

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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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	:	Case 468
PROFESSIONAL EMPLOYEES ASSOCIATION,	:	No. 46936 DR(M)-493
BROWN COUNTY MENTAL HEALTH CENTER	:	Decision No. 27477
PROFESSIONAL EMPLOYEES ASSOCIATION,	:	
BROWN COUNTY SHERIFF'S DEPARTMENT	:	
NON-SUPERVISORY EMPLOYEES,	:	
BROWN COUNTY AFSCME UNITS, LOCAL	:	
NOS. 1901, 1901-B, 1901-C, 1901-D,	:	
1901-E AND 1901-F	:	

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Appearances:

- Mr. Kenneth J. Bukowski, Corporation Counsel, Brown County Courthouse, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, on behalf of the County.
- Mr. Frederick J. Mohr, Attorney at Law, Suite 261, 414 East Walnut Street, P.O. Box 1015, Green Bay, Wisconsin 54305, on behalf of Brown County Social Services Professional Employees Association, Brown County Mental Health Center Professional Employees Association, and Brown County Sheriff's Department Non-Supervisory Employees.
- Mr. Jack Bernfeld, Staff Representative, 5 Odana Court, Madison, Wisconsin 53719-1169, on behalf of the various AFSCME Locals.
- Mr. Michael Williquette, Business Agent, 1546 Main Street, Green Bay, Wisconsin 54302, on behalf of Teamsters Local 75.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On January 31, 1992, Brown County filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. as to the County's duty to bargain with various labor organizations over the Brown County Clean Indoor Air Ordinance. By agreement of the parties hearing was not conducted until April 29, 1992 in Green Bay, Wisconsin at which time evidence and argument were presented before Examiner Peter G. Davis. At the commencement of the hearing, Teamsters Local 75's motion to intervene was granted.

The parties opportunity to file post-hearing argument ended with the receipt of an AFSCME brief on July 23, 1992.

Having considered the record and being fully advised in the premises, the Commission makes and issues the following

## FINDINGS OF FACT

1. Brown County, herein the County, is a municipal employer having its principal offices in Green Bay, Wisconsin.
2. Brown County Social Services Professional Employees Association, herein BCSSPEA, is a labor organization representing certain County employees for the purposes of collective bargaining.
3. Brown County Mental Health Center Professional Employees Association, herein BCMHCPEA, is a labor organization representing certain County employees for the purposes of collective bargaining.
4. Brown County Sheriff's Department Non-Supervisory Employees, herein BCSDNSE, is a labor organization representing certain County employees for the purposes of collective bargaining.
5. American Federation of State County and Municipal Employees, herein AFSCME, is a labor organization representing certain County employees for the purposes of collective bargaining.
6. Teamsters Local 75, herein Teamsters, is a labor organization representing certain County employees for the purposes of collective bargaining.
7. Since March 18, 1992 the following Brown County Clean Indoor Air Ordinance has been in effect:

## CHAPTER 34

### BROWN COUNTY CLEAN INDOOR AIR

**34.01 INTRODUCTION.** The smoking of tobacco products and other substances indoors causes recognized adverse health effects on not only the individuals smoking but also on others. Smoking indoors adversely affects among other things, health, safety, comfort, employee production and building maintenance expenses.

While it is difficult to quantify exactly, smoking indoors also drives up publicly funded expenses in terms of increased health insurance premiums, increased sick leave use, increased building maintenance and decreased employee productivity. In addition, there is a public interest of taxpayers to an investment in its employees by paying their health insurance, and a need to maintain employee health to keep county costs from rising.

Brown County, having received information and recommendations from a study committee on smoking issues, considered the problems caused by smoking indoors and believing it to be in the best interest of Brown County and its citizens, has recommended that the Brown County Board of Supervisors adopt the Clean Indoor Air Ordinance set out herein.

**34.02 PURPOSE, AUTHORITY AND INTENT.** Reports from the Surgeon General, the Environmental Protection

Agency and others show that smoking contributes to health problems of County employees and members of the public exposed to indoor smoke, both directly through deliberate use of smoking materials and indirectly, to nonsmokers, through involuntary inhalation of smoke in the air. This ordinance is enacted to protect the health and comfort of the public through the regulation of smoking, according to the authority granted this County by Sec. 101.123(2)(c), Stats. (The Wisconsin Clean Indoor Act) and Sec. 59.07, Stats.

