STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN EMPLOYEES UNION, AFSCME, COUNCIL 24, AND ITS AFFILIATED LOCAL UNIONS 219 AND 3394, Complainants,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 777
No. 66660
PP(S)-377

Decision No. 32019-A

Appearances:

Lawton and Cates, by **Atty. Kurt Kobelt**, P.O. Box 2965, Madison, Wisconsin 53701-2965, for the Complainants.

David Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 25, 2007, the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, and its affiliated local unions 219 and 3394 filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin had committed unfair labor practices by refusing to comply with certain grievance arbitration awards, in violation of Secs. 111.84 (1)(a) and (e), Stats. Hearing in the matter was held on July 10, 2007, with a stenographic transcript being made available to the parties by July 27, 2007. The parties thereafter exchanged written and supplemental briefs, the last of which was received on February 20, 2008. The Examiner hereby issues the following

FINDINGS OF FACT

1. AFSCME Council 24 is a "labor organization" as that phrase is defined by Sec. 111.81(12), Stats., and as that phrase is used throughout the State Employment Labor

Relations Act (SELRA). At all times material hereto, it was and continues to be the exclusive bargaining agent for those state employees whose positions were previously allocated by action of the Wisconsin Employment Relations Commission to statutorily created bargaining units pursuant to sec. 111.825, Stats. Pursuant to those same statutes, AFSCME Local Unions 163, 219 and 3394 are "labor organizations" representing employees employed at the Department of Corrections Kettle Moraine Correctional Institution (KMCI), Jackson Correctional Institution (JCI) and Columbia Correctional Institution (CCI), respectively.

2. The State of Wisconsin is the "employer," as that phrase is defined by Sec. 111.81(8), Stats., and as that phrase is used throughout SELRA, of the employees employed at all State of Wisconsin Department of Corrections (DOC) facilities, including Kettle Moraine Correctional Institution (KMCI), Jackson Correctional Institution (JCI) and Columbia Correctional Institution (CCI).

3. AFSCME Council 24 and the State of Wisconsin are parties to a collective bargaining agreement affecting employees identified in Finding of Fact 1, covering the period May 13, 2006 to June 30, 2007. Article 4 of the collective bargaining agreement establishes a grievance procedure for resolving disputes which culminates in final and binding arbitration. Pursuant to Section 4/1/4 of the agreement, all grievances "must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance."

4. The collective bargaining agreement between the parties also provides for Local Unions affiliated with Council 24, such as locals 163, 219 and 3394 to enter into Local Agreements, which are considered part of the collective bargaining agreement. Since at least the 2001-2003 agreement, and through at least the 2006-2007 agreement, the agreement has included the following provisions:

> **SECTION 7: Work Rules**
>
> 11/7/1 The Employer agrees to establish reasonable work rules. These work rules shall not conflict with any provision of this Agreement. Newly established work rules or amendments to existing work rules shall be reduced to writing and furnished to the Union at lease seven (7) calendar days prior to the effective date of the rule. The reasonableness of the newly established work rule(s) or amendment(s) to existing work rule(s) may be grieved beginning at the 2nd step of the grievance process.
>
> 11/7/2 For purposes of this Article, work rules are defined and limited to:
>
> > "Rules promulgated by the Employer within its discretion which regulate the personal conduct of employees as it affects their employment except that the Employer may enforce these rules outside the normal work hours when the conduct of the employee would prejudice the interest of the State as an Employer."

. . .

Negotiating Note 5:
2005-2007 AGREEMENT

OFFICERS AND YOUTH COUNSELORS

Within the institutions of the Departments of Health and Family Services and Corrections which employ Officers and/or Youth Counselors, the local Union and local management shall meet as soon as possible after the effective date of the Agreement to negotiate a solution to the problem of providing rest periods to all Correctional Officers and Youth Counselors. These negotiations shall take place in accordance with the provisions of Article XI, Section 2. [1]

To begin the negotiation procedure, local management shall submit a list of the posts and types of breaks for each post to the local Union.

