IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NOS. 81-2-284
81-2-285
81-2-286

PENNSYLVANIA LABOR RELATIONS BOARD

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 89, AFL-CIO,

Appellants

v.

CHAMBERSBURG AREA SCHOOL DISTRICT,

Cross-Appellant

BRIEF OF APPELLANT AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 89, AFL-CIO

Appeal From Decision and Order of the Commonwealth Court of Pennsylvania in Case Nos. 883, 886 C.D. 1980 dated June 12, 1981, affirming the Order of the Franklin County Court of Common Pleas in Case No. A.D. 1979-83, dated April 2, 1980

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DATED: December 14, 1981

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

RULES

STATEMENT OF JURISDICTION

This Court has assumed jurisdiction by its Orders of October 2, 1981, pursuant to Section 724(a) of the Judicial Code of 1976, Act of July 9, 1976, P.L. 586, No. 142, as amended, 42 Pa.C.S.A. §724(a).

ORDER APPEALED FROM

"AND NOW, this 12th day of June, 1981, the order of the Court of Common Pleas of Franklin County, dated April 2, 1980 is hereby affirmed insofar as it finds the smoking policy of the Chambersburg Area School District to be a matter of inherent managerial policy and not a mandatory subject of bargaining.

/s/ John A. MacPhail, Judge"

QUESTIONS PRESENTED FOR REVIEW

I. IS A BAN ON SMOKING BY EMPLOYEES OF A PUBLIC EMPLOYER A MANDATORY SUBJECT OF BARGAINING UNDER THE PUBLIC EMPLOYE RELATIONS ACT?

Answered in the negative by the Court below.

II. WAS THE EMPLOYER OBLIGATED TO BARGAIN WITH THE UNION, NOTWITHSTANDING A SUBSEQUENTLY AGREED-UPON INTEGRATION CLAUSE IN THE CONTRACT?

Not answered by the Court below.

STATEMENT OF THE CASE

A Charge of Unfair Practices was filed with the Pennsylvania Labor Relations Board (hereinafter "The Board") on October 28, 1976, by the American Federation of State, County and Municipal Employees, District Council 89, AFL-CIO (hereinafter "AFSCME" or "the Union"), alleging that the Chambersburg Area School District (hereinafter "The Employer" or "School District") had committed unfair practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act, Act of July 23, 1970, P.L. 563, No. 195, as amended, 43 P.S. §1101.1201(a)(1) and (5) (hereinafter "Act 195"). In substance, the charge alleged that the Employer had refused to bargain with the Union by unilaterally implementing a ban on cigarette smoking by employees. The Charge was docketed as Case No. PERA-C-9101-C (R. 4a).

On November 10, 1976, the Board issued a Complaint and Notice of Hearing on the above-captioned Charge (R. 10a). The Board further ordered hearing at the same time of Case No. PERA-C-9128-C, a Charge filed by Chambersburg Area Education Association concerning the same action by the Employer (R. 7a, 11a).

On December 9, 1976 and January 13, 1977, hearings in the above-captioned matter were held before a duly designated Hearing Examiner of the Board. At that time, a full

opportunity to present testimony, examine and cross-examine witnesses and introduce documentary evidence was afforded to all parties in interest (R. 43a - 392a).

On March 21, 1978, the Board issued its Nisi Decision and Order in which it found that the School District had violated Section 1201(a)(1) and (5) of Act 195. A copy of that decision is attached hereto as Appendix "A." Exceptions to the Nisi Decision and Order were duly filed by the School District (R. 21a); oral argument was held before the Board on May 17, 1978.

By its Order dated March 27, 1979, the Board issued its Final Order in which it dismissed the Exceptions filed by the School District and upheld its Nisi Decision and Order. A copy of the decision is attached hereto as Appendix "B."

On March 28, 1979, the School District filed a Petition for Review in the Franklin County Court of Common Pleas (R. 26a). The School District further made an ex parte application for a writ of supersedeas in this matter, which was granted by the Court without an opportunity being afforded to the Board or the Union to present argument (R. 29a).

