

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-002211-MR

JOHN MILLS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 11-CI-01454

LADONNA H. THOMPSON AND
PHILIP W. PARKER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND MAZE, JUDGES.

ACREE, CHIEF JUDGE: John Mills appeals, *pro se*, from an order of the Franklin Circuit Court dismissing his petition for declaration of rights in which he challenged the Kentucky Department of Corrections' Commissioner's authority to institute a tobacco-free policy at all Department of Corrections' Adult Institutions. We affirm the circuit court's dismissal of the petition.

Mills is serving time in the Kentucky State Penitentiary (KSP). By memorandum dated May 18, 2011, the Commissioner of the Kentucky Department of Corrections, Appellee LaDonna Thompson, declared all Department of Corrections' Adult Institutions tobacco-free facilities effective March 1, 2012.¹ By implication, the directive included KSP.

Unhappy with the Commissioner's decision, Mills and other inmates filed a group grievance asserting Kentucky Revised Statute (KRS) 61.165 exempted KSP from Commissioner Thompson's directive. Appellee Phillip W. Parker, Warden at KSP, denied the grievance.

Mills appealed directly to Commissioner Thompson. Commissioner Thompson denied Mills' grievance appeal, claiming KRS 196.245 granted her authority to implement the smoking ban.

Mills then filed a petition for declaration of rights in Franklin Circuit Court under KRS 418.040. Mills sought an order directing Commissioner Thompson to allow the continued sale and use of tobacco products at KSP. Appellees filed a response and motion to dismiss. By order entered October 25, 2011, the circuit court granted the Appellees' motion. Mills moved to alter, amend, or vacate the circuit court's order pursuant to Kentucky Rule of Civil Procedure (CR) 59.05, which the circuit court denied. Mills promptly appealed.

¹ The memorandum provides, in pertinent part: "After gathering information from other state correction agencies, reviewing national health trends, and the recent release of a study by the University of Kentucky the department has decided to eliminate smoking and tobacco use in all facilities to reduce the medical costs associated with exposure to tobacco and eliminate second hand smoke exposure to non-smokers. Effective March 1, 2012, all Department of Corrections Adult Institutions will become tobacco-free facilities."

Mills' argument to this Court is two-fold. First, Mills asserts that KRS 61.165 exempts KSP from Commissioner Thompson's May 2011 directive. Second, Mills argues Commissioner Thompson's reliance on KRS 196.245 is misplaced. Instead, Mills claims that KRS 61.165 controls.²

The Kentucky General Assembly first enacted KRS 61.165 in 1994. 2004 Ky. Acts ch. 480, § 1. The statute pertains to smoking in nearly all government offices and work places, and mandates the adoption of smoking-related policies. *See generally Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Government*, 131 S.W.3d 745, 751 (Ky. 2004) ("KRS 61.165 . . . governs smoking policy for all state and local government offices[.]"). Initially, KRS 61.165 exempted Kentucky jail and detention facilities from its mandates. 2004 Ky. Acts ch. 480, § 1 ("This section shall not apply to . . . jails or detention facilities."). However, the General Assembly amended KRS 61.165 in 2006 to, *inter alia*, remove the jail and detention center exemption. 2006 Ky. Acts ch. 115, § 1.³ The statute currently provides, in relevant part:

(1) Except as otherwise specified for the Capitol and Capitol Annex in KRS 61.167, a policy for smoking in governmental office buildings or workplaces shall be adopted by state government. This policy shall apply to all state-owned or state-operated office buildings,

² In his reply brief, Mills also asks this Court to strike and disregard the Appellees' brief as untimely. Mills claims that CR 76.12 requires an appellee's brief to be filed within 30 days after the date on which the appellant's brief is filed. This is simply incorrect. Instead, CR 76.12 instructs that, in civil cases, "[t]he appellee's brief . . . shall be so filed within **60 days** after the date on which the appellant's brief was filed." CR 76.12(2)(a) (emphasis added). Here, Mills' initially filed his brief on January 27, 2012, and the Appellees responded on March 9, 2012. The Appellees' brief was clearly filed within the sixty-day window. We decline Mills' request.

³ KRS 61.165 was again amended in 2010 to substitute the more socially-acceptable term "intellectually disabled" for "mentally retarded". 2010 Ky. Acts ch. 141, § 6.

workplaces, and facilities, including but not limited to state-operated hospitals and residential facilities for the intellectually disabled, state-operated veterans' nursing homes and health facilities, and any correctional facility owned by, operated by, or under the jurisdiction of the state.

