

VII. STANDING COMMITTEES

B. Finance, Audit and Facilities Committee

Consideration of Petition for Repeal of WAC 478-136-035

RECOMMENDED ACTION:

It is the recommendation of the President that the Petition for Repeal of WAC 478-136-035 (“No Smoking Policy for University Facilities”) submitted by Robert W. Haller be denied.

BACKGROUND:

On May 17, 2007, Petitioner Robert W. Haller (“Petitioner”) submitted a Petition to Repeal WAC 478-136-035 (Attachment 1). This petition and the following response are being submitted to the Board of Regents for its consideration pursuant to RCW 34.05.330.

1. Summary of legal authority for adoption of WAC 478-136-035

The University’s “No Smoking Policy For University Facilities,” WAC 478-136-035, was drafted in response to the recommendation of a committee of 22 individuals representing student government and numerous University departments on all three campuses. In addition, the University held two public meetings to invite comment from the campus community and the public. The Regents adopted the policy effective February 23, 2007.

For the reasons explained in more detail in the memorandum from Assistant Attorney General Jeffrey Davis (Attachment 2), the Regents have the authority to promulgate this broad “no smoking” policy.

To summarize, the Regents have been given “full control of the university and its property of various kinds, except as otherwise provided by law.” RCW 28B.20.130. The regulation in question, WAC 478-136-035, is an exercise in control of the property of the University under this statutory grant of authority. By its own terms it is “consistent” with RCW 70.160 (I-901)¹, but the authority for WAC 478-136-035 comes from RCW 28B.20.130, as well as from RCW 70.160.

RCW 70.160 bans smoking in two types of areas: (a) public places, and (b) places of employment. “Public places” are defined by RCW 70.160.020 as buildings open to the public, plus an area around those buildings’ doors, windows and air intakes. “Places of employment” are defined by RCW 70.160.020 as “area[s] under the

¹ The voters adopted Initiative I-901 in November 2005, and it has since been codified in the Revised Code of Washington as Chapter 70.160.

STANDING COMMITTEES

B. Finance, Audit and Facilities Committee

Consideration of Petition for Repeal of WAC 478-136-035 (continued p. 2)

control of a public or private employer which employees are required to pass through during the course of employment.”

RCW 70.160 does not grant smokers a right to smoke, anywhere. It does provide that it is not a violation “of this chapter” to smoke when “passing by or through a public place while on a public sidewalk or public right of way.”² However, it does not limit the University’s ability to impose additional restrictions applicable to such areas that are under the University’s control. Further, the statute does *not* exempt smokers who are passing through a “place of employment,” and the statute does not mandate that a “place of employment” be a building. Numerous University employees travel through outdoor portions of the campus as a regular part of their employment (*e.g.* police officers, mailing services employees, gardeners, faculty going to nearby buildings to teach class).

2. Response to specific arguments in Mr. Haller’s Petition (as specified on p. 1 and the summary on pp. 12-13)

- “It imposes unreasonable costs”

The only “cost” identified by the petitioner is longer travel time from a work location to a smoking location during work breaks. This is not an “unreasonable cost.”

- “It is applied differently to public and private parties”

The petitioner points to the language in WAC 478-136-035(2) that “[i]n addition, any student, staff, or faculty member who violates the university no smoking policy may be subject to disciplinary action.” This is not different application to public and private parties, such as allowing certain persons to smoke and forbidding others. Rather, the rule points out the obvious – that violation of the smoking rules may have additional consequences due to one’s associations with the University, such as student or employee status. In short, the petitioner conflates different consequences based on legitimate differences in status with “different treatment.”

- “It is not authorized. The agency has no authority to make this rule”

² “Sidewalk” is defined in RCW 46.04.540 as “property between the curb lines or the lateral lines of a roadway and the adjacent property,” thus does not describe walkways through the campus. “Public right of way” is defined or used in the RCW as synonymous with “roadway open to the public.” *See, e.g.,* RCW 79.36.440 or 35.99.010(5).

STANDING COMMITTEES

B. Finance, Audit and Facilities Committee

Consideration of Petition for Repeal of WAC 478-136-035 (continued p. 3)

As noted above, the Regents have been given “full control of the university and its property of various kinds, except as otherwise provided by law.” RCW 28B.20.130. No statute requires that smokers be allowed to smoke on property controlled by others. So long as the Regents do not enact a rule allowing smoking where I-901 prohibits it, the Regents are acting within the authority granted by RCW 28B.20.130.

