

Compelling Need for DEHS General Administration Manual Chapter 1-60
Policy to Establish a Smoke-Free Environment in EHS Buildings

BACKGROUND

The duty to bargain in good faith under 5 USC section 7117 extends in general to matters which are the subject of agency rules and regulations which are not Government-wide rules and regulations, to the extent they are not inconsistent with Federal law. When there is a "compelling need," however, for particular agency rules and regulations to prevail, vis a vis particular conflicting bargaining proposals, such rules and regulations will stand as bars to negotiation on such proposals. Therefore, internal agency rules and regulations, such as the Department of Health and Human Services (DEHS), General Administration Manual chapter involved here, may bar negotiations on conflicting collective bargaining proposals when, under the Statute, a compelling need for such a result is determined to exist by the Authority pursuant to section 2424.11 under subpart B of its regulations. American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA 451 (1980).

REVIEW OF COMPELLING NEED CASE HISTORY

The question of whether a union's proposal falls within the duty to bargain under 5 USC section 7117(a)(1), or whether, the duty to bargain does not extend to the proposal in view of agency rules and regulations, pursuant to section 7117(a)(2), has typically involved matters of financial concern to the employer. See, for example, National Association of Government Employees, Local R14-62 and U.S. Army Dugway Proving Ground, Dugway, Utah, 18 FLRA 307 (1985), National Association of Government Employees, Local R14-62 v. FLRA, No. 85-2098 (10th Cir., July 23, 1985), reversed on remand, 26 FLRA 59 (1987), Lexington-Blue Grass Army Depot, Lexington, Kentucky and American Federation of Government Employees, AFL-CIO, Local 894, 24 FLRA No. 6 (1986), and American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), aff'd on other grounds, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

In these cases, and others, the Authority examined financial considerations to determine whether the agencies' regulations satisfied the compelling need criterion set forth in section 2424.11(a) of the Authority's regulations. The Authority determined, that while financial considerations can be relevant, a demonstration of monetary savings alone is not sufficient to establish that a rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of the functions of an agency in a manner consistent with the requirements of an efficient and effective Government. Moreover, the Authority reasoned, the language and legislative history of the Statute supported their conclusion that a broad balancing of factors is appropriate in evaluating compelling need assertions. It is clear from the legislative history of the Statute that Congress intended the regulation to bar negotiations only on narrow grounds.

TI DN 0015832

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TI DN 0015832

STATEMENT OF CASE

This case represents a perfect example of the narrow grounds on which Congress intended the compelling need bar to negotiations to apply. Section 2424.11 of the Authority's regulations state:

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

(b) omitted.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other authority, for which implementation is essentially nondiscretionary in nature.

This case involves the issuance of Department of Health and Human Services General Administration Manual (GAM) Chapter 1-60, dated August 25, 1987, Subject: Policy on Smoking in HHS Occupied Buildings and Facilities. The purpose of this Chapter is to provide a Departmentwide policy on smoking in HHS-occupied buildings and facilities. The Department's policy is to establish a smoke-free environment in all HHS building space.

As background, DHHS is the Federal government's principal agency for furthering the health of Americans and providing them with essential human services. The health risks of smoking and exposure to smoke are clearly documented by reports of the Surgeon General. The 1986 Surgeon General's Report on The Health Consequences of Involuntary Smoking found that involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers; and, the simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke. The Department has determined that it is essential, in the accomplishment of its mission, that it provide a smoke-free environment in all HHS owned and leased building space.

Because the U.S. Public Health Service (PHS) carries out the mission of DHHS to have a nationwide program of disease prevention and is the organizational locus of the Surgeon General, who issues annual reports warning the nation of the dangers of cigarette smoke, including secondary smoke, it is absolutely critical that it provide a smoke-free work environment for its own employees as well as the general public which may visit any of its facilities. Accordingly, the Office of the Assistant Secretary for Health (OASH or the agency) asserts that the union proposal in question, dated August 21, 1987, and presented to the agency August 31, 1987, is inconsistent with the Departmentwide regulation, GAM Chapter 1-60, dated August 25, 1987, for which a compelling need exists.

TI DN 0015833

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The agency asserts that a compelling need exists under the criteria set forth in sections 2424.11(a) and (c) of the Authority's regulations. We believe that this regulation is not only essential, as distinguished from helpful or desirable, to the accomplishment of the mission of PHS and the execution of functions of the PHS in a manner which is consistent with the requirements of an effective and efficient Government, but also, implements a mandate to PHS under 42 USC, the Public Health Service Act, and related legislation, such as the Comprehensive Smoking Education Act of 1984, Public Law 98-474, and the mission of the agency and PHS in general, for which implementation is nondiscretionary in nature.