In these negotiations, the parties shall consider "Type A" (defined as a rest period for those work stations where an employee could reduce his/her activity while remaining at the station. The employee would either be expected to use his/her sound discretion in choosing an appropriate time for the reduction in his/her activity, or a set time would be established in advance and operational coverage would be increased by other employees during the break period for that particular assignment.) and "Type B" (defined as a rest period for those work stations where relief coverage could be provided within existing staffing levels.) breaks as potential solutions and shall also consider other types and kinds of solutions which may be appropriate for a particular post or institution, as may be mutually agreed to.

In the event disputes arise at the local level forty (40) days after the effective date of the Agreement, a department level meeting with representatives of the Department of Health and Family Services, the Department of Corrections, the Office of State Employment Relations and Council 24 shall be held within twenty (20) days to resolve any remaining disputes. In institutions where agreement is reached, they shall go into effect notwithstanding unresolved issues at other institutions.

Absent agreement, no changes in present practices shall be made at any post in any institution. Following agreement, no changes shall be made in the practice with regard to any post unless there is mutual agreement to change the practice.

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[1] Article XI, Section 2 relates to the provisions for Union-Management Meetings.

Any and all agreements relating to this issue shall be signed by both parties.

5. In accordance with this negotiating note, the local agreements at Kettle Moraine Correctional Institution (KMCI), Columbia Correctional Institution (CCI) and Jackson Correctional Institution (JCI) included terms which allowed employees to smoke during their rest breaks. The 1982 local agreement (LA) at KMCI defined Type A breaks as "those posts where staff could reduce their activity and break informally by drinking coffee, smoking a cigarette, etc. while remaining at their post." The "method of relief" section of Item #12 provided that officers on a Type A break "may drink coffee and smoke." The successor local agreement of December 8, 1983 deleted Item 12 because no agreement could be reached. In a memorandum dated December 14, 1983, the KMCI Personnel Manager explained that because the Local 163 bargaining team "wanted to make unacceptable changes" in the local agreement on rest breaks, an impasse was reached, but that "(m)anagement will continue the past practice and previously agreed local agreement on rest breaks."

The July, 1988 LA at CCI provided as follows:

GENERAL PROVISIONS:

1. Staff are expected to remain attentive to perform their responsibilities at all times while on their posts. Staff are not authorized to read non-work related material or to watch television while on their posts.

2. Staff may drink coffee or similar beverages on their post. Staff may smoke on their post, assuming that it is not a 'no smoking' area. Supervisors do have the discretion to dictate, in writing, when and where this behavior is appropriate.

3. All staff are expected to respond to calls in times of emergency.

4. This agreement covers any and all AFSCME Local 3394 employees at Columbia Correctional Institution now and in the future. Changes to this agreement can be made by mutual consent of both parties.

The four-page Rest Break Agreement also included several specific provisions unrelated to smoking. The CCI Local Agreement was most recently revised on October 12, 1994, without amendment to the provisions of the Rest Break Agreement quoted above.

6. On March 17, 1989 Wisconsin Department of Health and Social Services Secretary Patricia A. Goodrich issued an Administrative Directive to implement the Wisconsin Clean Air Act, Sec. 101.123, Stats. That directive, which applied to the DHSS Division of Corrections, the DOC's predecessor agency, provided as follows:

. . .

III. Policy

A. **Smoking will not be allowed in people's work stations, private offices, hallways, elevators, conference rooms, public waiting rooms or other rooms (except as provided in III.B. below)**

B. **Smoking is allowed only in those areas that have been specifically designated as smoking areas. All designated smoking areas must have visible smoking allowed signs posted. (Emphasis** in original)

Pursuant to Goodrich's directive, on June 6, 1989, the Director of the Bureau of Adult Institutions in the Division of Corrections, issued the following policy:

1. Smoking by inmates, staff or visitors will not be allowed in work areas/stations, private offices, hallways, elevators, conference rooms, public waiting rooms, visiting rooms, dining rooms, dayrooms/commons areas, or state vehicles except where specifically designated and posted as a smoking area. Institutions do have the authority to make special accommodations for staff who are not allowed to leave their post during their shift for breaks or meals. Inmates will be allowed to smoke in their rooms. As much as feasible, the institution will accommodate nonsmoking inmates in multiple-living arrangements.

2. Each institution will submit to the Bureau, for approval, a list of those areas designated for smoking. Any changes or modifications will be subject to a similar review.

