DC37, Hill (Executive Director) v. HHC, Baxter (Acting Pres.), 47 OCB 16 (BCB 1991) [Decision No. B-16-91(IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

DECISION NO. B-16-91
DOCKET NO. BCB-1220-89

-between-

STANLEY W. HILL, as EXECUTIVE DIRECTOR, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
Petitioner,

-and-

RAYMOND BAXTER, as ACTING PRESIDENT, NEW YORK CITY HEALTH and HOSPITALS CORPORATION,
Respondent.

DECISION AND ORDER

On October 25, 1989, District Council 37 ("DC 37" or "Union") filed an improper practice petition against the New York City Health and Hospitals Corporation ("HHC" or "City"). The petition alleges that HHC, in violation of §12-306a(4) of the New York City Collective Bargaining Law ("NYCCBL")[1] implemented a no-smoking policy unilaterally, without bargaining with DC 37.

HHC filed an answer to the improper practice petition on December 13, 1989. The Union filed a reply on February 5, 1990.

BACKGROUND

On September 21, 1989, HHC promulgated Operating Procedure No. 10-22, which bans smoking in all HHC facilities and locations,

[1] NYCCBL §12-306a(4) provides as follows:

> It shall be an improper practice for a public employer or its agents: ... (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

including vehicles, garages and enclosed areas. There are exceptions applicable to patients in various programs of HHC, but no exceptions are provided for employees. HHC employees and affiliate personnel who violate Operating Procedure No. 10-22 may be subject to discipline according to the procedures set forth in their collective bargaining agreements. Sanctions for patients who violate the procedure include closer supervision and/or confiscation of their smoking articles; visitors in violation may be required to leave the facility. Prior to the adoption of Operating Procedure No. 10-22, HHC employees had been permitted to smoke in designated areas of HHC facilities.

POSITIONS OF THE PARTIES

Union's Position

DC 37 alleges that Operating Procedure No. 10-22 was adopted unilaterally by HHC, without any negotiations with the Union. DC 37 notes that it filed a timely demand to bargain over the smoking procedure and that in response to that demand HHC representatives agreed to meet with DC 37 representatives. DC 37 alleges that at that meeting, which occurred on October 17, 1989, HHC representatives unequivocally rejected DC 37's demand to bargain and declared that Operating Procedure No. 10-22 would go into effect as of October 23, 1989.

DC 37 argues that HHC's ban on smoking is a mandatory subject of bargaining since it is a work rule which affects terms and conditions of employment. Accordingly, the Union alleges that HHC

has violated §12-306a(4) of the NYCCBL by failing to bargain in good faith over the smoking policy. If such an improper practice is found, the Union seeks an order from the Board directing HHC: (1) to cease and desist from implementing any aspect of operating Procedure No. 10-22; (2) to expunge from the personnel folders of all bargaining unit employees any adverse action resulting from Operating Procedure No. 10-22; (3) to revoke all adverse personnel actions taken against bargaining unit employees as a result of Operating Procedure No. 10-22; (4) to bargain in good faith with the affected Unions over any smoking policy prior to implementation of such policy, and (5) to grant such other and further relief as may be necessary.

In its Reply, the Union argues that Camden Central School District,[2] cited by the City in its answer, is inapplicable to the instant dispute. In Camden, PERB held that promulgation of a work rule prohibiting coaches from chewing tobacco while coaching students was within the school district's managerial prerogative. The Union notes that PERB only addressed the limited question of whether the promulgation of rules concerning the use of tobacco in the presence of students was a management prerogative. Moreover, argues the Union, PERB specifically emphasized that the critical factor in its determination was whether or not students were present. The Union differentiates the instant dispute from Camden, since in the instant dispute HHC prohibited smoking regardless of

[2] 19 PERB ¶3047 (1986).

whether a particular area was remote from patients.

DC 37 points out that HHC, previous to this total ban, had a policy which restricted employees' right to smoke in certain designated areas. This previous policy prohibited smoking in areas open to the public and in patient care areas, but permitted employees to smoke in non-public and non-patient care areas such as employee cafeterias and lounges. The Union argues that Operating Procedure No. 10-22 affects the working conditions of its employees by banning smoking in employee areas where it previously had been permitted. As such, according to the Union, the proposed ban is a mandatory subject of bargaining.

