

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL BROTHERHOOD OF TEAMSTERS :
LOCAL 8 :
v. : CASE NO. PERA-C-23-181-E
PENNSYLVANIA STATE UNIVERSITY :

PROPOSED DECISION AND ORDER

On August 2, 2023, the International Brotherhood of Teamsters, Local 8 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Pennsylvania State University (Penn State or University) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (Act or PERA). The Union specifically alleged that, on or about July 5, 2023, the University violated its duty to bargain by unilaterally implementing a ban on the use of all tobacco products by bargaining unit employes in the Office of the Senior Vice President for Research.

On September 6, 2023, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of December 5, 2023, in Harrisburg. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present testimony, admit documents, and cross-examine witnesses. On January 22, 2024, the Union filed its post-hearing brief. On February 2, 2024, the University filed its post-hearing brief.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The University is a public employer within the meaning of Section 301(1) of PERA. (N.T. 15-16)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 15-16)
3. The Union is the exclusive collective bargaining representative of a bargaining unit of Technical Service employes at Penn State campuses and facilities. Jonathan Light (Light) has been the President of the Union, since 2006. As such, Light deals directly with Penn State's Office of Labor and Employe Relations (LER). (N.T. 17-18; JX-1)
4. The University and the Union are parties to a collective bargaining agreement (CBA) effective from July 1, 2021 through June 30, 2024. (Joint Exhibit 1)
5. Unknown to the University, bargaining unit members have been using smokeless tobacco in the Office of Senior Vice President for Research. Light worked in the animal research rooms between 2001 and 2005, and he chewed tobacco during that time. He was never prohibited from chewing tobacco during his time there. The Union was unaware of the University directing any

bargaining unit employes to stop using tobacco in the animal research rooms prior to July 5, 2023. (N.T. 37-38)

6. On or about July 5, 2023, a non-bargaining unit employe observed a bargaining unit employe spitting tobacco juice into a can in an animal research room. Donalee Martin McElrath (McElrath) is the direct supervisor of the Animal Caretaker Technicians. On July 5, 2023, McElrath sent an email to Animal Caretaker Technicians attaching the Penn State tobacco policy No. AD32. (N.T. 21-22, 38-39, 113-114, 174-175; UX-1)

7. University Policy AD32, initially promulgated in 1989, was revised several times and applies to the whole University. In August 2018, AD32 was again revised and comprehensively banned all tobacco use. AD32 provides that "[s]moking and the use of tobacco are prohibited in and on all University owned or leased properties, facilities, and vehicles. The policy includes all University locations." The policy expressly exempts tobacco use for the purpose of research and cultural and religious uses. It is posted on the University's website and is available to all staff and students. The policy further defines tobacco as follows:

all tobacco-derived or containing products, including and not limited to cigarettes (e.g., clove, bidis, kreteks, electronic cigarettes, cigars and cigarillos) hookah smoked products, pipes and oral tobacco (e.g., spit and spitless, smokeless, chew, snuff) and nasal tobacco. It also includes any product intended to mimic tobacco products, contain tobacco flavoring or deliver nicotine.

(N.T. 149-150; UX-1)

8. In an email response to Union member Jodah Reed (Reed), McElrath stated that the rule "is directly from the [Guide for the Care and Use of Laboratory Animals (Guide)], the document we must abide by as an accredited laboratory animal facility." In a later response on July 5th, McElrath informed Reed as follows:

The rule's premise is to keep people from putting their hands near their eyes or mouth when working with animals to avoid giving themselves zoonotic disease, ie Ecoli, salmonella, etc[.] Therefor[e], I would advise that any tobacco less [sic] product that would be put in someone's mouth not be used in an animal holding room, procedure room and washroom where you would [or] could come in contact with feces. But you are correct it is not spelled out in the policy.

(UX-1)

9. After this email exchange on July 5th, Jonathan Emel (Emel), a bargaining unit member in the Office of the Senior Vice President for Research, called Light complaining of the email prohibiting the use of tobacco in animal rooms. Thereafter, Light called Melissa Camacho-Heenan (Camacho-Heenan), the Human Resources Manager in LER to discuss the matter. Light then met with bargaining unit members. (N.T. 19, 24-25)

10. Later in July or early August, Camacho-Heenan called Light stating that the University understands its bargaining obligation over tobacco use, but the Research Unit is insisting that it is a federal mandate. No bargaining ever occurred over the ban, and the Union never agreed to the

continued ban on all tobacco use in animal Research Laboratories and rooms. (N.T. 26-27, 53)

11. Light testified that the University never provided a federal law that banned the use of smokeless tobacco in the animal research unit. (N.T. 28)

12. In a May 20, 2021 bargaining proposal, the University proposed applying Policy No. AD32 to bargaining unit employees. The University specifically proposed adding a new article to the parties' CBA stating: "The provisions of University policy, AD32, Smoking and Tobacco Policy, as it may be modified or amended from time to time, shall apply to members of the bargaining unit." The ban on all tobacco use did not apply to the bargaining unit employees at that time. The Union never agreed to applying AD32 to its members, and the policy was not included in the 2021 CBA. (N.T. 36-37; JX-1, UX-3)

