STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RALPH CHRISTENSEN AND MIDDLETON EDUCATION ASSOCIATION, Complainants, vs. MIDDLETON JOINT SCHOOL DISTRICT NO. 3; BOARD OF EDUCATION OF MIDDLETON JOINT SCHOOL DISTRICT NO. 3, Respondents.	Case IX No. 19018 MP-451 Decision No. 14680-A

Appearances:

Ela, Esch, Hart and Clark, Attorneys at Law, by Mr. James F. Clark, appearing on behalf of the Employer.

Mr. Wayne Schwartzman, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of the Association and Mr. Christensen.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Ralph Christensen and Middleton Education Association having filed a complaint on April 8, 1975 with the Wisconsin Employment Relations Commission, alleging that the Middleton Joint School District No. 3 and the Board of Education of Middleton Joint School District No. 3 had committed and were committing prohibited practices within the meaning of Sections 111.70(3)(a)1 and 111.70(3)(a)4 of the Municipal Employment Relations Act; and the Commission having appointed George R. Fleischli, a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and the parties having waived hearing and agreed to submit the record made in an arbitration hearing held on January 9 and 10 and April 7, 1975 as the basis of the ruling in this matter; and the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Ralph Christensen, hereinafter referred to as Complainant Christensen or Christensen, an employe within the meaning of Section 111.70(1)(b), Wisconsin Statutes, was, at all times relevant hereto, employed as a full-time classroom teacher by Middleton Joint School District No. 3.

2. That Middleton Education Association, hereinafter referred to as Complainant Association or Association, is a labor organization within the meaning of Section 111.70(1)(j), Wisconsin Statutes, and the recognized representative of certain teachers, employed by Middleton Joint School District No. 3, including Complainant Christensen, for purposes of collective bargaining on questions concerning wages, hours and conditions of employment.

3. That Middleton Joint School District No. 3, hereinafter referred to as Respondent District or District, is a public school district organized under the laws of the State of Wisconsin, and a municipal employer within the meaning of Section 111.70(1)(a), Wisconsin Statutes.

4. That the Board of Education, Middleton Joint School District No. 3, hereinafter referred to as the Respondent Board or Board, is a public body charged under the laws of the State of Wisconsin with the management, direction and control of said District and its affairs.

5. That at all times relevant hereto, the Complainant Association and the Respondent Board were parties to a collective bargaining agreement for the school year 1973-74 which contained the following parts relevant to this proceeding:

"II. MANAGEMENT RIGHTS

The Board on its own behalf, hereby retains and reserves unto itself all powers, rights, authority, duties, and responsibilitie conferred upon it and vested in it by applicable laws, rules and regulations of the State of Wisconsin and the United States including but not limited to: The right to manage and control school properties and facilities; select, direct, and/or reassign personnel; determine and manage curriculum including co-curricular activities; offer final approval to type of schedule in operation in the various schools of the district; determine the size of the teaching staff, and the allocation of work to the staff; evaluate staff and program; determine the means whereby instructional materials, equipment, and supplies including textbooks are to be selected for utilization in the instructional program; retain all functions and rights to act not specifically nullified by the Master Contract.

The exercise of these rights shall not be subject to grievance.

. . .

XVII. TERMS OF AGREEMENT

This contract shall be in effect from July 1, 1974 and shall rema in effect through June 30, 1975.

This contract, reached as a result of collective bargaining, represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. It is agreed that any matters relating to this contract term, whether or not referred to in this agreement, shall not be open for negotiations after approval of both parent bodies except as the parties may specifically agree thereto. All terms and conditions of employment not covered by this contract shall continue to be subject to the Board's direction and control."

6. That from at least September 1970 until September 1974, Respondent Board limited smoking by teaching, nonteaching and administrative personnel and by visitors to athletic and similar events to certain designated areas within each building and prohibited smoking by students within any building; that, pursuant to this policy, teachers represented by Complainant Association were allowed to smoke and did smoke in teachers' lounges, in corriders during public events and at faculty meetings.

7. That at its April 9, 1974 meeting, Respondent Board adopted a "no-smoking" policy which reads as follows:

"POLICY 8002.4i(7)

'Smoking and possession of lighted smoking materials is prohibited at all times in school buildings.'