DC 37 notes that HHC argues that Operating Procedure No. 10-22 is not a mandatory subject of bargaining because it will be applied equally against employees, visitors, and patients. The Union points out, however, that the type of enforcement will vary depending on whether the violator is a patient, visitor, or employee. Furthermore, the Union argues, PERB's decision in Steuben-Allegany Boces[3] required the school district to negotiate with the union regarding the imposition of smoking restrictions upon unit employees even though the restriction applied to non-unit employees and visitors as well.

City's Position:

The City admits that at the October 17th meeting it stated its intent to implement Operating Procedure No. 10-22. In

[3] 13 PERB ¶3096 (1980).

justifying its decision to promulgate operating Procedure No. 10-22, HHC notes that tobacco smoke is a well documented cause of heart disease, lung disease, and cancer. HHC argues that as a corporation dedicated to health and safety, it has a responsibility to protect the health and rights of its non-smoking patients, visitors, and staff.

HHC argues that its decision to promulgate Operating Procedure No. 10-22 is within its managerial prerogative and, therefore, is not a mandatory subject of bargaining. Referring to §12-307(b) of the NYCCBL,[4] HHC argues that maintaining a safe, healthy, smoke-free atmosphere is within its management prerogative to direct its employees, maintain the efficiency of its operations, and determine the methods and means by which its operations are conducted.

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[4] §12-307(b) of the NYCCBL states:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

Furthermore, HHC argues, its interest in maintaining a smoke free environment is highlighted by New York City's Clean Indoor Air Act, which severely limits smoking in public places and in the employment setting. Additionally, in arguing that operating Procedure No. 10-22 is not a mandatory subject of bargaining, HHC relies upon the decision of PERB in Camden Central School District.[5]

Moreover, HHC argues its implementation of Operating Procedure No. 10-22 is not a mandatory subject of bargaining because it affects patients, visitors, and employees equally, and thus does not constitute a change in terms and conditions of employment. HHC argues that since its policy applies to the public at large in the same manner it applies to unit employees and since the policy is unrelated to employment status, it is not a mandatory subject of bargaining.

DISCUSSION

The question of whether there is a duty to bargain over the implementation of a smoking policy affecting employees is one of first impression for this Board. In determining whether such a duty exists, we look to our own prior decisions delineating the scope of working conditions subject to mandatory bargaining, as well as to how the Public Employment Relations Board, the National Labor Relations Board, and the Federal Labor Relations Authority have dealt with this question.

[5] 19 PERB ¶3047 (1986).

In two recent decisions, this Board announced that we will employ the test set forth in Ford Motor Co. v. NLRB in order to determine the scope of subjects appropriate for collective bargaining.[6] In Ford Motor Co., the Supreme Court defined mandatory subjects of bargaining as such matters that are "plainly germane to the working environment" and that are "not among those managerial decisions which lie at the core of entrepreneurial control." Thus, in evaluating whether the smoking policy implemented by HHC constitutes a mandatory subject of bargaining, we must first determine whether the policy is plainly germane to the working environment. If it is, we then must decide whether it is among those managerial decisions which lie at the core of entrepreneurial control.

As to the first factor -- germaneness to the working environment -- we note that previous to the. effective date of Operating Procedure No. 10-22, employees were permitted to smoke in designated areas of HHC facilities. Thus, the prohibition on smoking has an effect on at least some employees' personal convenience and comfort while on the job.[7] Now employees who wish to smoke must do so outside HHC facilities. Thus, it is clear that

[6] Decision Nos. B-1-90; B-5-90 (adopting the test set forth in Ford Motor Co. v. NIRB, 441 U.S. 488, 101 LRRM 2222 (1979)).

[7] In determining that restrictions on smoking were a mandatory subject of bargaining, the Hearing Officer in Steuben-Allegany Boces, 13 PERB ¶4552, 4601 (1980), aff'd 13 PERB ¶3096 (1980), considered employee convenience and comfort while on the job. The Hearing Officer also noted that work rules in general have been found bargainable by PERB and the NLRB.

a work rule prohibiting smoking is germane to the working environment.