13. Penn State has an Applied Research Laboratory (ARL) that does research for the United States Navy. The University receives federal funding from the Navy for that work. In 2017, the ARL attempted to bargain mandatory drug testing for bargaining unit employees working in the ARL. During those bargaining attempts, the University represented to Union negotiators that, if they could not get mandatory drug testing, they would lose federal funding. After reviewing the statutes and other materials presented by Penn State, the Union concluded that nothing mandated drug testing, and the Union did not agree to the mandatory drug testing. Penn State never lost federal funding for ARL Navy research. Penn State performs mandatory drug tests on the faculty at ARL, but not bargaining unit employees. (N.T. 41-42)

14. In the University's Pell Laboratory, researchers engage in gnotobiotic studies on animals injected with dangerous and contagious microorganisms¹. There is also an airborne infection hazard at the facility requiring masks and ventilators. In that facility, researchers and bargaining unit employees must don a Tyvek suit before entering animal rooms and shower off before doffing the suit. In these areas, there is no traditional open or exposed trash can, and biohazards are placed in sealed red bags. (N.T. 45-46; 50-51, 65-66, 198, 208)

15. In addition to the ARL and the Pell Laboratories, employees can generally work in a standard mouse or rat room, where the animals are contained in a plastic enclosed space, without any protective equipment. Where employees are exposed to animals in open air cages they are required to at least don a lab coat. (N.T. 65-66)

16. Bargaining unit employees can use smokeless tobacco in break rooms, hallways, offices, and outside spaces where there is no animal presence. Animals are not housed in rooms containing mechanical equipment or controls for heating, ventilating and air conditioning. (N.T. 49-50, 66-67)

17. The Union wants bargaining unit employees to be able to use smokeless tobacco even in the Pell Laboratory rooms. The Union posits that, even inside of a suit, the employee can swallow his/her tobacco juice instead of expelling it. (N.T. 52)

¹ Gnotobiotics is the study of animal organisms living in controlled conditions when inoculated with known microorganisms.

18. Dr. Todd Jackson (Jackson) is the Director of the University's Animal Resource Program. He is also a researcher in veterinary and biomedical science. (N.T. 55-56)

19. The United States Government passed the Health Research Extension Act of 1985 and therein directed the National Institute for Health (NIH) to create rules for operating research facilities. 42 USCS § 289(d). The law requires each research facility seeking a grant to have a local institutional animal care and use committee (IACUC) to provide assurances to the NIH Director that the entity is in compliance with the established guidelines and that the committee meets the requirements of the local IACUC. 42 USCS § 289(d)(c). The Federal Office for Laboratory Animal Welfare (OLAW) was created to provide the mandated oversight of local research entities. The assurance committee or local IACUC must assure OLAW that the local facility is in compliance with guidelines established by the NIH for the care and use of research animals. *Id.* OLAW requires an institution to develop an occupational health and safety program for animal handling. Additionally, the Occupational Safety and Health Administration (OSHA) regulates animal research facilities like any other employer. (N.T. 60-62, 162)

20. If the Director of NIH determines that the conditions of animal care, treatment, or use in a research facility do not meet applicable guidelines and the entity failed to take corrective action, the Director shall revoke or suspend funding. 42 USCS § 289(d)(d). Under the statute, a failure or refusal to comply with established guidelines could result in a revocation of funding. Absent federal funding, Penn State would be unable to maintain its current levels of animal research. (N.T. 62, 91, 106, 147, 187)

21. The IACUC conducts inspections at least semi-annually. If the IACUC at Penn State finds a safety or health issue, it must report the matter to OLAW. (N.T. 61-63, 150, 191)

22. The Penn State IACUC has implemented IACUC Policy 2, which provides as follows: "Penn State Personnel, including students, are not permitted to have food/beverages intended for human consumption or to use tobacco products in any animal facilities except for those areas identified and designated by supervisors for that specific purpose." (N.T. 153; PSU-6)

23. At the time of hire, researchers, animal care staff, and janitors who work in animal rooms are required to take online training. The University hired Jon Emel (Emel) into the position of Grade 8 Animal Care Technician, in February 2023. Emel did not receive any training on OSHA regulations or any other government regulations. Emel did not receive or see a copy of IACUC Policy 2, which prohibits the use of tobacco products in animal facilities. He was not trained on the policy or on anything related to tobacco use. Emel is aware of bargaining unit employees, prior to July 5, 2023, using tobacco in the animal research unit, and he is unaware of anyone being told that they could not use tobacco in the animal research rooms. (N.T. 151-156, 215-218)

24. The University and its researchers conducting animal studies need to control the environment in animal rooms and maintain certain constant environmental conditions to reduce the risk of unknown variables affecting experiment results. (N.T. 67)

25. The University maintains strict temperature controls within 2 degrees of a certain setting to ensure a variable free environment in the

animal rooms and laboratories. Humidity must remain between 30% and 70%. Airflow must be fresh from the outside, not recirculated from other interior spaces. For example, air from an office of someone wearing cologne could contaminate the laboratory air in animal rooms having an impact on experiments. (N.T. 67-68; 117-118)

26. Penn State researchers perform a lot of animal behavioral studies in the animal buildings. Tobacco use releases scents that, when detected by the animals, could affect the animals' behavior and skew the results of the experiments. (N.T. 68, 74)