**34.03 DEFINITION.** "Smoking" as the term is used in this Ordinance means a lighted cigar, cigarette, pipe or any other lighted smoking item or equipment.

**34.04 REGULATION OF SMOKING.** No person may smoke indoors at any time in any of the County owned buildings listed in Appendix "A", located in the County of Brown, Wisconsin, as set forth in Appendix A to this ordinance.

Department Heads in all other county-owned, rented, or leased buildings not listed in Appendix A shall enforce a "No Smoking" policy consistent with Sec. 101.123, Stats. (The Wisconsin Clean Indoor Air Act).

**34.05 PENALTY.** Any person found guilty of violating this ordinance or any part of this ordinance, shall be subject to a forfeiture of not more than \$25.00, together with the costs of prosecution, and in willful default of payment of such forfeiture and costs of prosecution, shall be imprisoned in the county jail until said forfeiture is paid at the rate of 1 day for each \$25.00 fine.

. . .

Adoption of this ordinance does not preclude the County Board from adopting any other ordinance or providing for the enforcement of any other law or ordinance relating to the same or other matter. And issuance of a citation hereunder shall not preclude the County or any authorized officer from preceding under any other ordinance or law by any other enforcement method to enforce any ordinance, regulation or order.

**34.06 NOTIFICATION TO PUBLIC.** The person in charge of any County building or his or her designee, shall cause to be posted at the entryway of all County buildings, signs notifying the public of the fact that the building is a smoke-free building. Absence of such sign, however, shall not be a defense to the violation of this ordinance.

**34.07 ENFORCEMENT.** All Brown County law enforcement officials of the Brown County Sheriff's Dept. are hereby authorized in the name of the County

of Brown to issue citations for prosecution for violations occurring under this chapter as well as the Superintendent of Buildings and Grounds. In addition, such officials may delegate this authority to department heads and/or persons in charge of the County buildings set forth in Appendix A.

Prosecutions under this chapter shall be made by the issuance of citations and the procedure to be followed shall be governed by those Wisconsin Statutes Section 866.119 which are pertinent and applicable to its prosecution of ordinances by citation. The District Attorney or the Corporation Counsel shall, upon receipt of a complaint from the Sheriff's Department or Superintendent of Buildings & Grounds, institute appropriate legal proceedings against the alleged offender.

**34.08 EMPLOYEE DISCIPLINE.** In addition to or in lieu of enforcement of this ordinance by forfeiture, violations of this section by County employees and officers may be punished by appropriate discipline as a violation of a reasonable work rule as determined by the supervisor of the employee and/or the Superintendent of Buildings and Grounds.

The only exceptions to the prohibition against indoor smoking listed in the Ordinance are set forth therein as follows:

APPENDIX "A"

Schedule of Locations

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Brown County Veterans Memorial Arena/Expo Center 1901 S. Oneida St., Ashwaubenon	(Excluding that portion leased and not open to the public)
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. . .

Brown County Mental Health Center 2900 St. Anthony Dr., Green Bay	(Excluding that part designated for clients, having a prescription from a physician, within the residential area of the inpatient health care facility, not accessible to other clients and members of the public).
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. . .

8. Certain County employes represented by AFSCME work in the County's library system and shelter care facility. Prior to the existence of the Clean

Indoor Air Ordinance, these employes were able to smoke in designated areas in the buildings in which they worked. Under the Ordinance, no one, including these AFSCME employes, is allowed to smoke in the various buildings. Employes are allowed to smoke outside the buildings.

9. Certain County employes represented by Teamsters work in the Courthouse and related buildings, Highway Department, Museum and Airport. Prior to the existence of the Clean Indoor Air Ordinance, these employes were able to smoke in designated areas in the buildings in which they worked. Under the Ordinance, no one, including these Teamster employes, is allowed to smoke in the Courthouse and related buildings, Highway Department, the Museum and unleased portions of the Airport. These employes are allowed to smoke outside the buildings. In those portions of the Airport which are leased by the County to outside parties for the purposes of operating a restaurant etc., the leases in force do not prohibit smoking. The County has not sought to apply the Ordinance to leased Airport premises and thus smoking is allowed to that extent at the Airport.

