is an accomplice, his testimony standing alone is sufficient evidence on which to find the defendant guilty, if after following the above principle that I have just discussed with you, you are convinced beyond a reasonable doubt that George D. Cutchall testified truthfully that the defendant committed the crime." (N.T. 80-82).

PENNSYLVANIA LABOR RELATIONS BOARD v. CHAMBERSBURG AREA SCHOOL DISTRICT, A.D. 1979 - 83, C. P. Franklin County Branch

Administrative Agency Law - Appeal From Pennsylvania Labor Relations Board - School District Ban on Smoking - NON-BARGAINABLE ISSUE - Zipper Clause in Contract

1. Where a school district places a smoking ban in all district buildings during the time the custodial employees union was bargaining for a new contract, district did not violate 31201(a)(5) of the Pennsylvania Public Employees Relations Act by implementing the ban without bargaining with the union, in that such a ban is a matter of inherent managerial policy and excluded from bargaining under 3702 of the Act.

2. Determining whether a matter is a bargainable issue or a matter of inherent managerial policy involves a balancing of the impact of the issue on the interests of the employee *in wages, hours and terms and conditions* of employment and its probable effect on basic school policy.

3. A smoking ban in a school district's building covering anyone using the building is a managerial prerogative aimed at implementing the district's ongoing programs against smoking.

4. A zipper clause in a contract signed after a smoking ban is established, is effective to waive the right to bargain on the smoking ban so long as the ban became effective while the contract negotiations were in progress.

Jonathan K. Walters, Esq., Attorney for Union-Intervenor

James L. Crawford, Esq., and Larry J. Rappoport, Esq., Attorneys for Appellee

Jan G. Sulcove, Esq., Attorney for Appellant

OPINION AND ORDER

EPPINGER, P.J., April 2, 1980:

The Chambersburg Area School District (district) and the

American Federation of State, County and Municipal Employees (AFSCME) representing an agreement on March 27, 1976. The agreement was signed December 9, 1976. In the meantime, on September 8, 1976 the district adopted a smoking ban in all of the districts buildings; the ban was to become effective November 1, 1976.

AFSCME filed an unfair labor practice with the Pennsylvania Labor Relations Board (PLRB) against the district on October 28, 1976, alleging a violation of Sec.1201 (a)(5) of the Pennsylvania Public Employee Relations Act (Act), Act of 1970,July 23, P.L. 563, No.195, 43 P.S. Sec.1101.1201. The violation charged was the district's implementation of the prohibition against smoking in the school buildings without bargaining with the union.

After appropriate proceedings, including a nisi decision and order, on March 27, 1979, the PLRB ordered the district to rescind the ban on smoking by custodial employees and the district appealed the final order to this court. Our jurisdiction is permissive under Sec.933 (a)(1)(vii) of the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, Sec.2, 42 Pa. C.S.A. 101,et seq. Our scope of review is limited to determining whether the PLRB's findings are supported by substantial and legally credible evidence and whether its conclusions are reasonable and not arbitrary, capricious and illegal. *North Star School District v. PLRB*, 35 Cmwlth. 429, 386 A.2d 1059 (1978).

Of the claims to error filed by the district, we will discuss only two. The others we find not well taken or immaterial to the outcome of the case.

The district contends the PLRB erred in holding that the smoking ban was a bargainable issue under Sec.701 of the Act and in failing to hold that it was a matter of inherent managerial prerogative under Sec. 702.The former section requires a public employer to bargain collectively with employee representatives over wages, hours and other terms and conditions of employment and provides:

> Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement of any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The provisions of Sec.702 exclude from the sphere of collective bargaining matters of inherent managerial policy in the following terms:

> Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. ...

Whether smoking shall be permitted in public school buildings, is our opionion, a matter of inherent managerial policy. Determining whether something is a bargainable issue or a matter of inherent managerial policy involves a balancing test. *PLRB v. State College Area School District*, 461 Pa. 494, 337 A.2d 262 (1975), *reversing* 9 Pa. Cmwlth. 229, 306 A.2d 404 (1973). It is a bargainable issue where it is a matter of fundamental concern to the employees' interest in wages, hours and other terms and conditions of employment, and the issue is not removed from the bargaining process simply because it may touch upon basic policy. So where a dispute has arisen, the PLRB and, ultimately, the courts must determine whether the impact of the issue on the interests of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

Everyone involved in this case applied *State College.* The PLRB noted that the ban is all—encompassing—prohibiting smoking by all employees in all buildings——and concluded that the impact of the ban on the employees' interests in terms and conditions of employment was direct and immediate and outweighed its probable effect on the basic policy of the system as a whole. We find the weight of the ban to be on the side of the salutary educational policy against smoking as being injurious to health. In this area schools can be expected to and have the right to set an education example. The impact of the employees is mininal.