The Union filed a Notice of Intervention pursuant to Rule 1531(a) of the Pennsylvania Rules of Appellate Procedure on April 16, 1979. Oral argument was held on July 5, 1979.

On April 2, 1980, the Court below entered its Opinion and Order, setting aside the Board's finding that the School District had committed an unfair labor practice. A copy of the court's decision is attached hereto as Appendix "C."

On April 10, 1980, the Union filed an appeal to Commonwealth Court, which was docketed at No. 883 C.D. 1980 (R. 37a). The Board filed its own appeal on April 17, 1980, which was docketed at No. 886 C.D. 1980 (R.38a). Upon the unopposed motion of the Board, Commonwealth Court consolidated these two appeals by Order dated May 2, 1980 (R. 42a).

On June 12, 1981, a three-judge panel of Commonwealth Court affirmed the Court of Common Pleas insofar as it found the smoking policy to be a matter of inherent managerial policy. A copy of the Commonwealth Court's decision is attached hereto as Appendix "D."

On July 10, 1981, the Board filed a petition for Allowance of Appeal with this Court (R. 394a). Cross-petitions were filed by the Union and the Employer respectively (R. 419a and 431a). By Orders dated October 2, 1981, this Court granted said petitions (R. 467-469a). All appeals were consolidated by Order of this Court dated November 30, 1981.

STATEMENT OF FACTS

The School District is a political subdivision of the Commonwealth of Pennsylvania and is a "public employer" within the meaning of Section 301(1) of Act 195 (Finding of Fact No. 1, Conclusion No. 1).[1/] AFSCME is an "employe organization" within the meaning of Section 301(3) of Act 195, and is the certified collective bargaining representative for a unit of custodial personnel employed by the School District (Finding of Fact No. 3, Conclusion No. 2).

On September 8, 1976, the School District adopted a ban on smoking by all employes at all times in all School District buildings. The ban became effective November 1, 1976 (Finding of Fact No. 5). The School District's ban on smoking was a voluntary action on its part and was not ordered pursuant to a directive from any other governmental agency (Finding of Fact No. 17). The School District adopted the regulation without bargaining or offering to bargain with AFSCME concerning the matter (Finding of Fact No. 6).

At that time, AFSCME and the School District were engaged in negotiations for a collective bargaining agreement

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1/ Findings of Fact and Conclusions refer to those found by the Board in its Nisi and Final Decisions and Orders.

(Finding of Fact No. 7). The parties did not execute a collective bargaining agreement until December 9, 1976 (Finding of Fact No. 9). The Board further found that, in fact, teachers and custodians have smoked in School District buildings since at least 1959, with the knowledge of the School District (Findings of Fact Nos. 10-11). Said smoking did not occur in the presence of students, but took place in the teacher lounges, boiler rooms, and similar places separate and apart from classrooms and unobserved by students (Finding of Fact No. 13).

SUMMARY OF ARGUMENT

The Pennsylvania Labor Relations Board properly found that the unilateral imposition of a ban on smoking by employees constituted a refusal to bargain in violation of the Public Employe Relations Act. The issue is not one of inherent managerial authority reserved to the Employer, nor is the Employer prohibited by law from bargaining concerning the issue.

Substantial and credible evidence supports the Board's finding that despite a written rule against smoking by employees, the practice was regularly allowed with the knowledge and tacit approval of supervisory personnel. The Union did not waive its right to bargain over this matter, since the "zipper" clause relied upon the Employer did not come into effect until after the new ban was imposed.

ARGUMENT

I. THE DECISION OF THE COMMONWEALTH COURT IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF PENNSYLVANIA

As this Court has stated in the past, the scope of review of a Final Order of the PLRB is limited to a determination of whether the Board's findings are supported by substantial and legally credible evidence, and whether the conclusions deduced therefrom are reasonable and not capricious, arbitrary or illegal. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977); Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). It is not the function of an appellate court to

> lightly substitute its judgment for that of a body selected for its expertise whose experience and expertise make it better qualified than a court of law to weigh facts within its field.

PLRB v. Butz, 411 Pa. 360, 377, 192 A.2d 707, 716 (1963).