. . .

In a follow-up memo on June 16, 1989, the director wrote that "the intent of this policy is to restrict smoking as much as is feasible given physical plant and operational constraints. As noted in the policy, designated smoking areas must be approved by the Bureau. Approval will be granted with this philosophy in mind."

7. On January 6, 1993, CCI Warden Jeffrey P. Endicott issued the following memorandum:

> We have recently received information from the Engineering Division in Madison that residue from smoke in the bubbles can cause significant damage to the equipment. Due to this fact, along with the confined nature of the space and the impact is has on non-smokers, effective March 1, 1993, smoking in all housing unit bubbles, to include R&O and DS-1, along with Central Control, will no longer be permitted.

On March 30, 1993, Endicott issued the following memorandum:

On 1/6/93, I issued a memo dictating that all unit bubbles would be "No Smoking" areas. It has come to my attention from several sources that staff are not complying with this directive. This is not acceptable. For the benefit of non-smokers, all smoking policies are this institution are to be enforced. I would call your attention to my 6/23/93 (sic) memo to all staff which outlines the policies throughout the institution. I expect supervisors to monitor the situation and to take appropriate action when necessary.

8. On June 20, 1994, CCI issued the following Smoking Policy:

The Smoking Policy for Columbia Correctional Institution has been expanded to define the general smoking policy of the institution and for specific departments within the institution. This policy was developed by a committee appointed by the Warden's Office and was comprised of smokers and nonsmokers; both security and nonsecurity staff were represented on the committee.

Per state statute, smoking in the work place is considered a privilege, not a right. Employees do have the right to clean air in the work place. With this attitude in mind this policy has been established for Columbia Correctional Institution.

General Policies:

1. There will be no smoking in common (shared) areas. Individuals (inmates and staff) who work in common areas who smoke may do so only in designated smoking areas.
2. There will be no smoking in areas/offices with personal computers. Due to the fact that smoke and nicotine adhere and build-up on the hard drives and diskettes of personal computers, there will be no smoking in offices or areas with personal computers. Staff and inmates who work in areas with personal computers may smoke only in designated smoking areas.
3. Staff with personal offices may smoke in their offices providing they do not have personal computers.
4. There will be no smoking on elevators or hallways unless it is a designated smoking area.
5. Staff entering areas designated as nonsmoking may not bring lit cigarettes into those areas.
6. *Staff assigned to eight-hour posts that require them to stay at their post, will be allowed to smoke at their posts at times when there is no inmate/staff movement.* [*Emphasis* added]

7. In the event that the designated smoking break rooms are in use (i.e., meetings, training sessions), the table closest to the Lieutenant's Office will be a designated smoking area.

The policy also detailed the smoking/nonsmoking status of thirty (30) specific areas.

9. On November 30, 1999, CCI Warden Endicott distributed the following memo:

TO: All Staff and Inmates

SUBJECT: Smoking Policy and Procedure

Please be advised that the new smoking policy will become effective at CCI on 1/1/2000. A sign-up sheet for staff who are interested in attending a Smoking Cessation class is available in the Squad Room. If there is interest, the class will be offered in January. The policy is attached below and is posted in the Information Center for all staff to review. Thank you in advance for your cooperation.

As modified slightly in a manner not germane to the instant matter, the Smoking Policy and Procedure that became effective on January 1, 2000 read as follows:

POLICY: Inmate, visitor and staff smoking will be allowed on CCI property, buildings and grounds, only in designated areas. Smoking is prohibited in all other areas, to include State vehicles. Smoking areas will comply with all fire and safety codes.