27. In some of the animal laboratories, University researchers conduct studies with dangerous chemicals, such as Azoxymethane and Bromodeoxyuridine, that give an animal cancer, so researchers can study the disease process and the efficacy of experimental treatments. (N.T. 69-70; PSU-7)

28. These types of chemicals pose a serious health risk to employees if the chemical gets on their hands and the employee proceeds to place tobacco in his/her mouth or wipe tobacco juice dribble from their mouths. (N.T. 70, 118-120)

29. Clostridium Difficile (C-Diff) is a bacterium that causes severe diarrhea in people. C-Diff is given to lab animals to study treatments of the problem. Some research studies give Salmonella to lab animals to study food poisoning and to develop treatments for people. Some animals naturally carry Zoonotic or Zoobiotic agents, such as Cryptosporidium, which causes severe diarrhea in humans and which can result in hospitalization. (N.T. 71-72; PSU-7)

30. The hazardous chemicals, pathogens, and agents given to the animals are excreted in feces by the animals into the bedding in their cages. Handling and cleaning the cages and the animals presents dangers to the Animal Care Technicians. (N.T. 199-200)

31. All pathogens and chemicals used in the animal research lab pose a risk to employees and their families. If an employee places his/her hands near his/her eyes, nose, mouth or face while inserting or removing tobacco or wiping tobacco juice from their mouth, the employee could easily contract one of the serious pathogens used in the animal lab experiments and develop a serious and potentially fatal infection. (N.T. 73-74)

32. Viruses like influenza, Zika, and ADENO Associated Virus are given to the animals. The animals can transmit the virus or illness to employees who can then transmit those illnesses to their families, if employees are placing their hands near their face. (N.T. 77)

33. To eliminate these risks, there is no eating, drinking, or chewing gum in animal rooms to protect both the employees and the integrity of the research, especially in animal behavioral studies. The food given to the animals subject to biomedical studies is kept in a controlled environment under certain consistent conditions in a special storage room. (N.T. 73-74)

34. The Occupational Health and Safety in the Care and Use of Research Animals, copyrighted in 1997 by the National Academy of Sciences, is a report that sets forth best practices for working near laboratory animals. (N.T. 79-82; PSU-2)

35. The report distinguishes between rules and guidelines as follows:

Rules are necessary to ensure safety in the workplace. Rules governing training of personnel, adherence to work procedures, use of disinfectants and decontaminants, access, waste disposal, use and maintenance of equipment and safety devices, emergency procedures, reporting of accidents and exposures, and personnel behavior (smoking, eating, and hand-washing) should be rigidly enforced. Rules are "musts," whereas guidelines are recommendations and suggestions that allow for some judgment. For example, "No smoking, eating, or drinking in the animal room" would be a rule, whereas "The recommended use of chemical restraint before the use of hands-on procedures involving aggressive animals" would be a guideline.

(PSU-2)

36. The report further repeats certain prohibitions that are important basic tenets of working around research animals. It provides that "Most-helpful practices to prevent occupationally acquired infections associated with the care and use of research animals are the following: . . . Keep hands away from mouth, nose, and eyes." The report also provides: "Never eat, drink, smoke, handle contact lenses, apply cosmetics, or take or apply medicine in areas where research animals are kept." The report again provides for practices to reduce exposure to hazardous agents through ingestion as follows: "Do not smoke, eat, or drink in work areas used for the care and use of research animals," and "Keep hands and contaminated items away from mouth." (N.T. 85-86; PSU-2)

37. The purpose of these rules is to prevent employees from inadvertently exposing themselves to agents from the animals or interfere with agents given to the animal experimentally thereby interfering with research results. (N.T. 81, 85-86)

38. In 2011, the National Academy of Sciences issued a report called "The Guide for the Care and Use of Laboratory Animals (Guide)." The Guide contains provisions for behavior in animal research rooms prioritized into "MUST, SHOULD, AND MAY." (N.T. 93; PSU-3)

39. According to the Guide:

Must indicates actions that the Committee for the Update of the *Guide* considers imperative and mandatory duty or requirement [sic] for providing humane animal care and use. *Should* indicates a strong recommendation for achieving a goal; however, the Committee recognizes that individual circumstances might justify an alternative strategy. *May* indicates a suggestion to be considered.

. . . . Because the *Guide* is written in general terms, IACUCs have a key role in interpretation, implementation, oversight, and evaluation of institutional animal care and use programs.

(PSU-3) (emphasis original)

40. The Guide also provides that "[s]pecial facilities and safety equipment may be needed to protect the animal care and investigative staff,

other occupants of the facility, the public, animals, and the environment from exposure to hazardous biologic, chemical, and physical agents used in animal experimentation." (N.T. 97-98; PSU-3)

41. The Personal Hygiene section of the Guide provides that "[p]ersonnel should not be permitted to eat, drink, use tobacco products, apply cosmetics, or handle or apply contact lenses in rooms and laboratories where animals are housed or used." The Guide also states that "[m]icroenvironmental conditions can directly affect physiologic processes and behavior and may alter disease susceptibility." It also says that "[i]t is frequently necessary to maintain animals in an environment, especially during periods of testing and observation, with strict control over auditory, visual, tactile, and olfactory stimuli." (N.T. 97-98; PSU-3)