The Commonwealth Court held that a School District could unilaterally impose a smoking ban on custodial employees, finding such an action to be an "inherent managerial policy" of a School District. Such a position constitutes a drastic constriction of a public employer's duty to bargain under Act 195, in direct conflict with this Court's previous decisions on the subject.

The question of whether or not public employees may smoke at their place of work is clearly an issue which must be bargained with the collective bargaining representative of the employees in question. Section 701 of Act 195, 43 P.S. §1101.701 stated in part as follows:

> Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . .

By imposing a ban on smoking, the Employer has obviously set a condition of employment which falls within the bargaining requirements imposed by Section 701.

The School District claimed that the smoking ban was a matter of inherent managerial prerogative under Section 702 of Act 195, 43 P.S. §1101.702, and it was thus not required to bargain over it. However, Section 702 2/ was

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2/ Section 702 states as follows:

> 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. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and conditions of employment as well as the impact thereon upon request by public employe representatives.

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clearly intended to refer to much more fundamental decisions of inherent managerial authority, referring to decisions that go to the "core of entrepreneurial control." See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). However concerned the School District might be with discouraging smoking on the part of students, it is impossible to seriously maintain that a ban on smoking by custodians in the boiler room goes to the essential goals and policies for which the School District was established.

In PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975), this Court stated the test to be followed in determining whether a subject is removed from bargaining under Section 701:

> Thus we hold that where an item of dispute is a matter of fundamental concern to the employes' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under Section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the Courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.
> 337 A.2d at 268.

Thus, under the above-stated test, the Board must weigh the probable impact of the issue on the employees' terms and conditions of employment against its probable impact on the basic policy of the system as a whole. In the case at bar,

the Board found that a ban on smoking has a direct and immediate impact on the working conditions of employees. Under the rule adopted by the Employer, an employee caught smoking is subject to discipline or discharge (R. 310a).3/

The impact on the School District of such a ban is extremely slight. There is nothing in the law which would permit the inference that a ban on smoking by employees is in any way related to the basic policy goal of the School District to provide education to the young. The School District's position, that a ban on smoking by employees outside the view of students furthers the goal of minimizing or eliminating smoking by students (see e.g., Stipulations of the Parties, R. 160a-165a)4/, is hardly related to the overall goals of providing public education.

3/ The Commonwealth Court's assertion, in footnote 3 of its decision, that the Board did not discuss this aspect of the policy and the Union did not base its challenge on this provision is inexplicable. The very essence of the School District's action, which the Board found to be an unfair labor practice, was the establishment of a mandatory rule. It is only by disciplining the offending employee, as the policy clearly envisioned, that the smoking can become a condition of employment, as opposed to a request for voluntary restraint.

4/ In its decision, the Court of Common Pleas incorrectly stated the stipulations which were reached by the parties at the hearing. According to Judge Eppinger, "counsel for the parties stipulated that the ban on smoking could facilitate achievement of the following goals. . ." (Slip Op., at 5). However, the transcript clearly shows that the stipulation only went to the fact that the School District itself believed that the smoking ban could facilitate those goals; that point was expressly acknowledged by counsel for the School District (R. 161a-162a). There is no competent evidence that such goals would in fact be facilitated by a ban on employee smoking outside the presence of students.

In its decision, the Commonwealth Court finds that a smoking ban applied to custodial employees is a matter of educational policy, based on the School District's "unchallenged motivation" and its authority to direct employees under the School Code (Slip Op., at 5). However, the School District's motivation has nothing to do with the determination as to whether or not an item is a mandatory subject of bargaining. The test evolved by this Court in State College requires an objective analysis of the competing interests involved; intent, motivation, and the presence of absence of anti-union animus play no part.5/

The Commonwealth Court accepts as true the School District's belief that the minimization or elimination of smoking by students is a basic policy goal of the school system. Nowhere is that goal reflected in any enabling act of the Legislature, which provides for and governs the operation of public schools in the Commonwealth. In fact, other than the ban itself, neither the School District nor the Court below cites any authority in support of its proposition that the elimination of smoking among students is a primary, basic function of public school education in the Commonwealth. However desirable the goal may be, there

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5/ The Board has long held that a finding of an illegal refusal to bargain under Section 1201(a)(5) of Act 195, 43 P.S. §1101.11201(a)(5), does not require evidence of anti-union animus. PLRB v. Erie Municipal Airport Authority, 10 PPER ¶10028 (1979).

is a fundamental legal difference between stating that a certain end is desirable and stating that it is a basic policy goal of the school system.

