STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of BROWN COUNTY Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and BROWN COUNTY SOCIAL SERVICES PARA-PROFESSIONAL EMPLOYEES ASSOCIATION and BROWN COUNTY SOCIAL SERVICES PROFESSIONAL EMPLOYEES ASSOCIATION	Case CLXIV No. 30343 DR(M)-243 Decision No. 20620

Appearances:

Mr. Frederick J. Mohr, Parins, McKay & Mohr, S.C., Attorneys at Law, 415 South Washington Street, P. O. Box 1098, Green Bay, Wisconsin 54305, appearing on behalf of the Associations.

Mr. Kenneth J. Bukowski, Corporation Counsel, and Mr. Gerald Lang, Personnel Director, Brown County, 305 East Walnut Street, P. O. Box 1600, Green Bay, Wisconsin 54301, appearing on behalf of the Municipal Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The County of Brown having, on September 7, 1982, petitioned the Wisconsin Employment Relations Commission to issue a declaratory ruling regarding the duty to bargain over a unilaterally imposed no smoking policy implemented by the Municipal Employer; and a statement in support of the petition having been filed by the Municipal Employer on October 5, 1982; and a statement in opposition to the petition having been filed by the Brown County Social Services Department Paraprofessional Employees Association and the Brown County Social Services Department Professional Employees Association on November 22, 1982; and the parties having on or about December 23, 1982, waived an evidentiary hearing in the matter; and the Commission having considered the evidence and arguments adduced by the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Declaratory Ruling.

FINDINGS OF FACT

1. That the Brown County Social Services Department Professional Employees Association and the Brown County Social Services Department Paraprofessional Employees Association, hereinafter collectively referred to as the Associations, are labor organizations maintaining offices at Green Bay, Wisconsin.

2. That the County of Brown, hereinafter referred to as the Municipal Employer, is a municipal employer engaged in the provision of general governmental services to the citizens of Brown County, Wisconsin, and maintains its offices at Green Bay, Wisconsin.

3. That the Brown County Social Services Paraprofessional Employees Association, at all times material herein, has been, and is, the collective bargaining representative for all non-professional employes employed by the Brown County Department of Social Services, excluding the Director, professional, supervisory and confidential employes.

4. That the Brown County Social Services Professional Employees Association, at all times material herein, has been, and is, the collective bargaining representative for all employes classified as Social Worker in the Brown County Social Services Department.

5. That the collective bargaining agreement for the year 1982 between the Municipal Employer and each of the Associations contains the following provision:

ARTICLE 3. MANAGEMENT RIGHTS

> Through its management, the Employer retains the sole and exclusive right to manage its business, including but not limited to the right to direct its work force, to hire, assign, suspend, promote, discharge or discipline for just cause, to maintain discipline and efficiency of its employees, to determine the extent to which the Employer's operations shall be conducted, the size and composition of the work force, the number of offices and locations of such offices, equipment requirements and location of such equipment and the right to change methods, equipment, systems or processes, or to use new equipment, products, methods or facilities and to reduce the work force if, in the Employer's sole judement, the new equipment, methods, systems or facilities require fewer personnel. In no event shall the exercise of the above rights and responsibilities of the Employer violate the terms and conditions of this Agreement or restrict any rights of the employee under Wisconsoin (sic) Statute 111:70.

6. That some time after February 25, 1982, the management of the Brown County Department of Social Services unilaterally promulgated a policy prohibiting smoking in all areas of the Brown County Social Services Department building except the break room; that clients of the Department were allowed to smoke in the offices of individual employes at the discretion of the employe; and that employes who violate said no smoking policy are subject to disciplinary measures.

7. That the Municipal Employer filed a petition for declaratory ruling requesting the Commission to determine whether the establishment and content of such no smoking policy were mandatory subjects of bargaining pursuant to Sec. 111.70(1)(d) of the Wisconsin Statutes, MERA.