42. The Guide is the basis for the University's prohibition of all tobacco use in animal rooms, and more specifically, the Personal Hygiene section, which has 3 citation references: DHHS 2009, NRC 1997, OSHA 1998a. (N.T. 126-130, 171-172)

43. DHHS 2009 is the 6th edition of the CDC's Biosafety in Microbiological and Biomedical Laboratories (BMBL) publication. The BMBL specifically states that it is an advisory document recommending best practices for the safe conduct of work in biomedical and clinical labs from a biosafety perspective. It further provides that the BMBL is not intended to be a regulatory document while recognizing that some may use it that way. (N.T. 128-130; UX-4)

44. NRC 1997 is a publication from the National Academies of Medicine titled: The Occupational Health and Safety in the Care and Use of Research Animals. This publication, like the Guide, provides that "[r]ules are 'musts,' whereas guidelines are recommendations and suggestions that allow for some judgement. For example, 'No smoking, eating, or drinking in the animal room' would be a rule." (N.T. 131-132; UX-5)

45. OSHA 1998a, as referenced, contains OSHA regulations in 29 CFR. Section 1910, Subpart G, addresses environmental controls in animal rooms. The record does not establish the specific controls that OSHA has in place for animal rooms. (N.T. 133; UX-6)

46. The purpose of rules against eating, drinking, applying cosmetics, smoking, and adjusting glasses or contact lenses is to keep hands away from one's mouth, nose, eyes, and face until gloves are removed and the employe is outside of the animal room. Employes can leave the animal room to go to the bathroom and go outside to drink. All these rules are concerned with preventing the transfer of various hazardous chemicals or pathogens to employes through ocular, dermal, or oral exposure. (N.T. 136-137, 195-197)

47. James Crandall (Crandall) is the Penn State Senior Director for Environmental Health and Safety. He oversees workplace safety by performing safety inspections of facilities to ensure compliance with OSHA and EPA regulations. In animal spaces where blood borne pathogens are present, Crandall applies OSHA regulations that mandate compliance. OSHA regulation 1910.1030 provides as follows: "Eating, drinking, smoking, applying cosmetics or lip balm, and handling contact lenses are prohibited in work areas where there is a reasonable likelihood of occupational exposure." 29 CFR 1910.1030(d)(2)(ix). OSHA regulation 1910.1003-13, regulating areas where carcinogens are present, expressly prohibits any use of tobacco products.

This Section provides that "[s]torage or consumption of food, storage or use of containers of beverages, storage or application of cosmetics, smoking, storage of smoking materials, tobacco products or other products for chewing, or the chewing of such products are prohibited in regulated areas." 29 CFR 1910.1003-13(d)(3). (N.T. 193-194; PSU-14)

48. The OSHA 3143 Booklet on Industrial Hygiene recommends some best practices which include: "mandating that eating, drinking, smoking, chewing tobacco or gum, and applying cosmetics in regulated areas be prohibited." (N.T. 200; PSU-14)

49. The Environmental Protection Agency (EPA) has similar regulations pertaining to best practices in areas containing pesticides requiring employers to display requirements to "wash before eating, drinking, using chewing gum or tobacco or the toilet." 40 CFR 170.311(a)(3)(ii). Pesticides are used in Penn State animal research rooms. (N.T. 2007; PSU-14)

50. Since at least 2003, the University's IACUC has had a policy prohibiting eating, drinking, or using tobacco products in animal facilities. (N.T. 111; PSU-6)

51. The University's IACUC Policy 2 and the smokeless tobacco ban currently applies to bargaining unit employes in a small part of the University's property where animals are housed and used for experimentation. There are approximately 12 animal research facilities and farms. Some buildings have approximately 20 animal rooms and others have as little as 2 animal rooms. There are approximately 14 animal caretakers. (N.T. 99)

52. The job description for Animal Laboratory Technician lists many important duties and responsibilities required of the Technicians including, but not limited to, the following: collecting blood and tissue samples; handling animals; preparing and providing special diets; monitoring and preparing sterilized equipment; cleaning, changing and sanitizing all animals' housing and equipment. (PSU-4)

53. The job description for Animal Caretaker also lists many important duties and responsibilities required of the Caretakers including, but not limited to, the following: providing general care; feeding and watering animals; assisting in holding animals for weighing, clipping and administering drugs; performing routine medication and nursing procedures; cleaning and sanitizing cages, animal rooms, and related service areas. (PSU-5)

54. A single incident of tobacco use in an animal room by a bargaining unit member may not have to be reported and the employe would be retrained. The incident that gave rise to the enforcement of the tobacco ban in this case was not reported. Repeated tobacco use in animal rooms would have to be self-reported to OLAW. (N.T. 110-114)

55. The University does not prohibit employes from wearing eyeglasses or contact lenses in animal rooms. The University expects employes to situate lenses or eyeglasses before entering the animal rooms and not touch near their faces after entering the animal room. (N.T. 123-124; PSU-2, 6)

56. Melanie Lucas (Lucas) is the Director of the Penn State IACUC, and oversees staff. The Association for the Assessment and Accreditation of Laboratory Animal Care (AAALAC) accredits Penn State's animal research

program. Lucas ensures compliance with federal regulations and AAALAC accreditation requirements. She is a nationally certified professional IACUC Administrator. The IACUC conducts walk-through inspections of animal facilities to see if employes and students are following the regulations. (N.T. 115, 139-141; PSU-8)

