

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-01-382
)	
UNITED PUBLIC WORKERS, AFSCME,)	DECISION NO. 413
LOCAL 646, AFL-CIO,)	
)	FINDINGS OF FACT, CONCLUSIONS
Complainant,)	OF LAW, AND ORDER
)	
and)	
)	
BENJAMIN J. CAYETANO, Governor,)	
State of Hawaii and KAZU)	
HAYASHIDA, Director, Department)	
of Transportation, State of)	
Hawaii,)	
)	
Respondents.)	
)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On January 5, 1998, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against BENJAMIN J. CAYETANO (CAYETANO), Governor, State of Hawaii and KAZU HAYASHIDA (HAYASHIDA), Director, Department of Transportation (DOT), State of Hawaii (collectively Employer or State). The UPW alleges that the Employer transmitted proposed changes to a Departmental Smoking in the Workplace Policy (Policy) to the Union and the UPW requested negotiations over the revised Policy. In addition, the UPW requested information in connection with the proposed action. The UPW contends that the Employer declined to negotiate over the Policy and only provided partial responses to its request for information. Thus, the UPW contends that the

Employer violated §§ 89-13(a)(1), (5), and (7), Hawaii Revised Statutes (HRS).

On February 10, 1998, the Board conducted a hearing on the merits of the case. The parties were afforded full opportunity to present witnesses, exhibits, and arguments to the Board. The parties thereafter submitted written arguments to the Board.

Based on a thorough review of the evidence and arguments in the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The UPW is the exclusive representative, as defined in § 89-2, HRS, of employees of the DOT, State of Hawaii, included in bargaining unit 01.

BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and a public employer as defined in § 89-2, HRS, of employees of the State of Hawaii.

KAZU HAYASHIDA is the Director of the DOT, State of Hawaii, and a representative of a public employer as defined in § 89-2, HRS.

In 1987, the Hawaii State Legislature enacted Acts 234 and 245 which were codified as part of Chapter 328K, HRS, regarding Smoking. Act 234 provides a uniform statewide code to regulate smoking in public places and with respect to facilities or areas in state or county owned or controlled buildings, smoking was prohibited in:

- (6) The following facilities or areas in state or county owned or controlled buildings:

- (A) Meeting or conference rooms;
- (B) Auditorium or sports areas that are enclosed;
- (C) Community centers where persons may gather for meetings, parties, or any other purpose where the area is enclosed;
- (D) Waiting areas, baggage claim areas, and check-in counters within buildings in all state airports; and
- (E) All areas open to the public; including service counters and reception or waiting areas.

Act 245, the Smoking in the Workplace Act, inter alia, mandated employers, including State agencies such as the DOT to adopt, implement and maintain a written smoking policy to regulate smoking in the workplace and public areas. The Legislature intended that at a minimum, the policy accommodate the preferences of nonsmokers and smokers and, if satisfactory accommodation could not be reached, the policy should reflect the preference of a simple majority of the employees. The act provides:

Regulation of smoking in the office workplace.

(a) Each employer in the State shall within three months after June 24, 1987, adopt, implement, and maintain a written smoking policy which shall contain, at the minimum, the following provisions and requirements:

- (1) That if any nonsmoking employee objects to the employer about smoke in the employee's workplace, the employer, using already available means of ventilation or separation or partition of office space, shall attempt to reach a reasonable accommodation, insofar as possible, between the preferences of nonsmoking and smoking employees; provided that an employer is not required by this chapter to make any expenditures or structural changes to accommodate the preferences of nonsmoking or smoking employees; and
- (2) That if an accommodation which is satisfactory to all affected employees cannot be reached in any given office workplace, the preferences of a simple majority of employees in each

specifically affected area shall prevail and the employer shall accordingly prohibit or allow smoking in that particular area of the office workplace. If the employer's decision is unsatisfactory to the nonsmoking employees, a simple majority of all nonsmoking employees can appeal to the director of health for the determination of a reasonable accommodation. Where the employer prohibits smoking in an office workplace, the area in which smoking is prohibited shall be clearly marked with signs.

(b) The smoking policy shall be announced within two weeks of the vote of preferences of the employees in each respective work area and posted conspicuously in all the affected workplaces.