WAC 478-136-035(1) notes that the rule also helps protect property against fire hazards. Just as an enterprise that is essentially outdoors (such as a wildlife park or a zoo) may ban smoking to protect against fire, so too may the Regents. Cigarettes discarded into dry grass or leaves or into trash containers can cause significant harm. In fact, the Washington Department of Natural Resources determined that 3.4% of all forest fires in the state in 2001 were caused by cigarettes, a number higher than those caused by arson (*see* <http://dnr.wa.gov/htdocs/rp/01wildlandfiresum/2001firesummary.pdf>). Limiting smoking to areas that have improved protection from discarded cigarettes clearly assists the University in protecting its resources from fire.

- “It conflicts with another federal, state, or local law or rule”

The only rule identified by the petitioner is I-901 (RCW 70.160). WAC 478-136-035 does not conflict because it does not allow smoking where I-901 forbids it.

Contrary to petitioner’s assertion, I-901 does not say there may be no designated outdoor smoking sites. Because smoking is banned indoors in public places and place of employment, there cannot be designated *indoor* smoking sites in any campus buildings, but the designated smoking sites provided for in WAC 478-136-035 are all outdoors.

Also contrary to petitioner’s assertion, I-901 does not allow smoking anywhere. It simply does not mandate forbidding it beyond certain boundaries. In fact, WAC 478-136-035 is arguably required by RCW 70.160’s ban on smoking in places of employment, *i.e.* “area[s] under the control of a public or private employer which employees *are required to pass through* during the course of employment.” (Emphasis added.) An employee required to go from Smith Hall to Denny Hall, without this rule, would likely be required to pass through areas of cigarette smoke if smokers could smoke anywhere on campus so long as they were more than 25 feet from doors, windows and ventilation intakes. By designating specific smoking sites, the University has ensured that employees required to walk between buildings do not have to be subjected to cigarette smoke, since they can easily reroute themselves around these limited locations. Retaining the rule ensures that

STANDING COMMITTEES

B. Finance, Audit and Facilities Committee

Consideration of Petition for Repeal of WAC 478-136-035 (continued p. 4)

workers are properly protected from exposure in their workplace to second-hand smoke.

I-901 prescribes minimum protections for non-smokers, such as mandating that at least 75% of hotel rooms be non-smoking. Property owners may always go beyond those minimums, and many hotels in Washington have become entirely smoke-free. Such a decision is not in conflict with I-901, and neither is WAC 478-136-035.

- “Other.”

Petitioner raises two other issues: “1. The rule disparages the gradual cultural change that has been progressing so well without the rule[;]” and “2. The rule fosters contempt of law. After a review of the foregoing a reasonable person should conclude mischievous negligence. To let this amendment stand would constitute an act of Mala Fide (In bad faith).”

The voters adopted I-901 because “gradual cultural change” was not providing adequate safeguards against the detrimental health effects of second-hand smoke, including the risk of acquiring or aggravating cancer, asthma, bronchitis and heart disease. It is hardly “bad faith” or a “contempt of law” for the University to provide additional protections against these risks.

3. Conclusion

WAC 478-136-035 is legal and fulfills the Regents’ policy to the campus community to protect non-smokers from second-hand smoke. The petition to remove these protections should be denied, for the reasons herein provided.

Attachments:

1. Petition
2. Memorandum of Jeffrey W. Davis

VII. STANDING COMMITTEE

B. Finance, Audit and Facilities Committee

Consideration of Petition for Repeal of WAC 478-136-035

For a copy of **Attachment 1**, please contact the University of Washington, Office of the Board of Regents via telephone at 206-543-1633, or E-mail: regents@u.washington.edu. A copy will be sent via U.S. Postal Service or facsimile.



ROB MCKENNA

ATTORNEY GENERAL OF WASHINGTON

University of Washington Division • 101 Gerberding Hall • Box 351260

University of Washington • Seattle WA 98195-1260

(206) 543-4150 / FAX (206) 543-0779

MEMORANDUM

December 14, 2006

TO: Ms. Rebecca Goodwin Deardorff, Director
Rules Coordination Office, Box No. 355509

FROM: Jeffrey W. Davis
Assistant Attorney General

SUBJECT: **Authority of Regents Regarding Smoking on Campus**

You have requested advice concerning the legal right and ability of the Regents to limit smoking on campus. The lone attendant at the recent public hearings on adoption of amendments to WAC 478-136 has argued that the Regents can only ban smoking within 25 feet of buildings, given language in the recently passed Initiative 901 (I-901).