Teamsters and the County have also bargained an agreement which allows Highway Department employes to smoke in vehicles if they are alone or if the passenger does not object.

10. The BCSDNSE represents certain employes in the County's Sheriff's Department. Prior to the Ordinance, employes were allowed to smoke in the Department's buildings and, under certain circumstances, in vehicles. Under the Ordinance, no one, including these BCSDNSE employes, is allowed to smoke in the Department's buildings. Employes are allowed to smoke outside the buildings during breaks in the work day.

11. The BCSSPEA, BCMHCPEA, and AFSCME represent certain employes at the County Mental Health Center which has both a nursing home and a hospital component. Prior to the Ordinance, employes were able to smoke in designated portions of the Mental Health complex. Under the Ordinance, employes can only smoke outside the facility during breaks in the work day.

Under the Ordinance, adult residents/patients continue to be able to smoke indoors in certain areas, although an easily available physicians certification will ultimately be required if an adult resident/patient wishes to continue to smoke. Some employes supervise residents/patients while they smoke and assist them with smoking materials.

Visitors to the Mental Health Center are not allowed to smoke in the buildings.

12. The smoking restriction contained in the Brown County Clean Indoor Air Ordinance primarily relates to the management and direction of the County and the formulation of public policy in those buildings where there are no exceptions to said restriction.

13. The smoking restriction contained in the Brown County Clear Indoor Air Ordinance primarily relates to conditions of employment in those buildings where there are exceptions to said restriction.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The smoking restriction contained in the Brown County Clean Indoor Air Ordinance is a permissive subject of bargaining in those buildings where there are no exceptions to said restriction.

2. The smoking restriction contained in the Brown County Clean Indoor Air Ordinance is a mandatory subject of bargaining in those buildings where there are exceptions to said restriction.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

1. Brown County has no duty to bargain over the smoking restriction contained in the Brown County Clean Indoor Air Ordinance with any of the labor organizations who are parties to this proceeding as to those employes who work in buildings where there are no exceptions to said restriction.

2. Brown County has a duty to bargain over the smoking restriction contained in the Brown County Clean Indoor Air Ordinance with any of the labor organizations who are parties to this proceeding as to those employes who work in buildings where there are exceptions to said restriction.

Given under our hands and seal at the City of  
Madison, Wisconsin this 8th day of December,  
1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/  
A. Henry Hempe, Chairperson

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1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

Continued

Herman Torosian /s/  
Herman Torosian, Commissioner

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William K. Strycker /s/  
William K. Strycker, Commissioner

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1/ Continued

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.



BROWN COUNTY

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

The issue to be resolved in this proceeding is whether Brown County has a duty to bargain over the terms of the Brown County Clean Indoor Air Ordinance which restrict employe smoking. Issues as to whether the County's adoption or implementation of the Ordinance violate existing collective bargaining agreements were not litigated in this proceeding.

The County generally acknowledges a duty to bargain over the impact of the employe smoking restrictions it has imposed.

POSITIONS OF THE PARTIES

The County

The County contends that the smoking restriction in Brown County Clean Indoor Air Ordinance is a permissive subject of bargaining. It argues that as authorized by Sec. 101.123, Stats., the County concluded that it would eliminate smoking by employes and members of the public in County facilities. The County asserts that its decision is primarily related to the management of its buildings and property and to protecting the health of its employes and members of the public.

Consistent with the holding in Middleton Joint School District No. 3, Dec. No. 14680-A (Fleischli, 6/76) aff'd by operation of law (WERC, 6/76) the County argues that as the policy seeks to control the behavior of both employes and members of the public, the County has made a basic policy decision as to the management and use of its facility over which it need not bargain. The County notes that all employes continue to be allowed to smoke outdoors during breaks and meal periods. Citing City of Appleton, Dec. No. 25822-A (Greco, 5/89) aff'd by operation of law (WERC, 6/89), the County contends that the public policy goals it seeks to achieve outweigh the reduction in employe smoking options.

