STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS AND DAIRY EMPLOYEES UNION LOCAL NO. 563, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Complainant, vs. CITY OF APPLETON, Respondent.	Case 278 No. 41301 MP-2159 Decision No. 25822-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, by Mr. Scott D. Soldon, on behalf of Complainant.

Mr. Greg Carmen, Assistant City Attorney, Appleton City Hall, 200 N. Appleton Street, Appleton, Wisconsin 54911, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

General Drivers and Dairy Employees Union Local No. 563, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union, filed a prohibited practice complaint with the Wisconsin Employment Relations Commission on November 21, 1988 alleging that the City of Appleton, herein the City, committed a prohibited practice within the meaning of the Municipal Employment Relations Act, herein MERA, by unlawfully refusing to bargain over adoption and implementation of no smoking ban which affected bargaining unit personnel. The Commission appointed the undersigned to make and issue Findings of Fact, Conclusion of Law and Order as provided for in Sec. 111.07(5), Wis. Stats. The City filed an answer on January 12, 1989 and hearing was held in Appleton, Wisconsin on January 23, 1989. The City thereafter filed a brief which was received on March 14, 1989.

Having considered the arguments and the record, the Examiner makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. By letter dated January 21, 1988 1/, David F. Bill, the City's Director of Administrative Services/Director of Personnel, advised Dennis Vandenbergen, the Union's Secretary Treasurer, that:

. . .

> The Appleton Common Council, at its meeting of January 20, 1988, approved the following recommendation of the Board of Health:
>
> > "The City adopt a policy of prohibiting smoking in all City owned buildings. The effective date of the ban will be July 1, 1988."

1/ Unless otherwise noted, all dates hereinafter refer to 1988.

It is the position of the City that the decision to establish the above policy is a non-mandatory subject of bargaining. This position is based on WERC rulings in previous cases, particularly in Middleton Joint School District No. 3 (14680-A) 1976.

The City recognizes that it has a duty to bargain over the impact of the above decision on the conditions of employment of the employees you represent.

It appears that the major impact upon the employees would be the potential for disciplinary action for violating the policy. It is our position at this time that this would be dealt with on the same basis as a violation of any other work rule.

We are prepared to enter into negotiations over this and any other mandatory impact issues. If you wish to do so, please contact me to establish mutually agreeable dates and times for meetings.

. . .

2. By letter dated February 5 Vandenbergen replied:

This Local Union has received correspondence from you in reference to the City of Appleton adopting a policy of prohibiting smoking in all City owned buildings with an effective date of July 1, 1988.

Be advised that Teamsters Local 563 will certainly want to become involved over the impact of the Smoking Ban, which would involve thirteen units of the City of Appleton where certain employees are represented by Teamsters Local 563.

At this time, however, because of not knowing the details and probable ramifications, this Local Union will hold in abeyance any bargaining over the impact.

3. By letter dated August 19 Bill advised Vandenbergen that it would not impose any severe employe discipline "until the impact issues were resolved"; that "we attempt to settle any impact issues at our meeting of September 1"; and that the Appleton Common Council on August 17 took final action by adopting a non-smoking ban which prohibited any smoking in all City facilities except the Reid Golf course building and those City buildings leased in whole or in part to second parties.

4. By letter dated September 13 Vandenbergen advised Bill:

Am writing regarding our discussions of September 1,. 1988 involving parking stickers, smoking policy, the grievance situations in the Engineering Department and the grievance situation in the Parking Ramp Division. I think that we should schedule one more meeting to attempt to resolve these situations rather than proceed with other alternatives. Unfortunately, I will be out of the office in Chicago the entire week of September 12. I will be available to meet with you on September 23, 26 or 27 and would anticipate a short meeting of two hours or less.

Please contact my secretary, Alice Robison, regarding your availability to meet.

5. Bill advised Vandenbergen by letter dated the next day that the City still was willing to bargain over the impact of its decision and that it would follow certain steps to implement its no smoking policy.

6. Bill on September 14 also sent a notice to all City employes which provided:

> Subject: Smoking Ban
>
> The prohibition of smoking in City-owned buidlings takes effect on September 18, 1988.
>
> The following steps will be taken to implement this policy, as it relates to employee relations matters:
>
> 1. The Personnel Policies provide that employees are not authorized to leave their assigned City facility during paid breaks. "Facility" shall be interpreted to include the building and continguous City-owned property.
>
> 2. Violations of this policy shall be dealt with on the same basis as a violation of any other work rule, and shall result in progressive disciplinary action.
>
> 3. No discipline more severe than an oral warning will be administered during the first week the policy is in effect.
>
> You should be aware that violation of this policy could also result in a citation and fine, pursuant to the ordinances adopted by the Council.
>
> (1) DEFINITIONS. As used in this section:
>
> (a) "Building" means any enclosed, indoor area of a structure owned by the City.
>
> (b) "City-owned" means any building, as defined in this section, owned by the City, but not including buildings owned by the Appleton Housing Authority, the Appleton Public Library and the Appleton Redevelopment Authority.
>
> (c) "Smoking" means carrying a lighted cigar, cigarette, pipe or any other lighted smoking equipment.
>
> (2) SMOKING PROHIBITED. No person shall smoke in any City-owned building at any time.
>
> (3) EXCEPTIONS. The prohibition in subsection (2) shall not apply to the public area of the Reid Golf Course Building nor to any City-owned building or portion thereof leased by the City to another party.
>
> (4) RESPONSIBILITIES. The City shall post signs prohibiting smoking in all City-owned buildings. The signs shall:
>
> (a) Be of uniform dimensions and of distinct color.
>
> (b) Be posted at every public entrance into a City-owned building.
>
> Section 2. This Ordinance shall be in full force and effect from and after its passage and publication.
>
> Dated: September 15, 1988

7. The Appleton City Council on the same day adopted an ordinance which provided for a $25 fine for violating its no smoking ban.