The second part of the Ford test requires that the matter in question not be among those managerial decisions that lie at the core of entrepreneurial control. In its discussion of the subject, the Supreme Court relied on the concurring opinion of Justice Stewart in Fibreboard Paper Products CorR v. NLRB:[8]

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning ... the basic scope of the enterprise are not in themselves primarily about conditions of employment .... [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.

HHC argues that as a corporation dedicated to health and safety, it has a responsibility to protect the health of its non-smoking patients, visitors, and staff. HHC contends that maintaining a safe, healthy, smoke-free atmosphere is within its management prerogative to direct its employees, maintain the efficiency of its operations, and determine the methods and means by which its operations are conducted.

Obviously, HHC, in furtherance of its mission as a health care provider, may take steps to secure the health and safety of its patients and visitors. The issue in question is whether HHC may unilaterally impose a smoking ban in order to protect the health

[8] 379 U.S. 203, 57 LRRM 2609, 2617 (1964).

of its employees. In its relationship to its employees, HHC is not a health care provider, but an employer. As such, it is obligated to bargain over working conditions as any other employer would be. Since HHC is not in the business of providing health care services to its employees, a ban on employee smoking does not lie at the core of entrepreneurial control.[9] Thus, any effort to control or restrict the ability of employees to smoke is an action affecting terms and conditions of employment and is, therefore, a mandatory subject of bargaining.

In reaching this conclusion, we are mindful of the decisions of PERB, the NLRB, and the FLRA on this subject. PERB first considered the question of whether management must negotiate over the imposition of smoking restrictions on unit employees in Steuben-Allegany Boces.[10] PERB found that a directive which restricted smoking to specified locations was a work rule that dealt with a term and condition of employment. Balancing the unit employees I interest in negotiating this term and condition of employment against management's interest in controlling the working environment and in satisfying some non-unit employees, PERB determined that the unit employees' interest predominated, and it

[9] In Department of Health and Human Services, Indian Health Service v. Federal Labor Relations Authority, 885 F.2d 911, 132 LRRM 2492 (D.C. Cir. 1989), the D.C. Circuit upheld FLRA's finding that restrictions imposed on employee smoking were not within the agency's mission of advancing the health status of American Indians.

[10] 13 PERB ¶3096 (1980).

concluded that the directive involved a mandatory subject of negotiation. In making this determination, PERB noted that the office building in which smoking was limited was not normally used by students; thus, Boces could not argue persuasively that the limitation on smoking was designed to influence student conduct. This language regarding the presence or absence of students proved determinative in the next smoking case considered by PERB, Camden Central School District.[11] In this case, PERB found that a work rule prohibiting faculty from using tobacco while in the presence of students was within the school district's managerial prerogative.

In asserting its claim of managerial prerogative, HHC relies on PERB's decision in Camden Central School District. However, such reliance is misplaced. Underlying PERB's decision that a school district could unilaterally ban the use of tobacco in the presence of students was its rationale that faculty serve as role models for students.[12] No similar role model argument was alleged in HHC's pleadings. However, to the extent that a role model argument may be inferred from HHC's mere reference to the case, we find such an argument inapplicable in the instant setting. Unlike the direct effect a teacher's behavior could have on students, any impact on the public resulting from a ban on smoking in City hospitals would be tenuous, at best.

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[11] 19 PERB ¶3047 (1986).

[12] Id., 19 PERB ¶3047 at 3100.

PERB also makes a distinction between the imposition of smoking restrictions in employee and non-employee areas. For example, in County of Niagara (Mount View Health Facility),[13] a health facility could, in furtherance of its mission, unilaterally ban smoking by its employees in those areas of the facility customarily used by patients. Thus, since the lobby of the facility was regularly used by patients, the county was not required to bargain with its employees' union over the prohibition of smoking in the lobby. However, since the restrictions also applied to areas that were not customarily used by patients, such as the library and cafeteria, the county was required to bargain over the restrictions in those areas.