(2) Except as otherwise specified for the Capitol and Capitol Annex in KRS 61.167, any policy relating to smoking in state office buildings or workplaces shall be by executive order of the Governor or action of the General Assembly, and shall:

(a) 1. Require the governmental authority to provide accessible indoor smoking areas in any buildings where smoking is otherwise restricted; and

2. Favor allowing smoking in open public areas where ventilation and air exchange are adequate and there are no restrictions otherwise placed on the area by the state fire marshal or other similar authority; or

(b) Prohibit indoor smoking.

KRS 61.165(1), (2).

The plain language of KRS 61.165(1) directs the appropriate authoritative person, entity, or governing body to adopt a smoking policy. KRS 61.165(1). Notably absent from KRS 61.165(1) is any limitation on, or mandates as to, the terms of that policy; instead, the statute affords suitable discretion. Besides governmental office buildings and workplaces, the statute applies equally to KSP, a “correctional facility owned by, operated by, or under the jurisdiction of the state.” *Id.* The Commissioner of the Department of Corrections is the figurehead over penal institutions and their occupants. *See* KRS 196.070 (granting the Commissioner of the Department of Corrections authority to supervise and

administer department-run correctional institutions); KRS 197.020 (authorizing the Department of Corrections to promulgate regulations pertaining to “prisoners in their . . . conduct”). Accordingly, KRS 61.165(1) permits the Commissioner to adopt a smoking and tobacco-related policy applicable to any correctional facility owned or operated by the Commonwealth, including KSP.

As evidence of KSP’s alleged exemption from any directive implementing a tobacco prohibition, Mills points to Executive Order 2006-807 promulgated by then-Governor Ernie Fletcher in 2006. That Order directs that “[s]moking shall be prohibited in office buildings and common areas occupied by Executive Branch employees” but exempts from the Order “the state’s only maximum-security corrections facility, Kentucky State Penitentiary at Eddyville.” Executive Order 06-807. In this Commonwealth, the Governor is vested with “supreme executive power[.]” Ky. Const. § 69. That authority extends to executive-branch office buildings and work places, including state penitentiaries in which executive-branch workers are employed. To the extent KSP is exempted from the smoking prohibition in Executive Order 06-807, that exemption only extends to executive-branch employees, not to inmates housed at KSP. *See* KRS 61.165(2) (“[A]ny policy relating to smoking in state *office buildings* or *workplaces* shall be by executive order of the Governor or action of the General Assembly[;]” emphasis added).⁴ Executive Order 06-807 does not in any fashion restrict or prohibit the

⁴ Indeed, while KRS 61.165(2) directs that only the Governor or General Assembly may promulgate a policy relating to smoking in state *office buildings* or *workplaces*, KRS 61.165 does not restrict who may promulgate a smoking policy relating to *state correctional facilities*. Likewise, KRS 61.165(3) affords decision-making authority concerning smoking in non-state

Commissioner of the Department of Corrections from undertaking a tobacco-free initiative as it pertains to inmates such as Mills.

The Commissioner's authority over inmate smoking privileges dates back to before a general consensus existed regarding the health concerns associated with smoking and second-hand smoke. In 1952, the General Assembly afforded the Commissioner specific authority to restrict an inmate's smoking privileges for discipline purposes. 1952 Ky. Acts ch. 139, § 1⁵; KRS 196.245 ("The commissioner may permit or prohibit the practice of smoking by the inmates of the penal institutions, regardless of the age of the inmates, when he believes the regulation will enhance or improve the discipline of the inmates of these institutions."). The General Assembly enacted a new statute, KRS 61.165, when the adverse health effects of smoking and second-hand smoke became more well-known. As discussed, KRS 61.165 directs the appropriate person, and in the case of correctional institutions that person would be the Commissioner of the Department of Corrections, to adopt a smoking policy, the precise parameters of that policy are left to the Commissioner's discretion. Again, the statute places no limit on the Commissioner's authority to implement a tobacco-free policy applicable to all state-run penal institutions.

operated jails and detentions to the county, municipal, special district, urban-county, charter county, or consolidated local government with jurisdiction over the local jail or detention center.
⁵ As enacted in 1952, KRS 196.245 declared that "the Commissioner of Welfare is authorized to permit or prohibit the practice of smoking by the inmates of the Penal Institutions and houses of Reform, regardless of the age of the inmates, whenever he believes such regulation will enhance or improve the discipline of the inmates of these institutions." 1952 Ky. Acts ch. 139, § 1.

In sum, the Commissioner of the Department of Corrections retains authority to limit or restrict inmate smoking privileges for health purposes under KRS 61.165 and discipline purposes under KRS 196.245. Accordingly, the Franklin Circuit Court's October 25, 2011 order dismissing Mills' petition for declaration of rights is affirmed.

ALL CONCUR.

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