The Commonwealth Court's conclusion that the smoking ban is a matter of basic educational policy is based on an impermissably broad reading of The Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §1-101 et seq. (hereinafter "School Code"). Nothing in the Code remotely addresses the issue of smoking by employees. While Section 510 of the School Code, 24 P.S. §5-510 gives school boards the power to adopt rules and regulations regarding the conduct of employees,6/ that power has been expressly limited by the duty of the employer to bargain with the employees' certified bargaining representative concerning terms and conditions of employment. State College Area School District, supra.

The purpose of Section 702 is to "reserv[e] to management those areas that the public sector necessarily

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6/ Section 5-510 of the School Code reads, in pertinent part as follows:

> The board of school directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers, and other appointees or employees during the time they are engaged in their duties to the district, as well as regarding the conduct and deportment of all pupils attending the public schools in the district, during such time as they are under the supervision of the boards of school directors and teachers, including the time necessarily spent in coming to and returning from school.

requires to be managerial functions." State College, 337 A.2d at 268. It was not intended that Section 702 provide an avenue of escape for employers who did not want to bargain with unions. As this Court observed in State College:

> [T]he passage of Act 195 was a repudiation of the traditional concept of the sanctity of managerial prerogatives in the public sector . . . . The necessity for qualifications to adjust private sector concepts to meet the needs of the public sector does not justify the conclusion that the qualifications should be interpreted in a manner that would strip the bargaining provision of any meaning. Id., at 267

Moreover, "the fact that a prerogative was statutorily recognized . . . does not mandate that it be included with the 'inherent managerial policy' concept of Section 702. That determination rests solely on the considerations suggested in our discussion under Part II of this Opinion." Id., at 269.

Thus, the general grant of authority to the School Board to regulate its employees in no way alleviates the employer of its duty to bargain. Nor does such authority in any way transform smoking by employees into a matter of inherent managerial authority.

Even if one assumes that the elimination of smoking by students is a basic goal of the School District, it must be remembered that the smoking ban in dispute does not apply to students, but rather to employees. There is nothing in the law or in the decision under review which remotely

suggests that it is a basic policy goal of the School District to eliminate smoking among employees. Again, it may be a worthy goal, but it is not a goal within the competence, power, or authority of the School District.

In contrast with the speculative impact of the smoking ban on the basic goals of the School District, the impact on employees is direct and immediate. Previously, employees could smoke in the buildings where they worked; now they cannot. A work rule cannot have more direct or immediate impact than that. Whatever the vice or dangers of smoking, to take away that right or privilege from regular smokers is obviously an issue of special significance to the persons involved. The Court's statement, that the impact of the ban on employees is minimal, is speculative in the extreme, without any basis in the record.

The Labor Board issued in this matter a well-reasoned decision clearly within the parameters set forth by this Court in State College, supra. Nevertheless, the Commonwealth Court completely disregarded the Board's reasoning, substituting instead its own view of the broad powers of school boards to control their employees. The Commonwealth Court's view on the authority of school boards to circumvent the duty to bargain under Act 195 has been twice rejected by this Court, PLRB v. State College Area School District, 9 Pa. Cmwlth. 229, 306 A.2d 404 (1973), reversed 461 Pa. 494, 337 A.2d 262

(1975); PLRB v. Mars Area School District, 21 Pa. Cmwlth. 230, 344 A.2d 284 (1975), reversed 480 Pa. 295, 389 A.2d 1073 (1978), and should be again.