The City argues in its answer that because its smoking ban applies equally to patients, visitors, and employees, it should not be a mandatory subject of bargaining. The above case demonstrates the fallacy of that argument. As previously stated, a health care facility may unilaterally impose restrictions on patient and visitor smoking. However, it must bargain with the union before imposing similar restrictions on unit employees, with respect to areas not open to patients or visitors. The City may not circumvent its bargaining obligation by linking a permissible smoking prohibition, with regard to patients and visitors, to an impermissible one, with regard to employees.

In two recent decisions, PERB dealt with the newly enacted

[13] 21 PERB ¶3014 (1988).

state smoking legislation and its effect on the duty to bargain over smoking policy.[14] In Oneonta City School District,[15] the district, acting in response to a provision of the new law requiring employers to adopt written smoking policies, passed a resolution banning smoking in all of its buildings. At issue were two seemingly conflicting provisions of the law. The district contended that §1399-r gave it the absolute right to declare its entire physical plant a non-smoking area.[16] However, PHL §1399-o(6) (i) provides:

> Any provisions in a smoking policy that are more restrictive than the minimum requirements set forth in this subdivision shall, if a collective bargaining unit exists, be subject to applicable law governing collective bargaining.

Finding that the general provision, §1399-r, did not supercede the particular provision, §1399-o(6)(i), the Administrative Law Judge determined that the district violated its duty to bargain. In a subsequent case, an Administrative Law Judge determined that as a consequence of the recent statute, a charging party now must prove that the challenged prohibition is more restrictive than required by the statute, in addition to proving the existence of a

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[14] This legislation is Article 13-E of the New York State Public Health Law ("PHL") , entitled "Regulation of Smoking in Certain Public Areas."

[15] 23 PERB ¶4607 (1990).

[16] PHL §1399-r states:
Nothing in this article shall be construed to deny the owner, operator or manager of a place covered by this article the right to designate the entire place, or any part thereof, as a nonsmoking area.

noncontractual past practice permitting smoking and its unilateral discontinuance.[17]

HHC argues that New York City's Clean Indoor Air Act supports its position that the implementation of Operating Procedure No. 10-22 is within its managerial prerogative. Similar to the State legislation, the City's Clean Indoor Air Act imposes restrictions on smoking in pubic places, as well as in the employment setting. Contrary to the assertions of the City, however, the Act neither requires a total ban on smoking, nor suggests that restrictions on employee smoking may be imposed unilaterally, without bargaining with the affected unions.

Thus, City and State law, PERB decisions, and this Board's own decisions delineating the scope of working conditions, support the conclusion that smoking policy as applied to employees is a mandatory subject of bargaining. In addition, determinations made by the National Labor Relations Board and the Federal Labor Relations Authority buttress this conclusion. Viewing smoking restrictions as work rules, the NLRB has found a duty to bargain over smoking policy.[18] Similarly, the D.C. Circuit has twice upheld determinations by the FLRA that the Department of Health and Human

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[17] West Canada Valley Central School District, 23 PERB ¶4617 (1990).

[18] McCotter Motors Co., 291 NLRB No. 115, 131 LRRM 1370 (1988); Chemtronics Inc., 236 NLRB 178, 98 LRRM 1559 (1978).

Services must bargain over smoking restrictions.[19] Accordingly, we find the failure of HHC to bargain before implementing operating Procedure No. 10-22 constitutes an improper practice within the meaning of §12-306a(4) of the NYCCBL.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition herein be, and the same hereby is granted; and it is further

DIRECTED, that the Health and Hospitals Corporation shall cease and desist from implementing operating Procedure No. 10-22 with respect to employee areas which are not open to patients or visitors; and it is further

[19] Department of Health and Human Services, Indian Health Service v. Federal Labor Relations Authority, supra, at 9 n.9; Department of Health and Human Services . Family Support Administration v. Federal Labor Relations Authority, 920 F.2d 45 (D.C. Cir. 1990).

DIRECTED, that at the option of the City, the parties shall negotiate in good faith, within the parameters of the New York City Clean Indoor Air Act, concerning the implementation of smoking restrictions in such employee areas.

DATED: New York, NY
March 21, 1991

MALCOLM D. MacDONALD
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