57. Lucas credibly testified that using chewing tobacco in animal rooms is a concern that is reportable to the IACUC which would determine whether it violates policies, procedures, and/or regulations. (N.T. 143-145)

58. In animal research studies, it is important to control, if not eliminate, the risk of unknown variables affecting a study. Studying an animal's behavior or one that has been given a particular disease or both requires the animal to be unaffected by other agents, chemicals, or odors. There are strict controls on a research experiment to ensure that the data collected is reliable and not altered by unknown chemicals, tobacco, or food that could jeopardize the research results or forfeit the life of the animal. (N.T. 160-161)

59. Nicotine is identified as a controlled chemical used in animal research. It is only administered to animals as part of specific controlled research experiments in which the quantities are known and measured. When used in research, it is exempt from the tobacco ban. (N.T. 160-161; UX-1)

60. OLAW requires that the University provide a written Assurance Plan to OLAW to receive Federal funding. The Assurance outlines Penn State's requirements to follow the Guide and to protect the health and welfare of animals and humans. In the Plan, Penn State has assured OLAW of its commitment to maintaining a program for activities involving animals according to the Guide, which prohibits all tobacco use. (N.T. 162-164, 166-167, 171-172; PSU-9)

61. In 2022, the University received approximately 60 million dollars in federal funding for animal research. In 2023, the University received approximately 84 million dollars in federal funding for animal research. Without federal funding, the University would not be able to continue performing animal research. (N.T. 169-170, 186; PSU-10, 11)

62. Placing chewing tobacco in one's mouth before entering an animal room is not like eating before you enter an animal room. People chew then swallow their food before entering the animal room, whereas tobacco chewers maintain the tobacco in their mouths while in the animal room, which may cause that person to touch their face out of habit as a result of dribble. They may spit the juice out of habit or uncontrollably cough, choke, or sneeze causing the tobacco juice to escape. The facility cannot prevent people from sneezing or coughing generally, but it can prevent tobacco use and reduce that risk. A person who normally spits or wipes his/her mouth while chewing tobacco may spit or wipe out of habit even if they know they should not do so in an animal care area. (N.T. 176-178, 201, 203-204)

63. The University's prohibition on using chewing tobacco in animal areas protects workers from the exposure to hazards as a result of their natural behavior or habits. The wide variety of research activities, chemicals, and pathogens requires a broad spectrum of behavioral prohibitions. (N.T. 201-203, 209-211)

DISCUSSION

Initially, the University contends that the charge of unfair practices in this case is barred by the 4-month statute of limitations in Section 1505 of the Act because Penn State's IACUC tobacco ban policy has been in place for over 20 years. (University Brief at 24-27). A charge will be considered timely if it is filed within four months of when the charging party knew or should have known that an unfair practice was committed. Community College of Beaver County Society of Faculty, PSEA/NEA v. Beaver County Community College, 35 PPER 24 (Final Order, 2004).

The University posits that the Union should have known of the University's Policy 2 and tobacco ban because it was promulgated in 2003 and renewed in 2021. The policy is posted on the University's website which is accessible to all employees and students. Also, bargaining unit employees receive training on the safe practices and behavioral requirements for animal laboratory work. The University argues that the policy is widely known and implemented in the field of animal research. In this regard, the University maintains that, despite the claim that the Union first acquired knowledge of the policy on July 5, 2023, the Union should have known the policy well before that date.

The University makes a distinction between University Policy AD32 and IACUC Policy 2, the latter of which specifically applies to the animal research facilities in compliance with federal guidelines and regulations. Notwithstanding whether the Union should have known of either AD32 or IACUC Policy 2, the Union had actual knowledge that AD32 and IACUC Policy 2 did not apply to bargaining unit members in all University facilities, including animal rooms. In a May 20, 2021 bargaining proposal, the University specifically proposed adding a new article to the parties CBA stating: "The provisions of University policy, AD32, Smoking and Tobacco Policy, as it may be modified or amended from time to time, shall apply to members of the bargaining unit." The University obviously acknowledged that it was not applying the ban on all tobacco use to the bargaining unit employees at or before that time. The Union never agreed to applying AD32 to its members at that time or at any time thereafter, and the policy was not included in the 2021 CBA. The Union had no reason to believe that IACUC Policy 2 or University Policy AD32 applied to its members in animal housing because the University was communicating to the Union that its understanding was that it had an obligation to bargain a tobacco ban policy at all times before July 5, 2023 and the Union never agreed to it.

Although bargaining unit employees working in animal research areas receive training, there is no evidence establishing that the training includes notice of a ban on chewing tobacco in animal rooms. As recent as February 2023, just months before the University's July 5, 2023 banning of bargaining unit employees' use of smokeless tobacco in animal rooms, Jon Emel began as a Grade 8 Animal Care Technician. He received hands-on animal training and training regarding bloodborne pathogens. He did not receive any training on OSHA regulations or any other government regulations. Emel did not receive or see a copy of IACUC Policy 2, which prohibits the use of tobacco products in animal facilities. He was not trained on the policy or on anything related to tobacco use. Emel is aware of bargaining unit employees, prior to July 5, 2023, using tobacco in the animal research unit, and he is unaware of anyone being told that they could not use tobacco in the animal research rooms.