By substituting its judgment for that of the Board, the Court below has gone beyond its jurisdiction under Section 1501 of Act 195, 43 P.S. §1101.1501, and has limited the rights of the employees in a manner which conflicts with this Court's decision in State College Area School District, supra.

II. THE UNION DID NOT WAIVE ITS OPPOSITION TO THE SMOKING BAN DUE TO THE INTEGRATION CLAUSE IN THE COLLECTIVE BARGAINING AGREEMENT.

The Employer argues here that AFSCME waived its right to bargain concerning the smoking ban because of the integration or "zipper" clause in the contract signed on December 9, 1976. The Employer attaches no significance to the fact that the unilateral implementation of the ban was prior to the actual signing of the contract containing the zipper clause. The Court of Common Pleas, in its decision, even seems to argue that even if the School District had an obligation to bargain, the subsequent signing of an agreement containing a zipper clause makes such bargaining pointless, since the Employer could simply turn around and implement the ban as soon as the contract is signed.

The School District's reasoning on this point is in error for two reasons. First, the School District fails to appreciate the fact that by unilaterally implementing the smoking ban, the Employer prejudiced the very negotiations which resulted int he contract containing the zipper clause. Had the School Board insisted on the smoking ban during contract negotiations, the Union could have decided not to sign an agreement. The Employer's action amounts to an "end run" around the requirement to bargain in good faith.

In City of Pittsburgh School District, 9 PPER ¶9168 (1978), the Board considered a fact situation almost identical to

the one in the instant case. There, the employer unilaterally imposed a residency requirement at the same time as the employer was negotiating with the union for a new collective bargaining agreement. The union filed a charge of unfair pratice with the Board. The employer defended against the charge by arguing that the union had failed to raise its objections to the residency requirement during negotiations. In finding that the employer had violated Section 1201(a)(5) of Act 195, the Board stated that the union was not obliged to raise the issue once the announcement had been made:

> The School District declares that it was incumbent upon the PFT [Union] to raise the matter at the negotiating table but it appears to us that the very essence of collective bargaining is defeated if we permit a public employer to unilaterally impose a condition of employment and then place responsibility on the public employes to raise the matter at the next negotiations. The Employer asserts a double standard which would permit unilateral employer action to obtain a nonnegotiated advantageous position, and then place the onus on the union to now seek the employer's agreement to retrench. Such action clearly and decisively changes the parties' bargaining position and places the employer in a whopping advantage in the bargaining process.
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> The School District fails to realize that it is our policy that these mandatory subjects be bargained prior to implementation rather than have bargaining proceed after the condition has already been implemented. It would be manifestly unfair to expect the PFT to raise the subject of residency and bargain away the residency requirement by, no doubt, conceding other points. The fact that contract negotiations for a successor contract had commenced at the point in time when the resolution was introduced only demonstrates to this Board that the School District had a readily available opportunity to bargain over this issue in lieu of unilaterally implementing the same. 9 PPER ¶9168 [Emphasis added]

A copy of the above-cited decision is attached hereto as Appendix "E."

It is well settled that the waiver of bargaining rights by a Union will not be lightly inferred, and that any such waiver must clearly and unmistakably show that any obligation to bargain has been discharged. School District of the City of Erie, 9 PPER ¶9123 (1978); City of Pittsburgh School District, 9 PPER ¶9168 (1978); Caravelle Boat Company, 227 NLRB 1355 (1977); Timken Roller Bearing Company v. NLRB, 325 F.2d 746 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964); Tide Water Associated Oil Company, 85 NLRB 1096 (1949). The Board's policy on the issue of waiver is the same as that of the National Labor Relations Board, which is responsible for enforcing the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq., in the private sector.

Here, it must be remembered that the unlawful action taken by the Employer predates the contract which includes the zipper clause. The zipper clause allows the School District to make only those changes which originate after execution of the contract. The smoking ban is firmly rooted in actions taken by the Employer prior to the signing of that contract. The Board has already issued its order directing the School District to bargain with the Union concerning the smoking ban. It would be a mockery of the remedial powers of the Board and the Court to think that the Employer could evade the Board's Order by simply repromulgating the same rule as soon as this case is finished. The terms of the Board's Order make it very clear that the School District may not do this. Contrary to the assertion of the Court

of Common Pleas, if this Court affirms the Order of the Board, the Employer must bargain concerning the ban on smoking. There is nothing moot or futile concerning this present appeal.