Policy adopted by School Board April 9, 1974 - to be effective with start of 1974-1975 school year.";

that said no-smoking policy was adopted, at least in part, because students were smoking in the school buildings.

8. That Respondent Board first publicly discussed the "no-smoking" policy, referred to in paragraph 7, at its February 26, 1974 regular meeting; that the Board publicly discussed it again at its March 12, 1974 regular meeting but postponed action on the measure until its April meeting in order to receive teacher, student and public input; that at the March 12 meeting, the president of Respondent Board asked Michael Austad, the president of Complainant Association but not a member of the Association's negotiating team, for the position of the Association on the proposed smoking ban; that Austad indicated that he was unable to respond without contacting the membership; that after consulting the Association's Executive Committee and others, Austad responded to the Board's inquiry at the Board meeting of April 9, 1974, indicating that he had not received much reaction from the membership because they were more concerned about other things but that the Association opposed such a ban; that, thereafter, on April 9, 1974, the policy was adopted by the Board.

9. That Austad knew by at least March 12 of the exact nature of the proposed change in the smoking policy; that, subsequent to the March 12 meeting of the Board and prior to March 17, Austad sent a memorandum to all Association members, including members of the bargaining team the relevant part of which reads as follows:

"At the school board meeting of 3/12/74 smoking in dist. buildings was again discussed but was tabled until the teachers of MEA can meet to discuss the matter and report thier [sic] feelings back to the Board. This is exactly what we wanted, a chance for imput! [sic]

The board is considering a policy change (see the dist. handbook) that would prohibit smoking in all areas of district buildings. Let your building reps know what you think the dist. policy on smoking should be."

10. That Mark Detert, a member of the Association's bargaining team for the period during which the 1974-75 collective bargaining agreement was being negotiated, received a copy of Austad's memorandum and was aware that the Board was considering prohibiting smoking in all areas of school buildings.

11. That copies of the agenda for Board meetings and copies of the minutes of the last meeting were regularly sent to Austad as President of the Association; that the agenda for the meeting of March 12 indicated that further discussion and action concerning that proposed no-smoking policy, a copy of which was attached, was to take place at that meeting; that the agenda for the meeting of April 9 indicated that discussion and adoption of the no-smoking policy was to take place at that meeting.

12. That negotiations between Complainant Association and Respondent Board for the 1974-75 collective bargaining agreement were in progress

from on or about January 21, 1974 to May 2, 1974; that, even though the implementation of the no smoking policy was delayed until the beginning of the 1974-75 school year thereby affording the Association an opportunity to bargain before it became effective, at no time during said negotiations did the Association's bargaining team request that the Board bargain about any aspect of the proposed change; that one of the issues in the negotiations was the Association's request that a "maintenance of standards clause" be included in the agreement which clause read as follows:

> "Standards Clause - All conditions of employment shall be maintained at not less than the highest minimum standards in effect in the district at the time this agreement is signed, provided that such conditions shall be improved for the benefit of teachers as required by the express provisions of the agreement. This agreement shall not be interpreted or applied to deprive teachers of professional advantages heretofore enjoyed unless expressly stated herein."

That although the Board's bargaining team refused to agree to said provision, it invited the Association's bargaining team to list any condition of employment that the Association wished maintained during the term of the agreement for possible inclusion in the agreement; that the Association's bargaining team never indicated its desire to maintain the conditions of employment described in Findings of Fact 6 above and on April 16, 1974, after the Board had adopted the no-smoking policy, the Association's bargaining team dropped its request that the agreement contain a "maintenance of standards clause"; that thereafter the Complainant Association entered into a collective bargaining agreement, which was signed by its representatives on June 11, 1974 which contained provisions substantially identical to Articles II and XVII set out in Finding of Fact No. 5 above.

13. That on August 13, 1974, Daniel Van Lanen, a teacher employed by Respondents and a member of the Complainant Association, attended a regularly scheduled Board meeting, at the request of other teachers, to ask questions concerning the implementation of the new no-smoking policy; that the Association did not at that time request that the Board bargain about such implementation.