On August 3, 1987, the DOT convened a task force to develop and publish a workplace smoking policy in accordance with Chapter 328K, HRS. The task force formulated and drafted a proposed Policy and finalized it in October 1987 after consultation with the unions. On October 5, 1987, pursuant to § 1.05 of the applicable collective bargaining agreement (contract), the UPW responded to DOT's request for consultation and provided several comments and recommendations to the proposed Policy. On October 8, 1987, the DOT adopted its Smoking in the Workplace Policy (1987 Policy). The Policy was subsequently revised on October 18, 1988 deleting the "Penalties for Violations" section in accordance with UPW's October 5, 1987 recommendations (1988 Policy). Since October 1988, the DOT has not revised its policy.

On June 30, 1993, the DOT reprinted its 1988 Policy as Chapter 19, Smoking in the Workplace in the DOT manual.

4.19.03 SMOKING ON DEPARTMENT OF TRANSPORTATION PREMISES

* * *

- .2 Smoking is permitted:
 - a. only in designated areas;
 - b. outside the work areas described in 4.19.03;
 - c. in common, open, well-ventilated areas.
- .3 Smoking with conditions:

Smoking may be permitted in enclosed areas, not expressly prohibited by law, if all occupants of the area agree to allow smoking. This applies to the following areas:

 - a. offices with more than one occupant;
 - b. restrooms restricted to employees;
 - c. lunchrooms which are designated for fewer than 51 people;
 - d. employee cafeterias;
 - e. outside areas with fewer than four walls.

On May 9, 1995, DOT Director HAYASHIDA wrote a letter to the UPW State Director Gary Rodrigues (Rodrigues) to request a meeting over various departmental policies. HAYASHIDA was concerned that there were no departmental records to confirm that proper consultation had occurred over the various departmental policies with the UPW. On August 25, 1995, Rodrigues responded to HAYASHIDA's request by indicating the UPW's consent to certain chapters of the DOT manual including Chapter 19 pertaining to Smoking in the Workplace.

Pursuant to the Policy, departmental employees were permitted to smoke in designated areas in the workplace. Airports division employees were permitted to smoke in areas where the public was generally allowed to smoke. Within division controlled areas, employees were permitted to smoke in cafeterias, break rooms, and employee only restrooms.

Smoking employees comprise approximately 25% of the DOT workforce.

On October 10, 1997, Respondent CAYETANO issued Executive Memorandum No. 97-14, regarding Policy and Procedure regarding Smoking and Tobacco use in State Buildings under the Executive Branch. The Memorandum provides in part:

This memorandum updates the policy and procedure by which departments or agencies shall comply with The Smoking in the Workplace Statute, Chapter 328K - Part 2, Hawaii Revised Statutes, effective 9/22/97.

Policy:

It is the policy of the executive branch to establish a smoke-free environment for State employees and members of the public visiting or using State facilities. The smoking of tobacco products is thus prohibited in all interior space owned, rented, or leased by the executive branch of the State Government, and in any outdoor areas under executive branch control in front of air intake ducts.

1. Exceptions. The general policy established by this order is subject to the following exceptions:

* * *

- d. The head of any agency may establish limited and narrow exceptions that are necessary to accomplish agency missions. Such exceptions shall be in writing, approved by the agency head, and to the fullest extent possible provide protection of nonsmokers from exposure to environmental tobacco smoke. Authority to establish such exceptions may not be delegated.

The Executive Memorandum required agencies, including the DOT, to update their workplace smoking policies within 90 days in accordance with the Executive Memorandum. As a result the DOT revised its 1988 Policy.

The draft of the Policy revised in 12/97 provides in part:

4.19.01 POLICY STATEMENT

It is the policy of the Department of Transportation to establish a smoke-free environment for our employees and members of the public visiting or using Department facilities statewide.

* * *

4.19.03 SMOKING ON DEPARTMENT OF TRANSPORTATION PREMISES

- .1 The smoking of tobacco products is prohibited in all interior space owned, rented, or leased by the Department of Transportation; and, in any outdoor areas which are under Departmental control that are in front of air intake ducts and/or wherever the smoke can enter the interior space. Interior areas shall include any area enclosed by a roof and at least three walls.
- .2 Smoking of tobacco products is prohibited in all areas open to the public, including service counters, reception areas, waiting areas, baggage claim areas, and check-in counters.
- .3 "No Smoking" signs shall be conspicuously displayed and shall be at least one inch high, and shall include the words "Smoking Prohibited by Law."

* * *

4.19.04 RESPONSIBILITIES

- .1 Director, division administrators and staff officers shall:
 - a. Ensure that their subordinates are familiar with the law and departmental policy.
 - b. Promote smoking cessation programs and encourage appropriate employees to stop smoking.
- .2 Branch managers, district engineers, and staff officers:

- a. May prohibit smoking of tobacco products, in addition to the requirements of the law, in all areas under their control.
 - b. Shall post appropriate signage and enforce the laws and departmental policy.
- .3 Employees shall comply with the law and departmental policy on smoking in the workplace.

On December 3, 1997, the DOT sent a letter to the UPW requesting consultation on the proposed revisions to the 1988 Policy in accordance with the Unit 01 contract. The DOT indicated that it planned to implement the revised policy on January 9, 1998 and requested the Union's reply by the close of business on January 6, 1998. The DOT also consulted with the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEEA) and the Hawaii Firefighters Association (HFFA). On December 5, 1997, the HFFA provided DOT with comments and recommendations which the DOT considered and revised its proposed draft accordingly.

On December 10, 1997, the UPW informed the DOT that the proposed revisions of the 1988 Policy constituted a mandatory subject of bargaining and therefore requested bargaining over the subject matter. The UPW subsequently filed the instant complaint contending that the Respondents made unilateral changes in their smoking policy.

As of the hearing date, the DOT had not implemented the revised Policy.

Based upon the foregoing, the Board finds that pursuant to Chapter 328K, the DOT promulgated a Smoking in the Workplace Policy in 1987. The Policy followed the provisions in the statute.

The DOT consulted with the UPW as well as other unions over the Policy and the UPW requested that the DOT delete the Penalties provision. In 1988, the DOT deleted the Penalties section. Thereafter, in 1997 the Governor issued an Executive Memorandum which banned smoking in the interiors of State buildings and outside in front of air intake ducts and required all agencies to revise their policies in accordance with the Memorandum. The DOT revised its Policy and forwarded it to the UPW for consultation purposes and the UPW requested negotiations over the Policy and requested the DOT to cease and desist from implementing its revised Policy.

The Executive Memorandum and Policy imposes a material and significant change in the working conditions of DOT employees. The UPW requested negotiations over the DOT Policy and but not over the Executive Memorandum.

DISCUSSION

The UPW alleges that the DOT refused to negotiate over the Policy revisions and thereby violated §§ 89-13(a)(1), (5), and (7), HRS, which states in pertinent part:

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce an employee in the exercise of any right guaranteed under this chapter;

* * *

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in Section 89-9;

* * *

(7) Refuse or fail to comply with any provision of this chapter; . . .

The UPW contends that under relevant case law, policies banning or restricting smoking in the workplace are mandatory subjects of bargaining and the Respondents have no basis to argue that the matter is subject to consultation. In addition, the UPW contends that the DOT and the UPW entered into an agreement in 1997 on the matter of smoking policies. The UPW further argues that bargaining over a mandatory subject is required when there is a change which impacts materially on working conditions. The UPW argues that the "smoker" population within DOT is 25% of the workforce and is affected by the Policy which extends beyond the provisions of the law, because the Policy prohibits smoking in all interior spaces within DOT controlled buildings and permits DOT managers discretion to ban smoking in all areas under their control, even outside of the buildings. The Policy is intended to discourage the employees from smoking. The UPW contends that the State is precluded from re-litigating the negotiability of a smoking ban affecting Unit 01 employees because it was previously found by an Arbitrator to require negotiations. The UPW contends that the Respondents argue that their intent is to comply with the legislation but Chapter 328K, HRS, affords the employers discretion and does not preclude bargaining under Chapter 89, HRS. As such, the UPW requests a ruling that CAYETANO's Memorandum and the Policy requires negotiations.

The Respondents contend that Chapter 328K, HRS, requires the adoption, implementation, and maintenance of a written smoking

policy and compliance with the statute is non-negotiable. Respondents contend that only consultation is required since the employer is formulating and implementing personnel policy. Respondents also contend that past practice indicates that Complainant always consulted with the DOT on the smoking policy. Respondents additionally argue that Act 245 specifically provides that the Act was not intended to create any right to smoke or to impair the government's prerogative to prohibit smoking in the workplace. Because the Legislature gave government agencies only three months to adopt a policy, Respondents argue that negotiations were not envisioned and would be unreasonable and burdensome. Respondents also contend that the Policy and its revisions are within the scope of the law.