In its orginal decision, the Court of Common Pleas overestimated the legal effect of the zipper clause by relying on Board case law which has recently been reversed. In PLRB v. Commonwealth of Pennsylvania (Venango County Board of Assistance), 11 PPER ¶11223 (1980) (on appeal to Commonwealth Court), the Board has stated that a broadly-worded zipper clause will not relieve an employer of the duty to bargain unless the record shows that the union "consciously yielded or clearly and unmistakably waived its interest in the matter." Id., citing Unit Drop Forge Division, 171 NLRB 600 (1968). In modifying its policy toward zipper clauses, the Board expressly cites the policy of the National Labor Relations Board, e.g., Pepsi-Cola Distributing Co., 241 NLRB No. 136 (1979), as well as that of other labor boards. A copy of the Board's decision is attached hereto as Appendix "F."

The facts of Venango County Board of Assistance are virtually identical to those involved herein. The employer had unilaterally imposed a no-smoking ban upon its employees. The contract contained a broad integration clause, although the specific issue of smoking had never been discussed by the parties at negotiations. On those facts, the Board held that the employer committed an unfair labor practice, notwithstanding the language of the zipper clause.

In the case at bar, the Board found that at no time prior to implementation of the smoking ban did the Union and Employer discuss the issue. The Union has not, therefore, consciously yielded or clearly and unmistakably waived its interest in the matter, and the integration clause does not relieve the Employer of its obligation to bargain.7/

Needless to say, the Board's new policy with respect to zipper clauses means that if the Employer revoked the ban today, they could not simply reinstate it tomorrow. These proceedings are, therefore, not an "utter waste" as the Court of Common Pleas states. Slip Op. at 8-9. Indeed, these proceedings will enforce the Employer's duty to bargain which goes to the heart of the labor-management relationship envisioned by Act 195, 43 P.S. §1101.701.

In its Cross-Petition for Allowance of Appeal, at 6-7, the School Board mistakenly relies on County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.3d 849 (1977), for the proposition that a broadly-worded

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7/ There is also nothing in the Record to show or permit an inference that the Union waived its right to bargain over the imposition of a smoking ban. The Record shows that the Union filed its Charge of Unfair Practices on the matter on October 28, 1976, just prior to the implementation of the smoking ban, and some six weeks prior to the signing of a collective bargaining agreement. The School District was thus on notice as to the Union's opposition to the unilateral implementation of the smoking ban. See, City of Pittsburgh School District, supra.

zipper clause must be given retroactive effect. The issue before the Court in Allegheny County was radically different. There, an arbitrator upheld a benefit conferred on the employees by past practice, even though the contract did not refer in any way to the practice. This Court, in vacating the arbitrator's award, noted that an arbitrator's authority is derived from the contract and his award must draw its essence from the collective bargaining agreement.

Here, the issue is not the existence of a contractual benefit, but the duty of the employer to bargain as to any term or condition of employment under Section 701 of Act 195. The courts have accepted the separate responsibilities of arbitrators and the PLRB. Richland Education Association v. PLRB, 43 Pa. Cmwlth. 550, 403 A.2d 1008 (1979). An arbitrator enforces private rights derived from contract. The Board enforces the public policies and statutory rights embodied in Act 195. Allegheny County dealt only with an arbitrator's contractual authority, not the statutory duty to bargain, and is therefore not relevant here.

The School District had a mandatory duty to bargain at the time of the unilateral imposition of the smoking ban. A subsequently negotiated zipper clause does not relieve it of that duty, and the decision of the PLRB should be affirmed on that issue.

CONCLUSION

For all the above-stated reasons, it is respectfully submitted that the decision of the Commonwealth Court be reversed and that the Final Decision and Order of the Pennsylvania Labor Relations Board be reinstated.

Dated this 14th day of December 1981.

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CERTIFICATE OF SERVICE

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