I-901's provisions have been incorporated into RCW Chapter 70.160. It should be noted that RCW 70.160.011 declares, incorporating the legislative findings the people made in adopting I-901, that "second-hand smoke is known to cause cancer in humans." Accordingly, the statute goes on, "[i]n order to protect the health and welfare of all citizens, including workers in their places of employment, it is necessary to prohibit smoking in public places and workplaces."

RCW 70.160.020 defines a public place to include buildings "used by and open to the public," including "a presumptively reasonable **minimum** distance, as set forth in RCW 70.160.075, of twenty-five feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited" (emphasis added).

RCW 70.160.075 provides a mechanism by which a property owner may prove that less than twenty-five feet is adequate under circumstances unique to a given property, but neither RCW 70.160.020 nor RCW 70.160.075 prevents a property owner from setting the distance at more than twenty-five feet from doors, windows and ventilation intakes. The goal is to ensure that workers are never exposed unwillingly to second-hand smoke because it is a well-known carcinogen, not to mention a noxious substance to most non-smokers. Any owner of property

Rebecca Goodwin Deardorff

Memorandum

December 14, 2006

Page 2

covered by this statute is within his rights under the statute in defining the needed distance more broadly, since the goal of the statute is to protect non-smokers, not to protect smokers.

More to the point, nothing in the statute provides smokers with a right to smoke, anywhere. The owner of a resort hotel in this state, for example, may choose to enhance the enjoyment of all the facilities, indoor and outdoor, by banning smoking from the premises and trespassing anyone who violates that ban. Indeed, it is common knowledge that non-smokers may be just as bothered by a person smoking near them at a swimming pool as by a person smoking near them in a restaurant, and may choose to not patronize resort hotels that allow such noisome behavior. Nothing in I-901 or in RCW 70.160 bars the resort owner from taking steps to retain the trade of the non-smoker by making the entire premises smoke-free.

The Regents of the University of Washington are the “owners” of the property of the University of Washington to the extent that the legislature has given them “full control of the university and its property of various kinds, except as otherwise provided by law.” RCW 28B.20.130. The Regents may not allow smoking within any area covered by I-901/RCW 70.160, since that is one of the exceptions “otherwise provided by law.” Since I-901/RCW 70.160 does not grant to smokers the right to smoke in any particular location, the Regents retain the right to limit smoking more broadly than the minimum distances provided for in RCW 70.160.020 and -.075.

There are numerous reasons why the Board should do so, given the legislative finding by the people, in adopting I-901, that second-hand smoke is a carcinogen that non-smokers are entitled to be protected from. Those findings, incorporated as noted above into RCW 70.160.011, also dedicate the state to protecting its citizens, “including workers in their places of employment.”

Many University of Washington employees walk through campus as part of their assigned duties, such as police officers, mailing services employees, gardening and maintenance employees, faculty en route to classes in various buildings around campus, and support staff assigned from time to time to pick up or deliver items from campus locations. By limiting smoking to specific locations, the Regents protect the rights of these employees to travel through these work spaces without unwanted exposure to unwanted carcinogens and smoke, by means of only modest detours in their routes. In the absence of such rules, University employees needing to walk through campus as part of their employment duties would have no way of ensuring freedom from harmful exposure, except when in the propinquity of building doors, windows and ventilation intakes, given the modest minimum requirements of RCW 70.160.020. Gardeners and delivery persons are as entitled to perform their job duties without exposure to carcinogenic tobacco smoke just as much as nurses or office staff who spend the majority of their time indoors.

In summary, the Regents have the legal right to regulate smoking on the campus, so long as they do not allow smoking in areas prohibited by I-901/RCW 70.160. They may prohibit it more broadly than that initiative and statute do, since nothing in either restricts the right of the Regents to control the property of the University granted to them by RCW 28B.20.130.

Rebecca Goodwin Deardorff
Memorandum
December 14, 2006
Page 3

JWD:JWD

cc: Karen VanDusen