Therefore, the Union had every reason to believe that a complete tobacco ban did not apply to its members, either generally across campus or specifically in animal rooms. Indeed, the record shows that a chewing tobacco incident in one of the animal rooms had never come to the Union's or the University's attention before July 5, 2023. Accordingly, the charge of unfair practices was timely filed on August 2, 2023.

Regarding the issue presented, the Union argues that a prohibition on the use of smokeless tobacco products is a mandatory subject of bargaining. The Union relies on Ellwood City v. PLRB, 606 Pa. 356, 998 A.2d 589 (2010), an Act 111 case, in which the Pennsylvania Supreme Court concluded that "an employer's restrictions on employee tobacco use at work are subject to mandatory collective bargaining." However, Ellwood City is inapplicable to this case because the holding is predicated upon the application of the Act 111 standard for determining whether a matter constitutes a mandatory subject of bargaining, which is more onerous for employers. In this case, the appropriate standard for determining whether a matter constitutes a mandatory subject of bargaining or a managerial prerogative under PERA requires the application of the test enunciated in PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975). Under State College, an employer has the burden to show only that its interests simply outweigh the interests of employees for the subject to be considered a managerial prerogative.

The Union also cites to PERA cases such as Commonwealth v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983) and Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1995) to support its position that tobacco use in the workplace is a mandatory subject of bargaining. These cases involved different facts and circumstances making them distinguishable from the case *sub judice*. Moreover, the decisions in Commonwealth, *supra*, and Crawford County, *supra*, involved employees smoking tobacco products at their workstations or in the workplace, which have since been overruled by the Clean Indoor Air Act of 2008, 35 P.S. § 1230.1 *et seq.*, repealing the Clean Indoor Air Act of 1988.

In Fraternal Order of Police Conference of PA Liquor Control Board Lodges v. Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 3 (Final Order, 2005), the Board held that, where the Board and the courts have not previously addressed whether or not an employer must bargain over a specific issue, determining whether or not a novel issue is a mandatory subject of bargaining, requires the application of the State College balancing test. Although the Board has considered tobacco use policies in the past, neither the Board nor the courts have specifically addressed tobacco use policies in the highly controlled environment of animal research laboratories and rooms under PERA or Act 111. Therefore, prior PERA and Act 111 caselaw concluding that a tobacco policy is a mandatory subject of bargaining is inapplicable given the unique set of facts and circumstances involved in this case, thereby requiring that the balancing test under PERA be applied and analyzed anew.

In State College, the Pennsylvania Supreme Court held, in relevant part, as follows:

W]here an item of dispute is a matter of fundamental concern to the employees' 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.

State College School District, 461 Pa. at 507, 337 A.2d at 268.

In applying this standard, the Board has stated that as follows:

[A]n employer's work rule constitutes a legitimate exercise of managerial policy if the employer can show that the rule is on its face: (1) narrowly tailored to substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague or ambiguous; and (2) appropriately limited in its applicability to affected employes to accomplish necessarily limited objectives.

International Union of Operating Engineers, Local 542 v. Upper Southampton Township, 36 PPER 112 (Final Order, 2005). The Ellwood City Court agreed with prior Commonwealth Court decisions under PERA concluding that tobacco use in an employe's place of employment "is properly described as a working condition. While tobacco use may not be important to certain workers and has been proven to be deleterious to one's health, a policy on tobacco use nonetheless is a part of the environment in which tobacco users work." Ellwood City, 998 A.2d at 599. Ellwood City is applicable herein for the proposition that, as a general matter, the use of smokeless tobacco in the workplace is a working condition.

The question becomes whether the University in this case met its burden of establishing by a preponderance of credible and substantial evidence that management's interests in banning smokeless tobacco in animal research and care rooms outweigh the interests of employes in using smokeless tobacco in animal rooms and thereby constitutes a managerial prerogative. I conclude that the University has met that burden and established that its tobacco ban constitutes a managerial prerogative in this case. I also conclude that the University met its burden of demonstrating that its tobacco ban was narrowly tailored to accomplish the very specific goal of eliminating tobacco use only in animal care and research rooms and was not an overly broad ban on all tobacco use across the entire University for bargaining unit members.

In considering the University's interests and reasons for imposing the ban on the use of smokeless tobacco in animal research and care rooms, the record shows a variety of legitimate factors that weigh heavily in the University's favor and outweigh the bargaining unit employes' interests in using tobacco products in the animal rooms. Primarily, the University has 5 legitimate reasons, which are supported by substantial evidence, for banning tobacco use in animal rooms and labs: (1) employe and employe-family safety; (2) integrity of animal experiments; (3) industry practices and guidelines; (4) federal regulations; and (5) federal agencies requiring that the University follow the guidelines and best practices for handling and using animals in research facilities for funding.