14. That in late summer of 1974, probably in response to Van Lanen's appearance at the August 13, 1974 Board meeting the Superintendent of Schools for Respondents, John Stofflet, drafted a proposed disciplinary procedure for the enforcement of the no-smoking policy which was presented to the Respondent Board, and eventually applied to Complainant Christensen, the relevant part of which reads as follows:

> "However, it would be my recommendation to the Board that in the event an employee of the district fails to abide by the no smoking policy or any other policy the following procedure be followed:
>
> a. The building principal who becomes aware of the fact that an employee is not carrying out the policy is asked to verbally remind the employee of the policy and ask the person to abide by the policy in the future. A written reminder of the policy is to be sent to the employee.
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> b. If the employee continues to violate the policy a written warning is to be issued the employee advising him that he must abide by the policy.

c. If the employee continues to violate the policy, the principal is advised tc place a reprimand in the employee's file indicating with the next violation the employee will be disciplined. (See reprimand model letter.)

d. With the next violation the employee is to be disciplined - which could vary from suspension without pay initially to eventual dismissal if the employee continued to violate the policy.

The above procedure would assure that ample opportunity had been made available to the employee to abide by the policy and that continued violation could only be interpreted as insubordination."

15. That representatives of the Complainant Association first became aware of the disciplinary procedure proposed by Stofflet for the enforcement of the no-smoking policy at about the same time that it was proposed but never requested an opportunity to bargain about its content; that the Complainant Association never requested an opportunity to bargain about the no-smoking policy at any time prior to September 16, 1974; that on or about September 16, 1974 a group grievance dated September 5, 1974 and signed by Christensen and a number of other employes was filed which read as follows:

"As you know the purpose of the grievance procedure in the master contract is to insure adequate consideration of questions concerning violations of employment policies as agreed to in the master contract, but not to prevent the continuation of rapport between teachers, administrators and the board of education. This procedure is outlined in Articles III and XVI of the master contract.

We respectfully request that the administration and the board of education give adequate consideration to our interpretation of the master contract and the alleged violation thereof.

With regard to an alleged violation of the master contract we believe the board of education has unilaterally imposed a working condition on teachers without having negotiated in good faith that condition in the collective bargaining procedure. Board policy 8002.4i. banning smoking has been imposed upon the teaching staff without that condition being bargained during the 1974 negotiations sessions and is therefore a violation of Article I, Section B of the master contract.

We respectfully file this grievance and request that you rescind the smoking ban policy and permit teachers to smoke in those areas where smoking was previously permitted.";

that on September 17 and October 4, 1974 steps a and c of the disciplinary procedure set out above were applied to Complainant Christensen by his principal for alleged violations of the no-smoking policy; that sometime after September 17, 1974 Christensen filed a grievance which read as follows:

"GRIEVANCE SUBMITTED BY RALPH M. CHRISTENSEN

On 17 September 1974, I was reprimanded by James Stillman, Principal, Middleton High School, for smoking in the H.S. Faculty Room on 13 September 1974 in alleged violation of Board Policy #8002.4i(7). I stated that I should not be reprimanded for this act, as it was a

condition of employment which had been unilaterally changed by Board action, and was not a change in conditions of employment brought about by negotiations between Middleton Education Association and the Board. He replied that this was Board policy, which he could not change, and that the Board required him to take this action.

I present the following evidence as proof that smoking in designated areas has been an accepted condition of employment at MHS, and in Joint School District # 3, for the past ten years - the period of my employment at MHS;

1. Teachers, administrators, and other staff members smoked in the Faculty Room and no objection was made.
2. Ashtrays were provided at Board meetings; spectators, Board members, and administrators smoked, and no objection was made.
3. Administrators at MHS smoked in their offices, and permitted teachers to smoke there, and no objection was made.
4. Smoking was permitted at MHS faculty meetings until last year, when the faculty, by a majority vote, agreed to ban smoking because of the poor air circulation in that particular room.

Therefore, I submit that smoking in designated areas has been an accepted condition of employment for the past ten years, and that no change in this condition of employment has been negotiated between Middleton Education Association and the Board.

I hereby charge that in unilaterally changing this condition of employment, the Board has violated Article I.B. (Paragraph one) of the Master Contract.

In order to redress my grievance it will be necessary for the reprimand to be withdrawn, and for the Board to cease all effort to enforce

Board Policy # 8002.4i(7).";

that thereafter, on April 8, 1975, while said grievances were pending before the Arbitrator the complaint herein was filed; that further processing of the complaint herein was held in abeyance at the request of the Complainants pending disposition of said grievances by the Arbitrator.

16. That the policy adopted by the Respondent Board on April 9, 1974 banning smoking by all persons in school buildings relates to the management of the school system and to basic educational policy.

17. That the impact of said policy on working conditions described in Finding of Fact No. 6 above including the disciplinary procedure subsequently established for violations of said policy set out in Finding of Fact No. 14 above affect the conditions of employment of those employes represented by the Association.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSIONS OF LAW

1. That matters relating to the management of a school system and to basic educational policy are subjects reserved to the management and direction of the school system of the Respondents and its agents,

within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act, and that, therefore, the Respondents were not required to engage in collective bargaining, as defined in said section of the Act, with Complainant Association regarding the establishment of the no-smoking policy except insofar as that policy affected the conditions of employment of teachers in the employ of Respondent.

2. That Complainant Association, by its conduct during negotiations, including its agreement to drop its proposed "maintenance of standards clause" and to include Article II and Article XVII in the 1974-75 collectiv bargaining agreement, waived its right to bargain collectively over the impact of the no-smoking policy including the disciplinary procedure subsequently established for its enforcement.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the complaint be, and hereby is, dismissed.

Dated at Madison, Wisconsin this 2nd day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 16, 1974, a group grievance was filed by members of Complainant Association concerning the change in the smoking policy described in the above Findings of Fact; shortly thereafter, Complainant Christensen filed a grievance concerning the same matter. The parties proceeded to arbitration and a hearing was held on January 9 and 10, before the undersigned acting as Arbitrator. The Arbitrator determined that the matter raised by the grievances was not arbitrable under the terms of the collective bargaining agreement between the parties. Accordingly, no decision was made on the merits of the grievances.

The complaint in this proceeding was filed on April 8, 1975 and was held in abeyance pending disposition of the grievances. The parties agreed to waive hearing and agreed that the record made in the arbitration hearing and the briefs filed therein would be the basis for the decision herein provided that the undersigned was appointed by the Commission to act as Examiner.

POSITION OF COMPLAINANTS:

Complainants allege that Respondents unilaterally adopted the no-smoking policy and thereby changed a practice of several years standing which permitted teachers to smoke in designated areas in school buildings and unilaterally implemented a disciplinary procedure to enforce the no-smoking policy without first bargaining about the proposed changes, thus interfering with rights guaranteed by Section 111.70(2) and violating its duty to bargain collectively.

Complainants contend that the no-smoking policy and disciplinary procedure are mandatory subjects of bargaining. This is particularly so because a violation of the no-smoking policy results in penalties being imposed which could eventually affect the tenure of a teacher. Complainants further contend that, because Respondents unilaterally promulgated and implemented the policy and procedure without notifying the bargaining team of Complainant Association and offering to bargain the Association has not waived by its conduct its right to bargain about these subjects. Finally, they submit the Respondents' duty to bargain continues throughout the term of the contract between the parties and that no language exists in that contract which waives with sufficient clarity and specificity as required by law, the Respondents' duty and the Complainant Association's right to bargain.

POSITION OF RESPONDENT:

Respondents deny that they have violated any rights guaranteed by MERA or that they have improperly refused to bargain collectively with the Association.

Respondents argue that the no-smoking policy is not a mandatory subject of bargaining because it is a basic policy relating to the management of the school system which does not significantly infringe upon the conditions of teacher employment. Should any aspect of the policy be considered a mandatory subject of bargaining, Respondents contend that Complainant Association has waived its right to bargain by conduct and contract, particularly by the management rights and "zipper" clauses. Finally, Respondents contend that they have fulfilled any duty they may have had to bargain.

DISCUSSION:

In City of Beloit 1/ and Oak Creek-Franklin Joint City School District No. 1 2/ the Wisconsin Employment Relations Commission set forth the test to be used in determining whether a particular subject is a mandatory subject of bargaining. Generally speaking, matters primarily relating to the management of the school system and to basic educational policy are reserved to the management and direction of a school system and are not mandatory subjects of bargaining. Accordingly, a school system's unilateral change in a policy which is a nonmandatory subject is not a violation of its statutory duty to bargain.