MANDATE AND MISSION OF THE AGENCY

Title XVII of the Public Health Service Act, mandates the Secretary of HHS to: (1) formulate national goals, and a strategy to achieve such goals, with respect to health information and health promotion, preventative health services, and education in the appropriate use of health care, (2) omitted, (3) undertake and support necessary activities and programs to --

(A) incorporate appropriate health education components into our society, especially into all aspects of education and health care,

(B) increase the application and use of health knowledge, skills, and practices by the general population in its pattern of daily living, and

(C) establish systematic processes for the exploration, development, demonstration, and evaluation of innovative health promotion concepts;

(4) through (8) omitted, (9) use such other authorities for programs respecting health information and health promotion, preventive health services, and education in the appropriate use of health care as are available and coordinate such use with programs conducted under this title; and (10) establish in the Office of the Assistant Secretary for Health an Office of Disease Prevention and Health Promotion, which shall --

(A) coordinate all activities within the Department which relate to disease prevention, health promotion, preventive health services, and health information and education with respect to the appropriate use of health care;

(B) coordinate such activities with similar activities in the private sector;

(C) establish a national information clearinghouse...relating to such matters; and

(D) support projects, conduct research, and disseminate information relating to preventive medicine, health promotion, and physical fitness and sports medicine.

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The agency asserts that a compelling need exists under the criteria set forth in sections 2424.11(a) and (c) of the Authority's regulations. We believe that this regulation is not only essential, as distinguished from helpful or desirable, to the accomplishment of the mission of PHS and the execution of functions of the PHS in a manner which is consistent with the requirements of an effective and efficient Government, but also, implements a mandate to PHS under 42 USC, the Public Health Service Act, and related legislation, such as the Comprehensive Smoking Education Act of 1984, Public Law 98-474, and the mission of the agency and PHS in general, for which implementation is nondiscretionary in nature.

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(D) support projects, conduct research, and disseminate information relating to preventive medicine, health promotion, and physical fitness and sports medicine.

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In addition to the Office of the Assistant Secretary for Health, and the Office of Disease Prevention and Health Promotion, these functions are carried out by various agencies of PHS and offices within OASH as part of the statutory mandate of the agency.

The more specific mission statement of OASH includes "providing leadership, coordination, and direction of a nationwide program of disease prevention and health promotion." 48 FR, 2442, 1/19/83. Prior to broadening the mission to all disease prevention and health promotion, the mission statement of OASH included: "Provides leadership, coordination, and direction of a nationwide program aimed at informing Americans about the dangers of smoking." 42 FR, 61318, 12/2/77.

The mission and function PHS and the predecessor agencies of OASH have long included eliminating smoking as a major contributor to the incidence of a variety of diseases and a major reason why people die from these diseases. Over the past 30 years, biomedical researchers, physicians and PHS personnel have generated an inventory of more than 50,000 studies on smoking and health. These studies prove a causal relationship between cigarette smoking and 24 disease conditions. The medical evidence is well documented and overwhelming; smoking is the leading preventable cause of disease and death in this country, and involuntary smoking is now included among these causes.

The statutory mandate contained in Title XVII of 42 USC, requires this agency to take specific steps with respect to disease prevention, to educate our society in all aspects of health care, and increase the application and use of health knowledge and practices by the general population in its pattern of daily living. In the areas of cigarette smoking in general and smoking in the workplace in particular, this agency has an absolute requirement, under the law, to take specific action. Since we know the relationship between smoking and disease, we are required to take a leadership role in demonstrating to the American people the means and methods of preventing smoking and the diseases it produces and thereby promoting good health. Therefore, under the authority of the law, we have a mandate to lead in the elimination of smoking in our society, and, at a minimum, to undertake this responsibility in the workplace.

The regulation in question, GAM 1-60, and the agency's actions with respect to implementing this regulation are inextricably tied to the statutory mandate outlined above and the mission of PHS and the agency. That is, to formulate national goals and a strategy to achieve such goals with respect to health information and health promotion, and undertake and support necessary activities and programs to --

- (A) incorporate appropriate health education components into our society, especially into all aspects of education and health care,
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TI DN 0015835

In addition to the clear mandate contained in Title XVII of the Public Health Service Act and the mission statement of PHS and OASH, under which implementation of the regulation, GAM 1-60, is essentially nondiscretionary, the evidence also demonstrates that this regulation is essential to the accomplishment of this mission.