The record shows that University employes involved in animal research and care in the Office of the Senior Vice President for Research use extremely dangerous and highly contagious viruses and pathogens, as well as extremely toxic chemicals and pesticides to study their effects on animals and to develop efficacious treatment plans for humans with those conditions,

diseases, or who have been exposed to the chemicals. In some of the animal laboratories, University researchers conduct studies with Azoxymethane and Bromodeoxyuridine, which give an animal cancer, so researchers can study the disease process and the efficacy of experimental treatments. The animals are also exposed to pesticides to study their effects on animal tissue and consequently humans. These chemicals pose a serious health risk to employees if the chemical gets on their hands and the employee proceeds to place tobacco in his/her mouth or wipe tobacco juice dribble from their mouths.

Researchers also inject the animals with contagious and possibly deadly viruses such as C-Diff, Salmonella, influenza, Zika, and Adeno Associated Virus. The animals can transmit the virus to employees who can then transmit the virus to the employees' family members. The pathogens are excreted by the animals into the bedding in their cages. Handling and cleaning the cages and the animals presents dangers to the Animal Laboratory Technicians, the Animal Caretakers, and their families. If an employee places his/her hands near his/her eyes, nose, mouth or face while inserting or removing tobacco or wiping tobacco juice from their mouth, the employee could develop a serious and potentially fatal infection.

The integrity of animal experiments is also compromised by the odor of chewing tobacco and tobacco juice, expelled out of habit. The University has an important managerial interest in maintaining the integrity of its experiments on animals which inures to its core managerial function in conducting expensive animal research for the Navy and the scientific community. Penn State researchers conduct behavioral studies. Animals, which have heightened olfactory capabilities as compared to humans, could detect unusual scents. This is why the animal labs have specific HVAC requirements for filtered outside air instead of recirculated air, which may be tainted by an office where someone is wearing perfume or cologne and which could be detected by the animals. Airflow and humidity are tightly controlled so as to not affect experiments as is animal food and food storage. Tobacco odors can adversely affect a behavioral study thereby skewing the experimental results unknown to the researcher. To eliminate these risks, there is no eating, drinking or applying cosmetics in the animal rooms.

The Union asserts that there is no legal mandate that the University ban smokeless tobacco in animal rooms. However, federal regulations have the force and effect of law and both OSHA and the EPA have promulgated regulations prohibiting tobacco products in animal rooms, thereby removing the prerogative from Penn State. If the University does not have a choice in the matter, it cannot be expected to bargain the same. OSHA regulation 1910.1030 provides as follows: "Eating, drinking, smoking, applying cosmetics or lip balm, and handling contact lenses are prohibited in work areas where there is a reasonable likelihood of occupational exposure." 29 CFR 1910.1030(d)(2)(ix). Although this regulation does not expressly address tobacco use, the message is clear that any behavior that risks bringing hands close to the face is dangerous and therefore prohibited. Additionally, OSHA regulation 1910.1003-13, regulating areas where carcinogens are present, expressly prohibits any use of tobacco products. This Section provides that "[s]torage or consumption of food, storage or use of containers of beverages, storage or application of cosmetics, smoking, storage of smoking materials, tobacco products or other products for chewing, or the chewing of such products are prohibited in regulated areas." 29 CFR 1910.1003-13(d)(3).

Also, the EPA has similar regulations pertaining to best practices in areas containing pesticides requiring employers to display requirements to

"wash before eating, drinking, using chewing gum or tobacco or the toilet." 40 CFR 170.311(a)(3)(ii). Pesticides are used in Penn State animal research rooms. This regulation does not expressly prohibit the use of chewing tobacco in the animal rooms, but it does expressly require employers to post signs mandating that employees wash their hands before chewing tobacco, which amounts to the same thing. If tobacco chewing employees habitually wipe their mouths, they may do so while chewing in the animal rooms out of habit without washing their hands, thereby posing a risk of contamination to the employee.

Regardless of whether a federal mandate specifically prohibiting smokeless tobacco in animal rooms exists, the Union has shown no interest in agreeing to a smokeless tobacco ban in any part of the University when having been directly presented with the subject in the past. The University has a strong core managerial interest in following guidelines of best practices per industry standards and thereby maintain its accreditation and funding. It also has a core managerial interest in protecting its research enterprise and determining the level of its research services by ensuring the integrity of experiments, without unknown variables affecting the experimental results, and by ensuring the safety of employees and their families. The Union cannot be in control of the University's ability to fulfill its core managerial mission and entrepreneurial function to conduct and teach animal research with scientific integrity or the manner in which it chooses to do so.

Additionally, although the record does not establish that Penn State would in fact lose all or a portion of its \$60-\$80 million in federal funding for animal research if it permitted chewing tobacco in animal rooms, the University should not be expected to run that risk. In terms of guidelines and funding, which are interconnected, the NIH is charged with creating rules for operating research facilities. The rules and guidelines have been effectuated through OLAW, which further requires each institution to create a local IACUC to inspect and report rule violations, incidents, and safety concerns to OLAW. Applying the guidelines, Penn State's IACUC has developed and implemented policies for the safety of the employees and the animals. IACUC policy 2 in particular provides that "Penn State Personnel, including students, are not permitted to have food/beverages intended for human consumption or to use tobacco products in any animal facilities, except for those areas identified and designed by supervisors for that specific purpose."

The purpose of these rules is to prevent employees from inadvertently exposing themselves to agents from the animals or interfere with agents given to the animal experimentally thereby interfering with research results. The rules are also based on OSHA regulations and guidelines developed from basic tenets of animal research industry standards, experience, and expertise in safety and contamination prevention protocols in animal research facilities.