8. That the work rule set forth in Finding of Fact 6 primarily relates to wages, hours and conditions of employment.

9. That the parties have bargained over the subject of work rules for the term of their 1982 collective bargaining agreement and have set forth their agreement on the subject in Article 3. Management Rights.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That the no smoking policy set forth in Finding of Fact 6 is a mandatory subject of bargaining within the meaning of Sections 111.70(1)(d) and 111.70 (3)(a)4 of MERA.

2. That the parties have bargained to agreement on the subject of the Municipal Employer's right to establish reasonable work rules, and the Municipal Employer has therefore fulfilled its duty to bargain within the meaning of Sections 111.70(1)(d) and 111.70(3)(a)4 of MERA over the work rule set forth in Finding of Fact 6 for the term of the 1982 collective bargaining agreement.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes the following

DECLARATORY RULING 1/

The Municipal Employer has no duty to bargain collectively with the Associations, within the meaning of Section 111.70(1)(d) and Section 111.70(3)(a)4 of the Municipal Employment Relations Act over the establishment of the work rule set forth in Finding of Fact 6 during the term of the 1982 collective bargaining agreement.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

In July of 1981 the Municipal Employer circulated a questionnaire among the employes of the Department of Social Services in order to determine their concerns regarding clean air in the workplace, and specifically the attitudes about tobacco smoke. The results of the questionnaire overwhelmingly favored some regulation of smoking in the work place. After engaging in efforts to encourage voluntary curtailment of tobacco smoking, the Municipal Employer determined that mandatory regulations were required. This conclusion was based not only on the results of the questionnaire, but a review by supervisors which concluded that a health hazard was created by smoking within confined quarters. The Employer thereafter promulgated a policy forbidding tobacco smoking within the building except in the break areas. Visitors were also prohibited from smoking on the premises, although this rule was modified following objections from staff members that this might have an adverse effect on the clients.

The Municipal Employer put forth three arguments in support of its position that the no smoking policy is a permissive item. First, the Employer cites Middleton Joint School District No. 3 (14680-A) 1976, for the proposition that a no smoking policy is per se permissive. The County also cites the City of Cudahy (17139-A, B) 1/80, 2/80, for the proposition that a rule relating to public health and safety is a permissive subject. A second line of argumentation raised by the Municipal Employer relates to the management rights clause contained in the professional and paraprofessional labor contracts. These clauses, the Employer asserts, are broad enough to grant the Employer the contractual right to promulgate such a rule. Finally, the County relies on the adverse impact of smoking on the health of both smokers and non-smokers. As it is the responsibility of management to provide a safe working environment, a rule promoting such an end is within the legitimate rights of the employer.

The Associations assert, contrary to the Employer, that Middleton is distinguishable from the instant case and is thus not controlling. In the absence of the public policy goals served by the no smoking policy in Middleton they argue, such a policy is more directly related to working conditions and is thus a mandatory subject of bargaining. Additionally, the Associations note that the management rights clause of the collective bargaining agreement requires that management's exercise of those rights be consistent with the provisions of Chapter 111.70 and thus would not remove management's obligation to bargain over such a mandatory subject as a no smoking policy.

The petitioning Municipal Employer relies primarily on the decision in Middleton Joint School District No. 3, wherein Examiner Fleischli found the unilateral implementation of a no smoking rule in the school district not violative of Section 111.70(3)(a)4, MERA. The Municipal Employer asserts that this decision established that a no smoking policy is per se permissive. Middleton, however, is not so broad a ruling as the Municipal Employer suggests. In Middleton, the Examiner found two compelling public policy goals served by the no smoking policy. First, the policy enhanced the moral authority of the school district in its efforts to dissuade students from smoking. The example set by educators, administrators and visitors in not smoking while on school premises advanced an educational goal of the district. Second, the Examiner found that the rule in Middleton applied to all persons on school premises, without exception, and was therefore an exercise of the Municipal Employer's right to manage its facilities. Neither factor is present in similar degree in this case.