The Examiner concludes that the content of the no-smoking policy is not a mandatory subject of bargaining. The policy in this case is not designed to control the behavior of teachers alone but of all persons who enter school property. Respondents are, in effect, managing the use of their property. Further, the imposition of such a policy relates to basic educational policy. Respondents have apparently determined that the best way to teach its students about the undesirability of smoking, particularly on school property, is to set an example.

Accordingly, because the no-smoking policy rule is not a mandatory subject of bargaining, Respondents had no statutory obligation to bargain with Complainant Association about its promulgation.

The Commission in Beloit and Oak Creek, 3/ however, distinguished between the promulgation of a policy and its implementation. Even if the policy is not a mandatory subject of bargaining, its implementation or impact may be if it affects wages, hours and conditions of employment. The impact or implementation of the new no-smoking policy in this case clearly affected the teachers' established conditions of employment. First, the use of the teachers' lounge and other areas is now restricted and teachers may no longer smoke where they once could. Second, violation of the policy can lead to reminders, warnings, reprimands, suspension without pay and dismissal. Therefore, the impact on the teachers of the new no-smoking rule was a subject about which the Respondents had a duty and the Complainant Association the right to bargain.

The next question that arises is did the Association waive its right to bargain? The record indicates that it did. Although bargaining over the 1974-75 contract was actively going on during the time when the Board was publicly considering passing the measure, the negotiating team for the Association never mentioned a word about the proposed policy or its implementation.

The Association's claim that there is no evidence to support a finding that the Association's negotiating team was aware of the proposed change is without merit. Austad, President of the Association, sent all members a memorandum which clearly set forth the exact nature of the

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1/ (11831) 9/74; aff'd in relevant part, Nos. 144-272 and 144-406 (Dane Co. Cir. Ct.) 1/31/75; app'd to Wis. Sup. Ct.; aff'd 6/2/76.

2/ (11827) 9/74; aff'd, No. 144-473 (Dane Co. Cir. Ct.) 11/75; app'd to Wis. Sup. Ct.

3/ Supra, notes 1 and 2.

proposed change. Detert, a member of the Association's negotiating team testified that he received this memorandum and knew of the proposed change. Moreover, the agenda for future meetings sent regularly to Austad prior to the meetings disclosed the exact policy being contemplated and the exact action -- discussion or adoption -- to be taken. Yet at no time did the Association request bargaining. The Association was not presented with a fait accompli, as the Association contends, because the Association knew of the proposal prior to its passage and its implementation was delayed until the following school year.

The Association did not request bargaining in the Spring of 1974 while contract negotiations were in progress or at any time prior to filing the grievances. In August of 1974, at the beginning of the school year when the no-smoking policy was to become effective, a member of the Association did ask questions of the Board concerning the policy's implementation. Probably in response thereto Stofflet proposed a disciplinary procedure for its enforcement. The Association did not thereafter demand to bargain about the proposed procedure. 4/

For these reasons the Examiner concludes that the Association waived its right to bargain about the impact of the no-smoking policy on the employes it represents as well as any proposed disciplinary procedure for its enforcement. The Association clearly knew about the impact the no-smoking policy would have on the employes it represented and must be presumed to have known that the Employer intended to enforce that policy. Even so it entered into a collective bargaining agreement for the 1974-75 school year which did not contain a clause preserving the practice but did include Articles II and XVII. By entering into such an agreement under circumstances where the Complainant Association knew that Respondent intended to implement and enforce said policy during the term of the agreement, the Complainant Association clearly and unmistakably waived its right to bargain about the impact of the no-smoking policy on the employes it represented and any proposed disciplinary scheme for its enforcement. 5/

For the above and foregoing reasons, and based on the record as a whole, the undersigned Examiner has concluded that the complaint herein should be dismissed.

Dated at Madison, Wisconsin this 2nd day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

4/ In the group grievance it did in effect demand to bargain about the no-smoking policy itself.

5/ The conclusion that the Complainant Association waived its statutory right to bargain about any proposed disciplinary scheme for enforcing the policy is premised on the inseparable nature of a work rule and its enforcement. See e.g. member Fanning's dissent in The Capital Times Co. 223 NLRB No. 67, 91 LRRM 1481 (1976).