What are bargainable issues and what are inherent managerial policy matters came under further discussion in *State College* when the court noted:

> This problem would be simplified greatly if the phrase 'Conditions of employment' and its purported antithesis, educational policy, denoted two definite and distinct areas. Unfortunately, this is not the case. Many educational policy decisions make an impact on a teacher's conditions of employ-

> ment and the converse is equally true. There is no unwavering line separating the two categories.

461 Pa. at 507, 337 A.2d at 268, *quoting West Hartford Education Association v. DeCourcy*, 162 Conn. 566, 581, 295 A.2d 526, 534 (1972).

Arguably, the PLRB seemed predisposed to its conclusions because it refused to permit expert testimony proffered by the district to support the position that a no-smoking policy is a function and program of the district's efforts to foster good health habits and discipline among its students. It might be appropriate to refer the matter back to the PLRB to admit the evidence and for further consideration. We think, however, that without that testimony the evidence supported the district's contention. Counsel for the parties stipulated that the ban on smoking could facilitate achievement of the following goals:

> 1. The smoking ban as applied to all District personnel, including administration and Board, as well as the public, furthers the goal of consistency among ongoing school programs directed against smoking.
>
> 2. The smoking ban is part of a necessary regulatory scheme in the public schools.
>
> 3. The smoking ban compensates for the modeling efforts of parents who either are not involved in directing their children against smoking or do not see the need for it.
>
> 4. The smoking ban, as implemented as to all persons, generates, by virtue of the equality of treatment involved, respect among students for school authority and thereby improves discipline.
>
> 5. The smoking ban gives recognition to the plight of the nonsmoker.

The district is empowered to regulate and control its educational program. The adoption and publication of the ban as applying to everyone in the schools, whether administrator, employee, student or the general public, was an education force with community as well as school-wide impact. So the placing of the ban on smoking is a matter of inherent managerial perogative which falls within the district's discretion and is not a matter upon which it must bargain with its employees.

In *Ellenbogen v. County of Allegheny*, 479 Pa. 429, 438,

388 A.2d 730, 735 (1978), the court suggested that "most of those matters properly within the scope of mandatory bargaining...concern wages and other financial terms of employment..." (facts unrelated to instant case). Thus in *PLRB v. Mars Area School District*, 480 Pa. 295, 389 A2d 1073 (1978), where teacher-aides were released and replaced by upaid volunteers, the decision had an immediate impact on wages, hours and terms and conditions of employment. Applying *State College*, the court concluded the effect of the employee far outweighed any consideration of managerial policy and ordered mandatory bargaining.

Here, part of the reasoning of the PLRB was that the district would have effected the salutary goals of the ban by two other methods and, therefore, the ban's effect on the basic policy of the district was minimal. This conclusion suggests that the PLRB is acting as a super school board. Directing the district in the manner in which it should perform its function is not part of the PLRB's proper power.

We return now to the sequence of events to discuss them in conjunction with a waiver/zipper/integration clause contained in the contract between the parties dated December 9, 1976. The waiver clause with which we are concerned provides:

> 14.3 *Finality:* The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter within collective bargaining and that the understandings arrived at after the exercise of that right are set forth in this Agreement. Therefore, the District and the Union for the life of this Agreement each voluntarily waives the right to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement. The express provisions of this Agreement for its duration, therefore, constitute the complete and total contract between the District and the Union with respect to rates of pay, hours of work, and other conditions of employment. Nothing herein contained shall prevent negotiations concerning future contracts during the life of this contract, which negotiations shall be as provided in Act 194, the Public Employees Labor Relations Act.

In *Waynesboro Area Board of School Directors*, Case No. PERA-C-9224-C, 9 PPER 9066 (1978), PLRB found that a waiver clause substantially similar to that above indicated that

"the parties have negotiated, albeit indirectly, the matter of employees smoking on [school district] premises and therefore have satisfied their statutory obligation." So the smoking ban in that case as to the teachers was upheld. In the Waynesboro case, the ban was implemented during the life of the contract containing the waiver clause. In the case now before us, the ban was imposed prospectively during the negotitations on the contract.