The County acknowledges that smoking is still allowed in County facilities that are leased to private individuals. The County asserts that under the terms of the leases governing these premises, it cannot unilaterally impose a ban on smoking. It argues that when the existing leases expire and are renegotiated, no smoking provisions will be included.

The County also admits that certain residents at the Mental Health Center are allowed to smoke. However, the County contends that such smoking is limited to existing residents who were smoking in the facility prior to the new Ordinance and residents who obtain physician approval to smoke. The County further contends such resident smoking occurs only in areas not accessible to other clients and members of the public.

Given the foregoing, the County asks that the smoking restriction in the Brown County Clean Indoor Air Ordinance be found to be a permissive subject of bargaining.

AFSCME

AFSCME argues that as to the employes it represents, the Ordinance is a mandatory subject of bargaining primarily related to employe conditions of employment rather than to the formulation or management of public policy. AFSCME asserts that as crafted and applied, the Ordinance does not serve a legitimate public interest.

AFSCME contends that the Ordinance does not establish a universal or uniform prohibition against smoking in County buildings or on County property by either employes or others. It asserts non-employes are still able to smoke in some County facilities and employes who work outside or in County vehicles continue to be allowed to smoke. On the other hand, AFSCME points out that the smoking opportunities for some other employes have been substantially limited.

AFSCME asserts the "contradictory" nature of the Ordinance is best evidenced at the Mental Health Center where employes who wish to smoke "are required to huddle in cold doorways or in dark parking lots while the smoking rights of adult residents and patients remain intact." Indeed, AFSCME argues that it remains a job duty for some employes to assist and supervise residents and patients who wish to smoke to prevent the resident or patient from endangering themselves.

Applying the facts of this case to the holdings in prior Commission decisions, AFSCME contends that the smoking restriction in the Ordinance is a mandatory subject of bargaining. As was true in Brown County, Dec. No. 20620 (WERC, 6/83), AFSCME asserts the Ordinance is focused on employe conduct rather than on control of facilities. Thus, unlike Middleton Schools and Appleton, AFSCME argues the Ordinance does not in fact regulate the conduct of all present in County facilities. AFSCME also asserts that the County's obligation to bargain over the smoking restriction is further supported by the Ordinance provision which exposes employes to discipline for smoking where prohibited.

Given all of the foregoing, AFSCME urges the Commission to find the Ordinance to be a mandatory subject of bargaining.

Brown County Social Services Professional Employees Association,  
Brown County Mental Health Center Professional Employees Association, and  
Brown County Sheriff's Department Non-Supervisory Employees

These Unions assert when the Commission balances the employer and employe interests at stake herein, the smoking restriction in question should be found to be a mandatory subject of bargaining.

Looking first at the County's purported interest in the management and control of its facilities, the Unions contend that smoking continues to be allowed in the Mental Health Center, County facilities under lease, and in County vehicles. From this, these Unions argue the County's concern for its facilities is selective. Turning to the County's alleged health concerns, these Unions contend such concerns are "absurd" in light of the ability of Highway Department employes to smoke in trucks and the requirement that Mental Health Center employes monitor and aid smoking patients. Given the disparate treatment between patients and employes and between groups of employes, these Unions assert the Commission's prior holding in Brown County warrants a conclusion that the smoking restriction is a mandatory subject of bargaining.

#### DISCUSSION

In Beloit Education Association v. WERC 73 Wis.2d 43 (1976), Unified School District No. 1 of Racine County v. WERC 81 Wis.2d 89 (1977) and City of Brookfield v. WERC 87 Wis.2d 819 (1979) the Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours and conditions of employment" or to the "formulation or management of public policy," respectively.

As the parties have argued, in 1983 the Commission addressed the issue of whether a restriction on the smoking privileges of certain Brown County employes was a mandatory subject of bargaining. In that case, we held:

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 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 per-missive. 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' office 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 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 Services 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.

Here, as in the earlier Brown County dispute, the Ordinance impacts on employe conditions of employment by restricting the locations in which employes may smoke during the work day.

Here, as in the earlier Brown County dispute, the County cites the employer interests to be considered as being the public policy of protecting employe and public health and the management right to control facilities.