For 20 years cigarette packages and all cigarette advertising have carried the warning: "The Surgeon General has determined that smoking is dangerous to your health." That label was the result of the first "Surgeon General's Report on Smoking and Health," released in 1964 by Surgeon General Luther L. Terry. By the time the present Surgeon General, C. Everett Koop, assumed his position in 1981, another 12 reports had been released by three more Surgeons General: Drs. Stewart, Steinfeld and Richmond. Since 1981 the agency has produced four more reports. They have documented the relationship between smoking and cancer; smoking and cardiovascular disease; smoking and lung disease; smoking, cancer and chronic lung disease among working people; and the previously cited 1986 Surgeon General's Report on the health consequences of involuntary smoking.

These reports represent the most visible and well known DHHS efforts related to smoking and health. They are a manifestation of the OASH mandate. In carrying out this mandate, PHS, OASH and within OASH, the Office of Disease Prevention and Health Promotion, have embarked on a campaign against smoking in the workplace. The Federal government, particularly this agency, is spending millions of dollars annually to make America and the American workplace smoke-free. Perhaps our second most visible effort in this area is GAM 1-60, which demonstrates to leaders in the public and private sectors of this agency's commitment and seriousness with respect to our position on smoking in the workplace, and through implementation of GAM 1-60, PHS is marketing the benefits of the smoke-free work environment. Marketing the smoke-free workplace, through implementation of GAM 1-60, is a principal part of the function of this agency, essential to the accomplishment of its mission, and GAM 1-60 is the agency rule for which the Authority will have to determine a compelling need exists.

Regarding the relationship between GAM 1-60 and the mission of the Agency, Dr. Koop leaves no question on the function of PHS in eliminating smoking from the workplace. For example, in a May 23, 1986, address to a Conference on Smoking in the Workplace, at Glen Ellyn, Illinois, he stated:

I can assure them (leaders of the cigarette industry) -- and I want to assure the American people as well -- that the Public Health Service and its Surgeon General will do whatever we can, consistent with our commitment and with the law, to help those industry leaders become the kind of employers and the kind of citizens who thrive in a business that enhances life...not the kind that invites death.

TI DN 0015836

In addition to the clear mandate contained in Title XVII of the Public Health Service Act and the mission statement of PHS and OASH, under which implementation of the regulation, GAM 1-60, is essentially nondiscretionary, the evidence also demonstrates that this regulation is essential to the accomplishment of this mission.

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In the 1985 publication, A Decision Maker's Guide to Reducing Smoking at the Worksite, J. Michael McGinnis, M.D., Deputy Assistant Secretary for Health, and Director, Office of Disease Prevention and Health Promotion, OASH, PHS, DHHS, introduces the report, in part:

Given all the evidence - both scientific and anecdotal - we believe you will come to the conclusion that your organization cannot afford to wait any longer. For the sake of your business and your employees, it's time to join the growing number of companies that state, "NO SMOKING."

Yet Dr. McGinnis would be required to allow smoking in the workplace under the present union smoking proposal, which obviously undermines the ability of the Office of Disease Prevention and Health Promotion (ODPHP) and OASH to demonstrate their ability to take decisive action in this area and thereby accomplish the agency mission. The OASH mission is "providing leadership, coordination and direction of a nationwide program of disease prevention and health promotion." The ODPHP mission, as stated in law, is to coordinate all activities in the Department which relate to disease prevention and health promotion, coordinate such activities with similar activities in the private sector, and support projects relating to preventive health. The agency asserts that its inability to carry out a leadership role in this area seriously impairs its ability to accomplish its mission, and thereby satisfies the criteria set forth in section 2424.11(a) of the Authority's regulations.

CONCLUSION

It is inconceivable that Congress intended Federal agencies to negotiate actions which it takes in carrying out its mission. Such a finding in this case would severely undermine, if not critically impair, this Agency's ability to accomplish its statutory mandate.

Impairing the PHS mission to promote the health of Americans and prevent diseases caused by smoking, including secondary smoke, by subjecting to the negotiation process, the ability of the agency to lead the Nation in an effort to eradicate smoking, are the grounds for which Congress intended the Authority to issue regulations to bar negotiations on the basis of compelling need. Accordingly, the compelling need of the regulation in question, GAM 1-60, satisfies the criteria of 5 USC 7117(a)(2) and 5 CFR 2424.11(a) and (c), and therefore a duty to bargain, as alleged by the union, does not exist.

Prepared by: OASH/OM/OPM/OPOO/ETucker/11-25-87/Doc. 48860.

TI DN 0015837

In the 1985 publication, A Decision Maker's Guide to Reducing Smoking at the Worksite, J. Michael McGinnis, M.D., Deputy Assistant Secretary for Health, and Director, Office of Disease Prevention and Health Promotion, OASH, PHS, DHHS, introduces the report, in part:

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