Designated smoking areas are limited to:

1. General population inmate cells only. Smoking is not allowed in DS-1, DS-2 or HU-7 Seg cells.

2. Outside areas with appropriate waste receptacles, to include:

   a. The Rec Field when conditions allow (inmates and staff).
   b. Outside the Warehouse (inmates and staff), Truckgate (staff only), or perimeter grounds (inmates and staff).
   c. Picnic Area adjacent to Warehouse (staff only).
   d. Outside the lobby entrance (staff and visitors only).
   e. Barracks Break Pad (staff and inmates).
   f. In outside areas between Maintenance, the School, Laundry, Kitchen and Industries (staff and inmates). Inmates smoking in these areas must be appropriately

supervised. Posts may not be vacated or coverage diminished to accommodate staff or inmate smoke breaks.

g. Tower catwalks.

c. Other areas as designated by the Warden

Staff smoke breaks may not exceed one fifteen-minute beak every four hours. Similar accommodations **DO NOT** have to be made for inmate WORKERS. [Emphasis in original]

10. As do many DOC institutions, CCI has a Labor/Management Committee which meets periodically to address various issues. The LMC includes members of the Local 3394 Executive Board. The following are excerpts from the minutes of that committee:

March 5, 2002

. . .

No Smoking Policy. The Warden said we were looking to put together a work group to review the smoking policy at this institution. Labor was asked if they have anyone who wants to be on the committee. Management had initially made a commitment to try to go smoke free as of July 1. We were not sure if we'll meet that deadline as there have been some climate concerns throughout the institution for the past several months. Management is looking to do an assessment and to set up a process for doing this. The work group will need a mix of smokers and non-smokers. Roger Luder was previously asked and indicated interest. Management asked that several names be submitted to the Warden. There will be at least two members from Labor on the Committee.

April 2, 2002

. . .

No Smoking Committee. At the last meeting, management asked for names from Labor to be on the committee; Leonard Below volunteered. Labor will present another name this week.

At the time, Below was a member of the Local 3394 executive board. He was later joined on the committee by Local 3394 member Roger Luder. During the time he was serving on the Smoking Policy Review Committee, Luder was reprimanded and then given a one-day suspension for smoking cigars at his post, in violation of department work rules. Prior to joining the committee, Luder had been given a one-day and a three-day suspension for similar

violations.[2] Neither Below nor Luder were authorized by Local 3394 to negotiate or agree to any changes in the rest break agreement on behalf of Local 3394.

11. On May 29, 2002, CCI Deputy Warden Greg Grams issued the following memorandum, addressed to nine represented and unrepresented employees:

> SUBJECT: Smoking Policy Review
>
> You have volunteered or been recommended to serve on the smoking policy review committee. The first meeting is scheduled for Monday, June 24, 2002 at 1:00 p.m. in the large Administrative Conference Room. Overtime will be approved for staff not scheduled to be at work at this time.

12. According to the minutes of the Administrative Staff Meeting of June 4, 2002:

> No Smoking. There are a lot of questions out back about smoking/no-smoking. The Warden will have a memo sent out for posting in the HU's on the status of no-smoking at the institution. An implementation date is delayed pending review by a work group.

Local 3394 Vice President Jon Patzlsberger was present at this meeting, representing the union.

13. The Smoking Policy Review Committee met on June 24, 2002. On June 29, 2002, Lt. Dylon Radtke wrote Grams a memo in which he referenced the discussion at that meeting. Among other comments, Radtke wrote:

> I also agree with Sgt. Below's suggestion to have staff be restricted before inmates, as this may help prevent both sides going through this process at the same time.

14. The Smoking Policy Review Committee did not meet again until April 6, 2004, at which time it included Local 3394 Executive Board members Below and Office Chris Wech and other members of 3394. The following are excerpts from minutes of that committee:

> **Minutes, Smoking Policy Review Committee, April 6, 2004**
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> . . .
>
> Committee members agreed to recommend we move forward with no smoking/tobacco products for inmates first. Committee felt we should move

[2] Luder's series of suspensions for smoking at his post were addressed IN STATE OF WISCONSIN, DEC. 31240-A (Levitan, 12/2005) and DEC. 31240-B (WERC, 5/2006).

toward a tobacco-free environment and felt strongly that the institution needs to be proactive on this issue. Committee agreed that there are hazards to working in Corrections, but second-hand smoke is a preventable hazard.

Greg [Grams, Deputy Warden] said we will need to address staff smoking. Discussion is needed on options ranging from banning staff tobacco use or allowing smoking in designated areas outside only. We will also need to address climate issues about staff smoking if inmates can't. After some discussion on a possible target date, it was suggested to prohibit smoking effective September 1, 2004. Under this proposal, notices could go out to inmates as early as May 1 or as late as July 1, which will give them a 60-to 120-day notice. It was recommended that this notice be provided to every inmate, not just a unit posting. It was suggested to advise inmates soon of the target date. ….