The ban on smoking in the Brown County Department of Social Services cannot persuasively be characterized as one that is aimed at educating or influencing the clients of the Department, for an exception is incorporated into the rule allowing clients to smoke in individual employes' offices in some circumstances. It is likewise apparent that the no smoking policy implemented by the Municipal Employer was not an exercise of the Municipal Employer's right to manage its physical facilities. For while, as noted above, an employe may grant a visitor permission to smoke in his/her office, that employe may not under any circumstances smoke in

the office. The focus of the rule is therefore not concerned so much with the use of the Municipal Employer's facilities as with the conduct of its employes. Because the Department's clients and visitors are not equally subject to the rules, the Employer's reliance on Middleton is not persuasive.

The Municipal Employer cites the Examiner's decision in City of Cudahy for the proposition that a decision which is related to the safety and welfare of the public is a permissive subject of bargaining. In Cudahy the Union had charged a prohibited practice over the City's unilateral decision to prohibit the use of flashlights containing more than two cells by City police officers. The Police Chief's general order was motivated by a concern over the use of such flashlights as weapons, and resulted from several instances where the flashlights had been so employed, leading to lawsuits against the municipal employer. The policy dimensions involved clearly predominated over the employe interest in being allowed to have or use the large flashlights.

The evidence in the instant case supports the notion that workplace smoking poses at least some degree of risk to the health of both the smoker and non-smokers exposed to smokers' second hand smoke. However, the rule also directly affects smoker-employes who may well find it difficult or less pleasant to work without smoking in the Social Service Building.

In our view, the employe privilege/benefits elements at stake predominate over the public policy considerations at stake rendering the particular rule at issue a mandatory subject of bargaining in the office setting involved.

The duty to bargain to agreement or impasse during the term of an existing collective bargaining agreement extends to any mandatory subject of bargaining which the union has not waived its right to bargain over or which is not addressed in the existing agreement. 2/ The agreement between the parties provides, inter alia, that "(t)hrough its management, the Employer retains the sole and exclusive right . . . to direct its work force . . . (and) . . . maintain discipline and efficiency of its employees." This is subject to the proviso that the Employer shall not, in its exercise of such right, "restrict any rights of the employe under Wisconsin Statute 111.70." The Municipal Employer asserts that the former language grants it the right to establish reasonable work rules. The Associations contend that the latter language makes the imposition of such rules subject to the duty to bargain collectively before implementation.

As a general rule, management has the right to establish reasonable work rules regulating the conduct of its employes. This notion derives from management's right to direct the work force, and maintain discipline among its employes and efficiency in its operations. 3/ These latter rights have been specifically reserved to management in the instant agreements. Absent record evidence to the contrary, the Commission must conclude that the parties intended that the Management Rights clauses be given the meaning and effect customarily accorded them in the field of labor relations. Therefore, the parties have bargained to agreement over the subject of work rules for the duration of their 1982 collective bargaining agreement.

In finding that the parties have agreed that management may establish and enforce work rules, the Commission does not suggest that the Associations are without recourse to challenge such rules. Along with the general principle that management may establish work rules is the caveat that such rules must be reasonable, and that the reasonableness of the rule is subject to review in the

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2/ City of Kenosha, (16392) 1978; Madison Metropolitan School District, (15629) 1978; Nicolet Education Association, ((12073-B) 1974, (12073-C) 1975); Racine Unified School District No. 1, (18848) 1982.

3/ See, generally, Elkouri and Elkouri, How Arbitration Works, 3rd edition (BNA, 1973) at pages 517-520.

grievance procedure. Implicit in the Associations' argument that these rules are unnecessary and unduly burdensome is the allegation that they are unreasonable. The Commission expresses no views on the merits of that claim, however, as it goes not to the question of a duty to bargain, but the interpretation of the bargain ultimately reached. By the terms of their agreement, the parties have agreed to have such questions resolved through their grievance-arbitration procedure.

Dated at Madison, Wisconsin this 4th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner