

D.U.P. NO. 91-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

EGG HARBOR TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-90-165

EGG HARBOR TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint and dismisses an unfair practice charge against the Egg Harbor Township Board of Education for unilaterally implementing a smoking ban. A smoking ban is a non-negotiable subject of negotiations.

D.U.P. NO. 91-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

EGG HARBOR TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-90-165

EGG HARBOR TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Gelzer, Kelaher, Shea, Novy & Carr, attorneys
(Paul J. Carr, of counsel)

For the Charging Party,
Selikoff & Cohen, attorneys
(Steven R. Cohen, of counsel)

REFUSAL TO ISSUE COMPLAINT

On December 8, 1989, the Egg Harbor Township Education Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission"). In its charge, the Association alleges that the Egg Harbor Township Board of Education ("Board") engaged in unfair practices within the meaning of the New Jersey Employee-Employer Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically N.J.S.A. 34:13A-5.4(a)(1) and

(5).^{1/} The Association, the exclusive representative of the Board's teaching staff, alleges that the Board unilaterally adopted a policy banning smoking on all school premises effective September 1, 1989, without engaging in negotiations with the Association.

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charged.^{2/} The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act.^{3/}

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice.... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

3/ N.J.A.C. 19:14-2.1.

The Commission's rules provide that I may decline to issue a complaint.^{4/}

For the following reasons, I have concluded that the Commission's complaint issuance standard has not been met.

The Association and the Board are parties to a current agreement, effective June 1, 1989 through June 30, 1992. The Association contends that an established practice exists which allows unit members to smoke tobacco in designated areas. The Board asserts that there are no contract provisions with respect to a designated smoking area on the Board's premises. No grievance was pursued by the Association regarding this issue. On June 14, 1989, the Governor signed legislation requiring Boards of Education to make and enforce regulations to prohibit smoking of tobacco anywhere in Board buildings except as part of classroom instruction or theatrical productions. N.J.S.A. 26:3D-17 as amended by L. 1989 C.96 §1. The effective date of this legislation was six months after its enactment, specifically, December 14, 1989.

The Board adopted its smoking ban on August 8, 1989, prohibiting smoking on any and all school premises, effective September 1, 1989. The Association sent two letters in October 1989 notifying the Board that its imposition of a smoking ban on all premises prior to December 14, 1989, unilaterally changed terms and conditions of employment for unit members. Further, the Association

^{4/} N.J.A.C. 19:14-2.3.

stated that the Board must negotiate the imposition of any smoking ban extending beyond school buildings after December 14, 1989.

The Board revised its August 8, 1989 policy on October 24, 1989. The revision continues to prohibit smoking anywhere on school premises and further states that this prohibition is in the best interest of the health, safety and welfare of students and employees. Additionally, the Board's attorney was not authorized to negotiate with the Association over this issue, according to his November 1, 1989 letter to the Association. Subsequently, on December 8, 1989, the Association filed this charge.

After an exploratory conference was conducted in January 1990, I held the processing of this charge in abeyance until the Commission decided a pending case with a similar fact pattern, i.e., Livingston Bd. of Ed., P.E.R.C. No. 91-8, ___ NJPER ___ (¶ ___ 1990).

In Livingston, the Commission held that a comprehensive smoking ban implemented by the Livingston Board of Education was not mandatorily negotiable.

In view of Livingston, I notified the Association on July 23, 1990, that it seemed a complaint should not issue in this case, and the Association should withdraw its charge. The Association responded that the Board lacked authority to implement the comprehensive smoking ban on September 1, 1989, three months prior to the December 14, 1990 effective date of the statutory smoking ban.

The facts here are not distinguishable from those in Livington, where the Commission held:

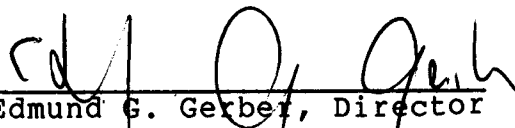
Employees have an interest in negotiating over smoking areas. But school boards have an overriding interest in shielding students from that activity, especially when students and the public are also prohibited from smoking.

This comprehensive smoking ban covers all persons -- students, employees and the public. Consistent with our caselaw and most caselaw from other jurisdictions, we hold that it was not mandatorily negotiable. Parking lots, sidewalks, athletic fields and other areas contiguous to school buildings are presumably areas within students' view and smoking bans in these areas are not mandatorily negotiable.

The Commission held a smoking ban is a non-mandatory subject of negotiations and not merely preempted by N.J.S.A. 26:3D-17. Accordingly, there was no obligation on the part of the Board to negotiate for the period prior to the effective date of N.J.S.A. 26:3D-17.

Accordingly, I decline to issue a complaint and dismiss the unfair practice charge.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: September 11, 1990
Trenton, New Jersey