Greg said we will need to meet again to address staff issues. Will we also phase out staff smoking or modify the policy regarding staff smoking locations? We'll set up another meeting in the next couple of weeks to address staff issues.

Minutes, Smoking Policy Review Committee, April 21, 2004

. . .

Pro's and Con's of Banning Tobacco for Staff. Greg asked if we can develop similar lists for banning tobacco for staff. The same first three reasons for banning tobacco for inmates would apply for staff as well. Steve said it would be covered under the Clean Air Act. Greg said our current policy treats people differently. Staff working straight-8's don't have the same ability for a break as other staff. Bill suggested allowing staff to smoke outside in a convenient area for all staff. Greg said we currently don't allow staff to go outside, because it can cause posts to remain vacant. Steve said the safety of the institution must be preserved if we allow staff to smoke. Allowing staff to smoke on grounds results in staff bringing in contraband. Steve said the State is moving toward no smoking in all public areas. Steve asked how we would ban tobacco for staff. At the same time as for inmates? Greg said the single most important reason to ban smoking is for health care costs. Mandell said the loss of productive time for smokers is certainly an issue for supervisors. It was estimated that 40% of CCI staff use tobacco products.

. . .

Minutes, Smoking Policy Review Committee, May 19, 2004

. . .

II. **Staff**

A. Decision to go tobacco-free for staff.

B. 3. Suggestion to use the same timeline as for inmates. Greg said we will look at what assistance can be made available for staff.

4. Smoking in vehicles during non-paid time will not be allowed in vehicles since the institution and grounds will be tobacco-free. Committee felt we should not police smoking in vehicles.

C. Consequences of policy violations will depend on the type of violation.

Greg will draft a proposal based on the discussion today for review by the committee members. We can schedule another meeting if needed. June 8 is the next training day. Greg will get the draft out, and if another meeting is needed, it will be scheduled for the 8th.

There is no indication in the adopted minutes that Below, Wech or any other member of Local 3394 on the committee conveyed to the committee any opposition to CCI going tobacco-free for staff as well as inmates, either on their own behalf or on behalf of Local 3394. The Smoking Policy Review Committee did not consider the relationship, if any, between Negotiating Note 5, the Local Agreement, the Rest Break Agreement and a decision that the facility go entirely tobacco-free for staff.

15. On or about May 24, 2004, Below, Wech and Luder received a copy of Grams' draft implementing the Smoking Policy Committee's recommendations, proposing as a "Suggested Policy on Tobacco Use" that "CCI buildings, grounds, and State-owned vehicles become tobacco free for all inmates, visitors, volunteers, contractors, delivery drivers, and staff effective on October 1, 2004." Committee members were asked to review the draft and provide any comments to Grams by June 1. No member of Local 3394 conveyed to Grams any objection, and on June 21, 2004, Grams sent Warden Phil Kingston a memorandum, which read in part as follows:

SUBJECT: Smoking Policy Recommendation

The following proposal is offered for your review and represents the conclusions of the Smoking Policy Review Committee's discussions at our April 6, April 21 and May 19, 2004 meetings. A draft of this report was shared with all committee members, as listed at the end of the report, for their review and final input. No comments were received from committee members on the

content of the report, so it is being submitted to you in the format developed at the May 19 meeting. For your information, the committee estimates that 35 to 40% of our staff use some form of tobacco products and that 55 to 60% of the current inmate population at CCI use tobacco products. Please contact me with questions or to discuss this issue further. I draw your attention to the timetable suggested by the committee, which is ambitious, but represents our discussions held at the three meetings.

Suggested Policy on Tobacco Use:

> CCI buildings, grounds, and State-owned vehicles become tobacco free for all inmates, visitors, volunteers, contractors, delivery drivers, and staff effective on October 1, 2004.

. . .

16. According to the minutes of the August 3, 2004 minutes of the CCI Labor/Management meeting:

. . .

> Smoking Committee. Labor asked if/when the institution will move towards a smoke-free environment. A recommendation to move towards a smoke-free environment has been made and sent to the Warden. Warden said he's waiting for a directive from DAI on this issue. We will be moving towards tobacco-free, it's now just a matter of the timeline. (Emphasis added).

17. Notwithstanding the committee's recommendation, and the commentary in the LMC minutes, Kingston did not implement the tobacco-free policy for staff. The record does not indicate what reason, if any, he gave for his decision.

18. According to the August 9, 2005 minutes of the CCI Labor/Management meeting:

> Local Negotiations. Jon said local negotiations will be coming up. Jon said trades are an issue that will probably be addressed. He has asked the membership to submit suggestions by the end of the month.
>
> No Smoking. Chris asked when no-smoking will be coming. Greg said the tentative date for inmates is January 15. He hopes to receive more information at next week's Wardens meeting.

According to the September 6, 2005 minutes of the Labor/Management meeting:

No Smoking. The tentative date for inmates is not going to be January 15, 2006. DAI has tentatively set a target date for September 1, 2006; CCI is contemplating a date sooner than that, but will give at least six months notice once a target date is finalized.

Rec Staff Rest Break. The paid fifteen minute break was allowed in various areas of the institution and now it reads that it can only be taken in the Squad Room. Officer Wech asks why the change? Janel replied that it is for accountability reasons and for clarity for the staff. No other changes like this are being contemplated at this time.

19. On September 23, 2005, Department of Corrections' Deputy Secretary Richard Raemish issued a memorandum, which read in part as follows:

Subject: Tobacco Cessation

. . .

Effective September 1, 2006, all tobacco products will be banned from DOC correctional facilities. Wardens/Superintendents, and Regional Chiefs will provide their Division Administrator their action plans to ensure compliance with this directive within 90 days. In addition, the use of tobacco products will be prohibited on all DOC owned or leased properties, including central office, correctional facilities, and field offices. No employees, inmates, offenders, juveniles, contractors, volunteers, or visitors will be allowed to smoke or use tobacco products on DOC owned or leased property. These restrictions on the possession and use of tobacco products shall apply unless there is specific authorization for the limited possession or use (for example, the use of tobacco products in inmate religious activities).

Those DOC facilities that currently allow tobacco products are directed to work at the local level to come into compliance with the tobacco cessation requirement as soon as reasonable but no later than September 1, 2006.

. . .

Local 3394 did not grieve Raemisch's memorandum setting a September 1, 2006 effective date for all state correctional institutions going entirely tobacco-free.

20. On September 29, 2005, the CCI Health and Safety Committee, which included members of Local 3394, met. According to the minutes:

Tricia Brein from the UW Center for Tobacco Research and Prevention was the guest speaker. She was here to help staff prepare for the smoking ban that will

go into effect in 2006. She informed the group of nicotine replacements that will help people trying to quit and also had current information on what the HMOs will cover. She agreed to review the cessation procedure that was designed previously and offer suggestions. She also left a wealth of information with the committee including books, CDs and brochures. suggestions. She also left a wealth of information with the committee including books, CDs and brochures. suggestions. She also left a wealth of information with the committee including books, CDs and brochures. The Warden asked that the committee members help in the effort to prepare staff in the tobacco free plan. Warden Grams will set a date for no tobacco in the next week. (Emphasis added).

21. On October 10, 2005, Grams, now CCI Warden, posted the following memo

To: All CCI Staff

SUBJECT: Tobacco Free Policy Announcement

All CCI buildings, institution grounds, and State-owned vehicles will be tobacco free for all inmates, visitors, volunteers, contractors, delivery drivers and staff effective on May 1, 2006. Tobacco products will be considered contraband anywhere on institution grounds, after May 1, 2006, unless secured in a locked personal vehicle in our parking lot. (emphasis in original)

This new policy is in accordance with DOC Policy issued by Deputy Secretary Rick Raemisch on September 23, 2005, requiring all DOC facilities to be tobacco free as soon as reasonable but no later than September 1, 2006. Mr. Raemisch's directive is attached for your review.

Information on available resources for staff who want to quit smoking during this transition period will be included in the October, 2005 Staff Bulletin. The CCI Health and Safety Committee is gathering a variety of information to be distributed in the next bulleting and made available to interested staff upon request, including available health insurance coverage in the various State employee health plans.

Notice is being sent to the inmate population under separate cover. Additional details on the phase in of this policy over the next several months, other smoking cessation resources, and information from other State institutions implementing this new policy will be distributed periodically as the policy implementation date of May 1, 2006 approaches.

Local 3394 did not grieve this memorandum setting a May 1, 2006 effective date for CCI going entirely tobacco-free for staff as well as inmates.

22. On October 11, 2005, the Kettle Moraine Correctional Institute (KMCI) informed all staff that KMCI was to become tobacco-free on May 1, 2006. On October 21, 2005, Union Local 163 filed a grievance, alleging that the employer had "arbitrarily and capriciously violated the WSEU Contract, Local and Break Settlement Agreements pertaining to Kettle Moraine's A and B Type Rest Breaks by issuing a memorandum stating that this institution would become Smoke-Free on May 1st, 2006." The grievance was denied and ultimately heard before Arbitrator Jay Grenig on Sept 12, 2006.

23. On January 15, 2006, Grams issued the following memorandum:

TO: All CCI Staff and Inmates

SUBJECT: Tobacco-Free Policy Implementation Plan – Update #1

I. Policy on Tobacco Use:

> CCI buildings, grounds, and State-owned vehicles become tobacco free for all inmates, visitors, volunteers, contractors, delivery drivers, and staff effective on May 1, 2006. All tobacco products (including chewing tobacco) and ignition products (matches, lighters) will be considered contraband after May 1, 2006. This policy is in accordance with the DOC directive issued by Deputy Secretary Raemisch on 09/23/05 and was previously posted at CCI on 10/10/05.

. . .

Local 3394 did not grieve this memorandum reiterating a May 1, 2006 effective date for CCI going entirely tobacco-free for staff as well as inmates.

24. According to the minutes of the April 4, 2006 Labor/Management meeting:

. . .

> Tobacco Free- May 1, 2006. Greg reported that effective this week inmates would no longer be permitted to buy tobacco products. He asked that staff report any changes in the climate to supervisors. It is anticipated that there will be some problems, especially on the SMU. Jim asked if there were many tobacco items coming into property. Jon reported that there were hardly any. Greg also reminded Labor that we do not want to discipline staff but will follow the discipline track as appropriate if they are using tobacco products on grounds during paid work hours. Tobacco in any form will be considered contraband on grounds during paid work hours. Tobacco in any form will be considered contraband on grounds unless locked in a personal vehicle. Staff will not be allowed to leave grounds to use tobacco products while in pay status.

Management requested cooperation of Labor to assure a smooth transition on May 1st. [Emphasis added]

. . .

Local 3394 did not grieve Grams' comments or directive.

25. On April 28, 2006, Grams issued the following memorandum:

TO: All CCI Inmates and Staff

SUBJECT: "Tobacco Free Institution" Policy Update

The following policy is effective on May 1, 2006:

CCI buildings, grounds, and State-owned vehicles are tobacco free for all inmates, visitors, volunteers, contractors, delivery drivers, and staff. As of that date, all tobacco (including chewing tobacco), tobacco products (rolling papers, pipes, etc.) and ignition products (matches, lighters) are considered contraband.

This policy is in accordance with the DOC-wide directive issued by Deputy Secretary Raemisch on 09/23/05 and was previously posted at CCI on 10/10/05 and 01/15/06.

This new policy will be added to the CCI Red Book in the near future. Effective on Monday, this policy change update overrides all references to the possession or use of tobacco located throughout the CCI Policies and Procedures, Inmate Handbooks, and Employee Handbooks.

. . .

Local 3394 did not grieve this memorandum setting a May 1, 2006 effective date for CCI going entirely tobacco-free for staff as well as inmates.

26. Pursuant to Grams' memo, CCI became tobacco-free on May 1, 2006. Local 3394 did not grieve implementation of the policy banning tobacco products from the institution. The implementation of the tobacco-free policy was discussed at the May 2, 2006 Labor/Management Meeting, at which Local 3394 was represented by its president, Jon Patzlsberger and others, including Below and Wech.