With respect to State and county buildings, Chapter 328K, HRS, prohibits smoking in meeting or conference rooms, enclosed auditoriums, community centers, waiting areas, baggage claim areas, and check-in counters in buildings at State airports and all areas open to the public. With regard to the office workplace, Chapter 328K, HRS, provides that each employer must have a written policy which as a minimum provides for accommodation of a nonsmoking employee who objects to smoking in the office. The law further provides that if an accommodation cannot be reached, then the preferences of a simple majority of the employees shall prevail as to whether to prohibit or allow smoking. Thus, the statute provides a discretion in implementation and permits the majority of employees in a workspace to determine whether smoking is prohibited or allowed in the office. The law also provides that if an

employer prohibits smoking, the area should display appropriate signage.

While the Board agrees with Respondents that compliance with statutes is non-negotiable, CAYETANO's Executive Memorandum and the DOT's Policy requiring a total ban on smoking in the interiors of State buildings and outside of the buildings near the air intake ducts clearly exceeds compliance with the minimal provisions of Chapter 328K, HRS.

The DOT's revised policy exceeds the Executive Memorandum because it allows branch managers, district engineers and staff officers to prohibit smoking in all areas under their control, including areas exterior to buildings. Respondents also contend that the UPW is precluded from negotiations over the subject matter because there is a past practice of consultation over the DOT smoking policies. The Board notes that past practice may be utilized as an aid to construction of language in a contract, but the Board cannot agree that the UPW is precluded from requesting negotiations over a subject because it previously consulted over the matter. Here, the 1987 Policy closely mirrored the provisions of Chapter 328K, HRS, and was subject to consultation with the unions. The Policy was modified in 1988 to address the UPW's objections by deleting the "Penalties for Violations" provision. The UPW requested negotiations over the revised Policy in 1997 because it "is a mandatory subject of bargaining because it materially and significantly impacts on job security, wages and other terms and conditions of employment." There is insufficient evidence in the record for the Board to conclude that the UPW

forever waived negotiations over the subject matter by submitting comments pursuant to the 1987 request for consultation.

The UPW argues that it previously negotiated the 1988 Policy rather than consulted with the Employer. Based upon the record, the Board is persuaded that the DOT offered the Policy to the unions in 1987 for consultation and the UPW's 1995 "agreement" with HAYASHIDA was merely the Union's confirmation that consultation had occurred.

The Union cites private sector cases holding that historically smoking is recognized as a mandatory subject of bargaining because it affects working conditions. In S.S. Kresge Company v. NLRB, 416 F.2d 1225, 1229-30 (6th Cir. 1969), an employee smoking policy, especially one with punitive elements to it was held to be a mandatory subject of bargaining. See also Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 69 LRRM 2024 (9th Cir. 1968); Winter Garden Citrus Products Cooperative v. NLRB, 238 F.2d 128 (5th Cir. 1956); Lloyd Fry Roofing Co. v. NLRB, 216 F.2d 273 (9th Cir. 1954) where company rules concerning coffee breaks, lunch periods, smoking, employee discipline, and dress code are mandatory subjects of bargaining. In Newark Valley Cent. School Dist. v. Public Employment Relations Bd., 83 N.Y.2d 315, 632 N.E.2d 443, 145 LRRM 2943 (N.Y. 1994), the court found that smoking affected terms and conditions of employment and absent a prohibition on negotiations in the statute, the subject was negotiable.

The Board finds that Chapter 328K, HRS, does not specifically prohibit negotiations over smoking in the workplace. Respondents contend that the short three-month timetable to

promulgate smoking policies envisioned by the Legislature suggests that the matter is non-negotiable. However, there is no specific language in the statute exempting smoking from Chapter 89, HRS, and nothing in the legislative history which persuades the Board to conclude that Chapter 328K, HRS, precludes negotiations over the subject matter.

In reviewing the record, the issue is whether the matters addressed in the Policy are subject to negotiations. The Board has traditionally applied a balancing test to determine whether a subject is a condition of employment and therefore a mandatory subject of bargaining. Linda Lingle, Order No. 1333 (8/30/96); Hawaii Fire Fighters Association, 2 HPERB 207 (1979). In Decision No. 84, Hawaii Government Employees Association, 1 HPERB 763 (1977), the Board established a test to determine whether an issue is negotiable where the employer claims an interference with management rights. The test is determined by the nature of the impact of the matter on terms and conditions of employment, i.e., whether the subject matter has a material and significant effect or impact on wages, hours, or other terms and conditions of employment.