The Guide for the Care and Use of Laboratory Animals contains provisions for behavior in animal research rooms, which are interpreted and applied by the University IACUC. The Guide is the basis for the University's prohibition on tobacco use in animal rooms. The Guide provides that "[p]ersonnel should not be permitted to eat, drink, use tobacco products, apply cosmetics or handle or apply contact lenses" in animal rooms."

The BMBL, like the Guide, is an advisory publication recommending best practices for the safe conduct of work in biomedical and clinical laboratories. The BMBL specifically states that the publication is not intended to be regulatory but recognizes that some institutions may use it

that way. Also, the OSHA 3143 Booklet on Industrial Hygiene also recommends best practices "mandating that eating, drinking, smoking, chewing tobacco or gum, and applying cosmetics in regulated areas be prohibited." The Occupational Health and Safety in the Care and Use of Research Animals provides that "[n]o smoking, eating, or drinking in the animal room is a 'must.'" Although these publications are not regulations or laws, all these prohibited behaviors, like using chewing tobacco, have the same safety concern in common: that is keeping hands away from the face. And OLAW requires Penn State's IACUC to provide a written Assurance that it is following the Guide which prohibits tobacco use in the animal rooms in order to receive funding.

The record demonstrates that Animal Laboratory Technicians and Animal Caretakers in the bargaining unit are exposed to dangerous pesticides, carcinogens, and pathogens. Collectively, these employees handle the animals, collect blood and tissue samples, administer drugs, perform nursing procedures, and clean animal housing units, which exposes them to feces containing pathogens and chemicals. There is a tremendous safety concern and managerial interest on the part of the University to ensure that these employees do not place their hands near their faces after that type of exposure to the animals. The Director of the University's IACUC, Melanie Lucas, is a nationally certified professional IACUC Administrator. With that training and experience, Ms. Lucas credibly testified that the permissible, regular use of chewing tobacco in the animal rooms would be reportable to OLAW. If OLAW and the Director of NIH determines that the conditions of animal care, treatment, or use in a research facility that is receiving funding do not meet applicable guidelines and failed to take corrective action, the Director shall revoke or suspend funding. 42 USCS § 289(d) (d). Under the statute, a failure, refusal, or inability to comply with established guidelines could result in a revocation of funding. In this regard, Penn State may lose some or all funding if OLAW determines that it is knowingly permitting the use of tobacco in animal rooms, although the loss of tens of millions of dollars for permitting tobacco use is speculative on this record.

Additionally, the University's limited ban on smokeless tobacco only in animal rooms is narrowly tailored to effectuate the combined goals of ensuring the safety of employees, complying with guidelines for federal funding, and maintaining the integrity of animal experimentation. In this vein, under the latest application of IACUC Policy 2 to bargaining unit employees in animal rooms, the University still permits those employees to use tobacco products in break rooms, hallways, offices, mechanical rooms, non-animal facilities, and outside spaces where there is no animal presence. The smokeless tobacco ban in animal rooms applies to bargaining unit employees only in a small part of the University's property where animals are used for experimentation.

The Union contends that the complete ban on tobacco use in the animal rooms is overly broad because employees could chew tobacco and swallow the tobacco juice. This argument, however, ignores the fact that the ban on chewing tobacco, gum, or food, is designed to overcome natural, habitual human behavior where people are accustomed to wiping their mouths or spitting the juice out of habit. The ban also reduces the risk that an uncontrollable cough or sneeze could cause the employee to expel the tobacco or choke, requiring the manual adjustment or removal of the tobacco. The University cannot eliminate the risk of a non-chewing employee coughing or sneezing, but it can reduce the risks associated with a chewing employee coughing or

sneezing. Also, swallowing a significant amount of tobacco juice may reasonably cause other physical reactions that could contaminate the experimental environment. The Union's argument also ignores the fact that bargaining unit employees are not swallowing their tobacco juice; they are spitting the juice out of habit as evidenced by the spitting incident that gave rise to the University's July 5, 2023 enforcement of IACUC Policy 2.

Accordingly, the University's managerial interests in prohibiting the use of tobacco products in animal rooms and facilities far outweighs the employees' interest in using tobacco in animal rooms. Also, the prohibition is narrowly tailored to target the combined core managerial functions and goals of maintaining experimental integrity, employee safety, accreditation, and federal funding. Therefore, the tobacco ban in animal rooms constitutes a managerial prerogative. This decision is specifically limited to the application of IACUC Policy 2 to animal care and research facilities on or in University owned or leased properties. It does not apply to the application of University Policy AD32 all across University owned or leased facilities. Applying AD32 would require the University to bargain with the Union. Additionally, the University should post IACUC Policy 2 in all animal rooms according to EPA and OSHA regulations, which would also place all employees and students on notice.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The University is a public employer under PERA.
2. The Union is an employee organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The University did not violate Section 1201(a)(1) or (5) of PERA, and it has a managerial prerogative to unilaterally apply a tobacco ban to bargaining unit employees limited to animal housing and research rooms and facilities.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner:

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

That in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-eighth day of March 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

/S/ JACK E. MARINO

Jack E. Marino, Hearing Examiner