

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2009 CA 1841**

**SAMUEL K. GALBRAITH**

**VERSUS**

**JAMES M. LEBLANC, SECRETARY, DEPARTMENT OF PUBLIC  
SAFETY AND CORRECTIONS, N. BURL CAIN, TERRI L. CANNON,  
AND TRISH FOSTER**

**Judgment Rendered: May 7, 2010**

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**Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Docket Number 569,141**

**The Honorable William Morvant, Judge Presiding**

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**Samuel K. Galbraith  
Angola, LA**

**Plaintiff/Appellant in Proper Person,  
Samuel K. Galbraith**

**Terri L. Cannon  
Baton Rouge, LA**

**Counsel for Defendant/Appellee,  
Louisiana Department of Public Safety  
& Corrections**

**BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.**

**WHIPPLE, J.**

Plaintiff, Samuel K. Galbraith, an inmate in the custody of the Louisiana Department of Public Safety and Corrections (“the Department”) housed at Louisiana State Penitentiary, challenges the district court’s dismissal of his petition for judicial review requesting that Louisiana State Penitentiary issue a new smoking policy that completely bans smoking within the institution. For the following reasons, we amend and affirm as amended.

**PROCEDURAL HISTORY**

On April 25, 2008, plaintiff filed an Administrative Remedy Procedure (“ARP”) complaining that the smoking policy implemented by Louisiana State Penitentiary as set forth in Directive No. 01.017 violates the provisions of the Louisiana Smoke Free Air Act (“the Act”), codified in LSA-R.S. 40:1300.251, *et seq.*, in that it conflicted with the Act’s mandatory prohibition of smoking in any state, local, or private correctional facility after August 15, 2009. Plaintiff thereby requested that the policy be revised and reissued to implement a ban on smoking throughout the institution starting on or before August 15, 2009. In the Department’s First and Second Step Responses, it determined that plaintiff’s request was premature, noting that plaintiff could resubmit his request after August 15, 2009, if he believed that the institution was not complying with the terms of the Act. In support, the Department relied upon Regulation No. B-05-005, which states, “when an inmate files a grievance concerning an action not yet taken, the grievance is to be rejected.”

On July 24, 2008, plaintiff filed a petition for judicial review requesting that the policy be rescinded and that a new policy completely prohibiting smoking throughout the institution be implemented. On May 31, 2009, the Commissioner issued a recommendation noting that “[i]n spite of the petitioner’s acknowledgement in his initial request for relief that the Department is required

by statute to enforce a no smoking ban at all correctional facilities by August 15, 2009, the petitioner seeks to compel the Department to enact a total ban on smoking prior to the date mandated by statute.” The Commissioner further determined that since plaintiff could point to no authority that would require the Department to enforce the mandated policy prior to the mandatory date as specified by the Legislature, the Department had the authority and discretion to implement the mandatory ban at any chosen time prior to the mandatory date, i.e., August 15, 2009. Thus, the Commissioner recommended that the agency decision be affirmed and that plaintiff’s petition for judicial review be dismissed with prejudice at plaintiff’s costs.

On June 29, 2009, the district court rendered judgment adopting the Commissioner’s Recommendation and dismissed plaintiff’s request for judicial review with prejudice at plaintiff’s costs. Plaintiff filed the instant appeal, contending that the district court erred in finding that his request for relief was premature and that Directive No. 01.017 complied with the provisions of the Louisiana Smoke Free Air Act.

### **DISCUSSION**

On appeal, plaintiff contends that he never suggested or implied that the correctional facility had to implement a total ban on smoking prior to the date mandated by statute; rather, he contends that he has sought all along to have the facility’s directive be revised to issue a total ban as of August 15, 2009, in compliance with the Act. Plaintiff argues that the current version of Directive No. 01.017 permits smoking after August 15, 2009, in direct contravention of the Act, which provides, in pertinent part, that “[a]fter August 15, 2009, smoking shall be prohibited in any state, local, or private correctional facility.” LSA-R.S. 40:1300.256(B)(14).

In purported accordance with the Act, Louisiana State Penitentiary issued Directive No. 01.017, entitled "Smoking Policy," which provides, that on August 15, 2009, the following procedures shall be applicable:

H. Smoking in inside areas is prohibited for all employees, visitors and inmates.

I. Where smoking is prohibited, "No smoking" signs or the international "No Smoking" symbol consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it shall be clearly and conspicuously posted in every public building and place of employment.

J. An individual, person, entity, or business subject to the smoking prohibitions of this policy shall not discriminate or retaliate in any manner against a person for making a complaint regarding a violation of this policy or for furnishing information concerning a violation to an enforcement authority.

K. Violations of this policy will be subject to disciplinary action pursuant to Department Regulations No. A-02-001 and B-05-001 and such penalties as enumerated in La. R.S. 1300.262.

Plaintiff contends that the correctional facility's directive seemingly permits smoking in certain areas and that "the question is, does this prohibition of smoking [as set forth in the Act] call for a full prohibition or will smoking still be allowed in correctional facilities in designated areas?" By plaintiff's own admission, this question cannot be answered until the directive is implemented.

On review, we find that although plaintiff may have a valid complaint in the future concerning the correctional facility's interpretation of the Act's smoking prohibitions as set forth in Directive No. 01-017, to the extent that plaintiff is seeking an interpretation of and ruling on the facility's smoking prohibitions prior to their application and implementation, we agree that his request is premature. Accordingly, we must affirm the June 29, 2009 judgment of the district court. However, because plaintiff can re-urge his claim subsequent to

the implementation of the directive on August 15, 2009, we amend the judgment of the trial court to reflect that his claim is dismissed **without** prejudice.<sup>1</sup>

### **CONCLUSION**

After a thorough review of the record and relevant jurisprudence, the June 29, 2009 judgment of the district court is hereby amended to provide that plaintiff's claim is dismissed without prejudice, and, as amended, the judgment is affirmed. Each party shall bear his/its own costs.

**AMENDED, AND AS AMENDED, AFFIRMED.**

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<sup>1</sup>In his brief on appeal, plaintiff contends that since the implementation of the directive on August 15, 2009, smoking is allowed outdoors and that smoking occurs in unauthorized areas on a daily basis at Louisiana State Penitentiary. Because, however, the facts that form the basis for these complaints were not known at the time plaintiff filed his ARP, and thus were not brought before the Department or the Commissioner, we find no authority to review such complaints in this appeal.