In this regard, Respondents presented no argument as to whether the revised smoking policy furthers any governmental mission. In accord with the federal and state precedents cited by the Union, the Board finds that the general ban on smoking contained in the revised Policy has a material and significant effect or impact on the employees' job security and their terms and

conditions of work.¹ The revised Policy completely bans smoking

¹In W.T. Forest Products Co., 304 NLRB 957, 138 LRRM 1089 (1991), the National Labor Relations Board stated:

We also disagree with the judge's reasoning that the smoking ban falls outside the ambit of "terms and conditions of employment" defined in Section 8(d) because it has only an "indirect impingement on job security." The same could be said of the prices of food at an inplant cafeteria. Yet the Supreme Court has held that "the availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those 'conditions' of employment that should be subject to the mutual duty to bargain." Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979). The Court said that the question is whether the subject matter is "germane to the working environment." In our view, a rule that forbids smoking is "germane to the working environment." Although smoking is not as critical to life-functioning as food in a cafeteria, and indeed may be deleterious to health, it is nonetheless a part of the working environment in which many smokers function. In addition, we note that in the instant case, a breach of the rule would constitute grounds for disciplinary action, including discharge and suspension. See Johnson-Bateman Co., 295 NLRB 180, 183 fn. 18 (1989).

In sum, we find, as the board implicitly did in Alberts, Inc., supra, and Chemtronics, Inc., supra, that a ban on smoking on an employer's premises during working hours is a mandatory subject of bargaining, regardless whether the bargaining representative seeks to obtain such a ban or to limit or eliminate it. In our view, the Board's failure in those cases to engage in an extended analysis of the basis for finding smoking bans to be mandatory subjects of bargaining had little or nothing to do with the fact that, because they were imposed for unlawful retaliatory reasons, they violated Section 8(a)(3) as well as Section 8(a)(5). Rather, we think the more likely explanation is that the parties and the Board thought it self-evident that

in the DOT buildings and requires the employees to comply with the departmental policy. While the Board notes that the Policy applies equally to members of the general public, the general public cannot be subject to workplace discipline for violating the Policy. Thus, while the ban may be intended to protect the health of the workers, the Respondents have not persuasively argued that a ban on smoking is somehow essential to the basic mission of the DOT.

As the natural consequence of DOT's refusal to negotiate over the revised Policy was the interference with the Union's right to bargain, the Board finds that the DOT's refusal to bargain was wilful.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant prohibited practice complaint, pursuant to §§ 89-5 and 89-14, HRS.

A new policy which has a material and significant effect or impact on wages, hours, or other terms and conditions of employment requires negotiation and mutual consent between the Employer and the Union prior to implementation.

The implementation of the DOT's revised Policy on smoking has a material and significant impact on the working conditions employees and is therefore subject to negotiations and mutual

restrictions on employee smoking in the workplace are "working conditions" within the meaning of Section 8(d). (Emphasis added).

Id. at 959.

In addition, Arbitrator Edward Parnell (Parnell) ruled that the Department of Education's unilateral change in its smoking policy violated, inter alia, §1.05 of the Unit 01 contract. Parnell found that the smoking ban changed the employees' conditions of work.

consent. The Employer's refusal to negotiate over the revised Policy constitutes a wilful violation of § 89-13(a)(5), HRS.

ORDER


The Board hereby orders the Employer to cease and desist from refusing to negotiate with the UPW over the implementation of the revised Smoking Policy.² Further, the Employer shall immediately post copies of this decision in conspicuous places at its worksites where employees of the bargaining unit assemble, and leave such copies posted for a period of 60 consecutive days from the initial date of posting. The Employer shall notify the Board of the steps taken to comply herewith within 30 days of the receipt of this order.

DATED: Honolulu, Hawaii, June 27, 2000.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


CHESTER C. KUNITAKE, Board Member

²The UPW requested that the Employer be ordered to negotiate over the Executive Memorandum. The record however, does not support a finding that the UPW requested the Employer to negotiate over the Memorandum. Thus, the Board can only conclude that the Employer committed a prohibited practice by refusing to negotiate the DOT Policy.

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