However, here, unlike the earlier Brown County dispute, the County Board determined as a matter of public policy that it wished to protect the health of employes and non-employes alike 2/ and thus in many work locations the ban on indoor smoking applies without exception to all individuals, employes and non-employes alike. As to such locations, the focus of the Ordinance is indeed controlling the use of County facilities consistent with the County's public policy determination rather than simply controlling the conduct of County employes. As to those buildings where no exceptions exist, we conclude that the management and public policy considerations predominate over the impact on employe conditions of employment. As to the employes working in these buildings, the County has no duty to bargain over the restrictions on employe smoking imposed by the Ordinance. 3/

Consistent with our earlier Brown County decision, we reach a different conclusion as to those buildings where smoking continues to be allowed. We

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2/ Secs. 34.01 and 34.02 of the Ordinance provide in pertinent part:

**34.01 INTRODUCTION.** The smoking of tobacco products and other substances indoors causes recognized adverse health effects on not only the individuals smoking but also on others. Smoking indoors adversely affects among other things, health, safety, comfort, employee production and building maintenance expenses.

. . .

**34.02 PURPOSE, AUTHORITY AND INTENT.** Reports from the Surgeon General, the Environ-mental Protection Agency and others show that smoking contributes to health problems of County employees and members of the public exposed to indoor smoke, both directly through deliberate use of smoking materials and indirectly, to nonsmokers, through involuntary inhalation of smoke in the air. This ordinance is enacted to protect the health and comfort of the public through the regulation of smoking, according to the authority granted this County by Sec. 101.123(2)(c), Stats. (The Wisconsin Clean Indoor Act) and Sec. 59.07, Stats.

3/ Because the Ordinance in dispute only applies to County buildings, we do not find the ability of County Highway employes to smoke in vehicles to be of significance herein.

acknowledge that at both the Airport and the Mental Health Center, the County has advanced bona fide reasons for the exceptions. At the Airport, the County is party to an existing restaurant/lounge lease which would likely require amendment if the Ordinance were to extend to said premises. In certain buildings at the Mental Health Center, the County has concluded the overall health and safety of the patients/residents will be enhanced by the continuing ability of patients/residents to smoke, so long as there is physician approval. Nonetheless, these exceptions are inconsistent with the purpose of the Clean Indoor Air Ordinance 4/ and sufficiently transform the County's control of facilities to a control of employe conduct so as to tip the balance in favor of the impact on employe interests. 5/

Given all of the foregoing, as to the employes working in buildings with exceptions, we conclude that the County does have a duty to bargain with the labor organization(s) that represent these employes as to any restrictions on existing smoking rights. Of course, our decision is subject to subsequent requirements imposed by state law through statute and/or administrative rule. Thus, we note that with respect to the hospital section of the Mental Health Center, 1991 Wisconsin Act 130 becomes effective in October, 1993. The amendments to Sec. 101.123(4)2 contained in said Act appear to prohibit smoking by all individuals, including employes and patients, in hospitals except ". . . that in a hospital or a unit of a hospital that has as its primary purpose the care and treatment of mental illness, alcoholism or drug abuse a person in charge or his or her agent may designate one or more enclosed rooms with outside ventilation as smoking areas for the use of adult patients who have

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4/ See Footnote 2.

5/ This should not be construed as determining that an employer's decision to designate specific portions of a building as smoking or non-smoking, applicable to all users of the building, employes and public alike, is a mandatory subject of bargaining. That issue is not before us.



the written permission of a physician." Thus, on the effective date of 1991 Wisconsin Act 130, the issue of smoking in the hospital section of the Mental Health Center would seem to become a prohibited subject of bargaining. 6/

Dated at Madison, Wisconsin this 8th day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/  
A. Henry Hempe, Chairperson

Herman Torosian /s/  
Herman Torosian, Commissioner

William K. Strycker /s/  
William K. Strycker, Commissioner

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6/ Obviously, we would reach the same result even if a hospital shares a building with another facility where smoking is allowed. While, in such circumstances, our "building exception" analysis would normally produce a finding that the employer must bargain with the union over a smoking prohibition in the hospital, the specific requirements of state law must govern.