In what seems to be a distortion of logic, relying on its own precedent in *City of Pittsburgh School District*, Case No. PERA-C-7364-W, 9 PPER 9168 (1978), the PLRB held an employer could not impose a condition of employment, then place the responsibility on the employees to bargain the issue at negotiations taking place at approximately the same time. In the *Pittsburgh* case the PLRB did not rely on a waiver or zipper clause, but instead relied on a contract provision which fell far short of proving to the PLRB that the parties had agreed that their bargaining obligation had been satisfied.

What strikes us about the contrasting conclusions in the Waynesboro case and this case so far as the zipper clause is concerned is that even if we were to hold the district was without authority to enforce the smoking ban as to custodial employees, it apparently could simply revoke the ban as to them, reinstate it and then this case would become indentical to the Waynesboro case. With that likely result, all of the work done by the PLRB, counsel and the court seems like an utter waste. The reasoning of the PLRB in this case is neither logical nor realistic and should not be permitted to stand.

So we hold that when AFSCME, representing the custodial employees, signed an agreement containing a zipper clause they did what they said they did, waived the right to bargain on the smoking ban.

ORDER OF COURT

April 2, 1980, the Final Order of the Pennsylvania Labor Relations Board entered March 27, 1979 making those portions of the Board's Nisi Decision and Order of March 21, 1978 relating to Case No. PERA-C-9101-C absolute and final is hereby set aside; and

The Findings and Conclusions of the Pennsylvania Labor Relations Board set forth in the Nisi Decision and affirmed in the Final Order are reversed in accordance with the foregoing opinion.

livered subsequently, it may be prudent to include the mandated disclosure.

LEON SOLIS-COHEN, JR., *Chairperson*
Zoning and Land Use Committee of the
Section on Real Property, Probate
and Trust Law

*Published at request of Thomas H. Humelsine, Esq., President of the Franklin County Bar Association.

NOTICE TO THE BAR:
NEW LOCAL RULES OF COURT

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF PENNSYLVANIA

IN RE: :
Rules of Judicial :
Administration :

ORDER OF COURT

July 15, 1980, it is ordered that the following new rules of Judicial Administration for the Franklin and Fulton County Branches be adopted effective immediately.

Rule 1800. These rules shall apply to civil actions for trial by jury, trials in which juries have been waived, equity and arbitration proceedings.

Rule 1801. A certificate of readiness for trial shall be filed in the Prothonotary's office when a case is in all respects ready for trial. A case is ready for trial when all pleading has been completed, all motions have been disposed of and all discovery is completed. The certificate of readiness shall be in the following form:

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF PENNSYLVANIA - COUNTY BRANCH

: CIVIL ACTION
:
: No.
:
:

CERTIFICATE OF READINESS

....., 19...., I, ...
Attorney for ..... do hereby certify that the pleadings in this case have been completed, all motions have been disposed of and discovery is completed and that the case is ready for trial and direct the Prothonotary to place the case on the next trial list.

.....
Attorney

Rule 1802. Except as otherwise ordered for cause, a certificate of readiness shall be filed by August 31, 1980, for actions commenced on or before December 31, 1979 and within 240 days of actions commenced after December 31, 1979. An action is commenced when the first praecipe for writ of summons of a complaint is filed.

Rule 1803. If a certificate of readiness is not filed on or before August 10, 1980 for all actions commenced on or before December 31, 1979, or within 210 days after the action is commenced for actions commenced after December 31, 1979, the Prothonotary shall give notice in writing to all counsel of record and to the parties who are not represented by counsel that if a certificate of readiness or application for an extension of time is not filed within the time provided by Rule 1802, a rule to show cause why the action should not be dismissed will be issued as of course. The notice shall be in the following form:

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF PENNSYLVANIA - COUNTY BRANCH

: CIVIL ACTION -
:
: No.
:
:

NOTICE

..... , 19... . The parties to the above-captioned proceedings are hereby notified that if a certificate of readiness or application for an extension of time is not filed within the time provided by Rule 1802, to wit, on or before ....., a rule to show cause why the action should not be dismissed will issue as of course.

.....
Prothonotary

* * * *

Rule 1804. Before the expiration of time provided by Rule 1802 any party may apply to the motion judge for an extension of time for filing a certificate of readiness. A copy of the application shall be served on all other parties or their counsel at least 5 days prior to the date of the intended presentation to the court and shall set forth the reasons for and the length of extension required. The court may grant the extension only for good cause and shall set a new time limit or refuse the extension.

Rule 1805. An application for an extension of time shall be in the following form:

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF PENNSYLVANIA - COUNTY BRANCH