8. By letter dated September 30 Vandenbergen informed Bill that the no smoking ban was not uniform because it excluded the golf course building, the Appleton Public Library, and City buildings leased to others, and he also claimed

that "the decision to establish the policy is, in fact, a mandatory subject of bargaining" warranting reconsideration by the City Council. He added:

> It is the position of the Local Union that a "Smoking Free" rather than "Smokeless" environment would be the proper way of handling this situation. The Union is, of course, willing to negotiate on the impact issue of any policy but, in this particular case, is requesting to negotiate over the establishment of any policy. Recognizing that the Council only gets in formal sessions periodically, this writer will wait for a response until Monday, October 17, 1988. At such time, if you have not agreed that the establishment of a policy regarding smoking is a mandatory topic of collective bargaining, we will be forced to file prohibitive practice charges with the Wisconsin Employment Relations Commission on this matter. I would hope that you would not force this situation.
>
> Regarding any discipline, should you discipline any individuals in bargaining units represented by this Local Union during this period of inquiry, negotiations or litigation, we will pursue any such illegal actions to the fullest extent allowed under the law.

9. But for the golf course building where anyone including bargaining unit personnel can smoke, and buildings leased to other entities, the City's no smoking ban has been uniformly applied to all City-owned buildings.

10. While the City has refused to bargain over its decision to adopt the no smoking ban, it has at all times material herein been willing to bargain over the effects of said decision and has in fact done so.

Based upon the foregoing, the Examiner makes and issues the following

CONCLUSION OF LAW

The City of Appleton did not violate Sec. 111.70(3)(a)1 and 4, nor any other section of MERA, by either adopting or enforcing its no smoking ban.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER 2/

IT IS ORDERED that the Complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of May, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

(Footnote 2/ continued on page 5)

(Footnote 2/ continued)

2/ Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Union's complaint asserts that the City's no smoking policy is discriminatory because "it applies to only some, but not all, of the buildings and property under . . ." the City's control and because it only applies to union members in certain situations. As a remedy, it requests that the City be ordered to cease and desist from enforcing its no smoking ban against bargaining unit employes and that it rescind any disciplinary actions levied against said employes and make them whole for any losses caused by such disciplinary action.

The City, on the other hand, maintains that it enforces its no smoking ban in any evenhanded fashion; that it is not required under Middleton Joint School District No. 3 (14680-B) 1976, to bargain over the decision to adopt such a ban; and that its only obligation is to bargain over the impact of such a decision, which it has done.

In Middleton, supra, the Commission ruled that while its effects were bargainable, an employer's decision to adopt a no smoking ban was a permissive subject of bargaining because it primarily related to the management and control of the employer's facility.

The Commission dealt with this issue again in Brown County (20620) 1983, where, in the face of a contractual management rights clause, it ruled that promulgation of a no smoking ban was not unlawful. In doing so, the Commission stated that its holding Middleton supra, was "not so broad a ruling as the Municipal Employer suggests" explaining that it was predicated upon the facts of that case and the two compelling public policy goals served by the ban, i.e. enhancing the "moral authority of the school board in its efforts to dissuade students from smoking" and representing the exercise of the employer's right to manage its facilities. Going on, the Commission found that "the employee priviledge/benefits elements at stake predominate over the public policy considerations . . . ." Nevertheless, the Commission ultimately ruled that the employer had the right to promulgate its no smoking ban because it constituted a reasonable work rule under the terms of the collective bargaining agreement.

Here, of course, we are not dealing with a school setting, hence negating one of the two primary factors found determinative in Middleton, supra. However, the second factor is present since the promulgation and application of the broad rule here covers everyone on the premises and is thus in accord with the City's right to manage its facilities. For contrary to the Union's claim, the record shows that the ban covers both bargaining unit personnel and others alike; that it is applied evenhandedly to all City-owned facilities over which it has direct control, including even the City library which is a separate legal entity; and that the ban's exclusion of the golf course building is reasonable since the building is used strickly for recreational purposes and since bargaining unit employes employed there in any event are allowed to smoke there. Hence, there is no merit to the Union's claim of discriminatory treatment.

In addition, the City's effort to eliminate smoking in its buildings represents a reasonable exercise of its management rights, as there is ever growing public concern and efforts in trying to stop or reduce the level of smoking - a public health hazard which kills hundreds of thousands of people a year and which emits a noxious odor which is offensive to those people who are then forced to breathe that very same air.

Weighed against this is an individual smoker's interests who, as the Commission found in Brown County, supra, "may well find it difficult or less pleasant to work without smoking . . ." Applying the primary relationship and balancing test enunciated by the Wisconsin Supreme Court in Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89, 1977, however, it must be concluded that the public policy goal sought to be achieved by the City outweighs a smoker's interests and that, based upon this record, a smoker's right to smoke in fact ends where someone else's nose begins. Accordingly, the City's decision to adopt the no smoking ban represented a permissive subject of bargaining.

Accordingly, and because the City in fact has bargained with the Union over the impact of its no smoking policy, it follows that the City has not unlawfully refused to bargain; the complaint therefore is dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of May, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner