] [t]he consequences of a particular interpretation[,] [t]he contemporaneous legislative history[,] [and/or] Legislative and administrative interpretations of such statute." 1 Pa.C.S. §1921(c).

PASSHE claims that Section 2 of the Clean Indoor Air Act defines "public place" as three distinct areas -- either an "enclosed area which serves as a work place", a "commercial establishment" or "an area where the public is invited or permitted". We disagree. Under the express terms of the Clean Indoor Air Act a "public place" is "an enclosed area" which serves as "a workplace", a "commercial establishment" or "an area where the public is invited or permitted." As the Commonwealth Court has stressed with regard to legislative construction, limiting predicate language cannot be ignored. Snyder County Prison Board and County of Snyder v. Pennsylvania Labor Relations Board and Teamsters Local 764, 912 A.2d 356 (Pa. Cmwlth. 2006), *petition for allowance of appeal denied*, 593 Pa. 730, 928 A.2d 1292 (2007). The predicate language for "public places" which must be given effect here is that they are "enclosed" areas. Indeed, this is consistent with the object to be attained by the "Clean Indoor Air Act", see 1 Pa. C.S. §1924 ("[t]he title and preamble of a statute may be considered in the construction thereof") and is, as noted by PASSHE, consistent with the repealed Section 10.1 of the Fire and Panic Act, Act of April 27, 1927, P.L. 465, No. 299, addressing smoking in certain public places including "[a]n enclosed common indoor area which is not operated by a state or local government agency, which is used by the general public and which is any of the following ... (ii) [a]n educational facility." 35 P.S. §1230.1(b)(2) (repealed).

PASSHE claims that "public place" cannot be limited to enclosed areas because in its definition of "public place", the Legislature included "[a] sports or recreational facility, theater or performance establishment." 35 P.S. §367.2. While those types of facilities may or may not be partially open, they nevertheless are generally areas where the public has limited choice of seating in a confined area to view and enjoy the sporting event, theatrical production, or other type of performance. For all intents and purposes, "[a] sports or recreational facility, theater or performance establishment" is enclosed given the

nature of the seating arrangements, despite the fact that they may be partially open. If the General Assembly had wanted to ensure that both indoor and outdoor areas of a state university campus are non-smoking, it would have included university campuses in clause (5), or otherwise separately enumerated them as it did for sports or recreational facilities, theaters or performance establishments. Accordingly, PASSHE campuses are not removed from the predicate language indicating that smoking is banned only in enclosed areas.

Moreover, construing the definition of "public place" as PASSHE does renders Section 3 of the Clean Indoor Act superfluous. Indeed, if any "area where the public is invited or permitted" includes privately-owned outdoor areas, then any proprietor of a "commercial establishment" would be precluded from deciding whether to permit or prohibit smoking on the grounds outside of his or her establishment, notwithstanding the reservation in Section 3 that "[n]othing in this act shall preclude the owner of a public or private property from prohibiting smoking on the property." 35 P.S. §637.3(a). Furthermore, if PASSHE's broad interpretation of "public place" to include any "area where the public is invited or permitted" were to prevail, then PASSHE would be encouraging a violation of the Clean Indoor Air Act by allowing bargaining unit members to smoke off campus on public streets.¹

Notwithstanding the predicate language that a public place be an enclosed area, PASSHE argues that Section 2 of the Clean Indoor Air Act separately defines a public place as "a facility which provides education, food or health care-related services". PASSHE asserts that the term "facility" can be defined by reference to PASSHE's enabling legislation which states that "[i]nstitution shall mean each of the State-owned universit[ies] ... and including its personnel, and its physical plant, instructional equipment, records and all other property thereof." 24 P.S. §20.2001(A). Accordingly, PASSHE contends that "facility" within the meaning of the Clean Indoor Air Act must mean all property, including the real estate, of a state university, within the meaning of PASSHE's enabling act. However, this argument disregards the express language in Section 2 of the Clean Indoor Air Act that "the ... words and phrases when used in this act shall have the meanings given to them in this section." 35 P.S. §637.2. Clearly the context in which "facility" is used in the Clean Indoor Air Act, within the definition of a "public place", does not demonstrate any intent to negate the predicate language that a "public place" is an "enclosed area."

Moreover, the General Assembly's deliberations regarding the Clean Indoor Air Act, as reflected in the legislative history, are clearly contrary to PASSHE's interpretation. Under PASSHE's interpretation, "a facility which provides ... food ... services" would have to ban smoking in outdoor areas. However, that proposition was flatly rejected by the General Assembly. In discussing amendments to the bill in the House, Representative Gabig inquired, what "if you are outside in a café, outside the front of a restaurant where they have

¹ Roxane Rix, Associate Professor at Kutztown University, testified that under PASSHE's September 8, 2008 no-smoking policy, she would need to walk ten minutes to College Boulevard to smoke. (N.T. 40). Robert Storch, Assistant Professor at Lock Haven University, also testified that he has a ten minute walk to Susquehanna Avenue. (N.T. 45).

chairs...?" Representative Gerber responded that "Yes, ... [a]ssuming it is an outdoor area, smoking would be permitted." Legislative Journal - House, July 16, 2007 at 2061.

Indeed, the Pennsylvania Department of Health, which is charged by the Clean Indoor Air Act with the "establishment of an Internet website, to educate the public regarding the provisions of this act ... [and] inform persons who own or operate a public place of the requirements of this act," 35 P.S. §§ 637.9, also disagrees with PASSHE's interpretation. The Department of Health's Guidance for Public Places and Workplaces, as of August 21, 2008,² provides:

the outdoor property of a business building is not covered by the Pennsylvania Clean Indoor Air Act. The Department of Health recommends that the designated area for smoking be located in an area away from building entrances, windows or openings, and have appropriate containers for ash and cigarette disposal.

In response to the frequently asked questions (FAQ) about a restaurant that has an outside deck, the Department of Health responds that "the [Clean Indoor Air Act] does not ban smoking for structures such as a deck or patio that is not enclosed by walls and a ceiling..."

Likewise, "a facility which provides ... education ... services" must be given the same interpretation as "a facility which provides ... food ... services". Indeed, in speaking on the inequities of a proposed House amendment which would have made it unlawful to smoke outdoors in a zoo, Representative Gabig stated that "I would say on this zoo issue, that is outdoors... It is not indoor... I know I have two State parks and a State education facility in my district, ... and they are all outdoors... If we are going to tell other outdoor facilities what they can and cannot do outdoors, I think we as a State need to at least be on the same minimal standards..." Legislative Journal - House, July 16, 2007 at 2063 (emphasis added). What Representative Gabig was expressing was his understanding that under the Clean Indoor Air Act, smoking would be permitted outdoors at a PASSHE university.

If this was not clear enough, in a similar context with regard to outside areas of amusement parks, Representative Gabig noted that he "did not see anything about prohibiting smoking at amusement parks." Representative Gerber noted a question posted to him by an amusement park operator that "if we have designated areas outdoors where we allow people to smoke, would we be able to still provide that amenity to those smokers[?]" His response was "yes, because, it is outdoors in a designated area, it is not an enclosed or substantially enclosed area, smoking would be allowable under those conditions." Legislative Journal - House, July 16, 2007 at 2061-2062. Representative Gabig went on to question, "[j]ust to close the loop on that amusement park, ... if they have an indoor facility, a substantially enclosed facility as defined under this law, that would be prohibited under the law from smoking, but if they have an area that is somehow sort of warded off in some manner but is open air for people during the course of their 8 hours or

² <http://www.dsf.health.state.pa.us/health/cwp/view.asp?a=174&q=251429>.

10 hours at the park, if they need to go take a break from the kids and have a smoke, that is permitted under the law?" Representative Gerber responded emphatically "Yes... That is the intent of the language." Legislative Journal - House, July 16, 2007 at 2062. As noted by Representative Gabig, for purposes of the Clean Indoor Air Act, the outside areas of amusement parks, zoos and state universities are essentially the same. Indeed, this view is consistent with that of Senator Stack, who on final passage of Senate Bill 246, stressed that "[w]e are not banning smoking. This law would ban the practice of smoking in enclosed, crowded places." Legislative Journal - Senate, June 10, 2008 at 2141. Thus, clearly the legislative intent of the Clean Indoor Air Act is to prohibit smoking in an enclosed indoor "facility which provides education, food or health care-related services", but to permit it for outdoor areas.

Although Section 3 of the Clean Indoor Air Act provides that "[n]othing in this act shall preclude the owner of a public or private property from prohibiting smoking on the property," that does not preclude collective bargaining over the subject of employe smoking in outdoor areas. As the Department of Health recognizes, "[t]he [Clean Indoor Air Act] smoke-free requirement for the indoor workplace and public places supersedes all union agreements related to smoking in the indoor areas of a workplace or public place. Any other policy would relate to outdoor smoking and accommodations for your workers." Guidance for Public Places and Workplaces, *supra*. As the Pennsylvania Supreme Court made emphatically clear, "[t]he mere fact that the General Assembly granted the prerogative to the employer does not exclude the possibility that the decision to exercise that prerogative was influenced by the collective bargaining process." State College Area School District, 461 at 509, 337 A.2d at 269. Because the Clean Indoor Air Act does not prohibit smoking in non-enclosed, outdoor areas, and therefore does not explicitly and definitively preclude bargaining over employe smoking outdoors on a State System College or University campus, PASSHE was obligated under Section 1201(a)(1) and (5) of PERA to bargain with APSCUF before banning smoking on all outdoor areas of the campuses.

After a thorough review of the exceptions and all matters of record, we conclude that PASSHE violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing a smoking ban prohibiting employes from smoking outdoors on campus. Accordingly, we shall sustain the exceptions filed by APSCUF and set aside the Proposed Decision and Order consistent with the above discussion.

CONCLUSIONS OF LAW

CONCLUSIONS numbers 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 and set aside and the following additional conclusions are made:

5. PASSHE has not committed unfair practices under Section 1201(a)(9) of PERA.

6. PASSHE has committed unfair practices under Section 1201(a)(1) and (5) of PERA.

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 by the Association of Pennsylvania State College and University Faculties are hereby sustained, that the Order on page 8 of the March 3, 2009 Proposed Decision and Order, is vacated and set aside, and

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that PASSHE shall:

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of the Act.

2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but limited to the discussing of grievances with the exclusive representative.

3. Take the following affirmative action, which the Board finds necessary to effectuate the policies of PERA:

(a) Rescind the September 8, 2008 unilateral change to the smoking policy and reinstate the past practice of permitting bargaining unit employes to smoke on campus while outdoors;

(b) Post a copy of the Proposed Decision and Order and this Final 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 Final Order by completion and filing of the attached affidavit of compliance.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this nineteenth day of May, 2009. 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The Pennsylvania State System of Higher Education hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of PERA; that it has rescinded the September 8, 2008 policy prohibiting bargaining unit employes from smoking in outdoor areas of the campuses; that it has posted the proposed decision and order and final order as directed; and that it has served a copy of this affidavit on the Association of Pennsylvania State College and University Faculties at its principal place of business.

Michael Amodeo 6/1/09
Signature/Date

Assistant Vice Chancellor
Title Labor Relations

SWORN AND SUBSCRIBED to before me
The day and year first aforesaid

Mary Ann Worley
Signature of Notary Public
COMMONWEALTH OF PENNSYLVANIA

Notarial Seal
Mary Ann Worley, Notary Public
City Of Harrisburg, Dauphin County
My Commission Expires May 27, 2010
Member, Pennsylvania Association of Notaries