27. On September 28, 2006, Arbitrator Grenig sustained the Local 163 grievance, holding that the State of Wisconsin, Department of Corrections and KCMI violated Section 11/7/1 of the collective bargaining agreement, a 1986 settlement agreement and Negotiating Note 5 when they banned staff from possessing and using tobacco products at

KMCI. Grenig directed that the then-present practice regarding smoking during rest breaks, as reflected in the 1982 local agreement, remain in effect absent mutual agreement to modify it, but authorized the employer to make reasonable rules regarding designated smoking areas. The Grenig Award contained the following:

ISSUES

The parties agreed that the issue before the Arbitrator is:

Did the Employer violate the collective bargaining agreement when it banned tobacco products from Kettle Moraine Correctional Institution? If so, what is the appropriate remedy?

. . .

The principal established by the 1986 settlement agreement was reiterated in a negotiation note included in subsequent bargaining agreements, including the 2001-2003 agreement. That negotiating note (Negotiating Note 5) went even further than the settlement agreement, referring to "present practices" rather than practices established by a local agreement. The negotiating note expressly provided that "[A]bsent agreement no changes in present practices shall be made at any post in any institution." The Employer has attempted to do just what the negotiating note and the settlement agreement prohibit – change the rest break practice without obtaining the Union's agreement. This is a violation of the parties' contract. The Employer's actions violate Section 11/7/1. The rule is unreasonable, being in conflict with the 1986 settlement agreement, and it is in conflict with the provision of Negotiating Note 5 of the collective bargaining agreement prohibiting changes in present practices absent agreement of the parties.

. . .

CONCLUSION

The Employer's actions violate Section 11/7/1. The rule is unreasonable, being in conflict with the 1986 settlement agreement, and it is in conflict with Negotiating Note 5 of the collective bargaining agreement prohibiting changes in present practices absent agreement of the parties. While the Employer has the authority to make reasonable rules designating smoking at KCMI, under the settlement agreement and the negotiating note it

does not have the authority to totally ban smoking during rest breaks.

AWARD

Having considered all the relevant evidence and the arguments of the parties, it is concluded that the Employer violated the collective bargaining agreement when it banned tobacco products from Kettle Moraine Correctional Institution. The present practice regarding smoking during rest breaks, as reflected in Item 12 of the 1982 local agreement, shall remain in effect absent mutual agreement to modify it. However, the Employer retains the authority to make reasonable rules regarding designated smoking areas.

28. The record in the Genig Arbitration included the following testimony by Robert Peters, former president of Local 163:

Q: Now, between 1982 and 1999 were there times when management would approach you about banning tobacco use among employees?

A: Yes.

Q: And what would you say when management would approach you?

A: There were several .... I can't remember all of them, but there was several. And I told them, no, it's not an issue. It's non-negotiable, it's not going to happen.

The record also included the following testimony by Terry Klumpyan, his successor:

Q: After you became president of Local 163 in 1999, did there come a time when inmates were banned from possession smoking – or tobacco products at this facility?

A: That's correct. I believe it was 2001, if I am not mistaken. That's when they banned it for the inmates.

Q: At the time it was banned for the inmates, did you have any discussions with management about whether the ban should be extended to employees as well?

A: No. They mentioned it to me at I believe it was a labor management meeting that they intended, you know, to have that for staff, too.

Q: And what response did you provide?

A: That we have a binding agreement, Item 12. That we have a binding agreement that says we can smoke, and I didn't agree with that. And it was dropped at that time.

29. On October 17, 2006, CCI Correctional Officer II Jon Patzlsberger, President of Local 3394, filed a "group" grievance, as follows:

> After being made aware that a negotiated agreement between an employer and their employees supersedes a Governors Executive directive. We are filing on behalf of the Local 3394 members. It states in our Rest Break Agreement that staff may smoke on their post. The Governor's order cannot supersede this agreement, as was proven with an arbitrator's decision made on a KMCI grievance award to their members.
>
> As relief, the grievance sought:
>
> Cease & desist the Governor's executive order and allow staff to smoke at the previous designated smoking areas as was the case before this order.

30. On October 31, 2006, Warden Grams denied the grievance, as follows:

> Grievance denied as it was not filed in a timely manner. First notice of tobacco free policy distributed during October, 2005, and implemented on May 1, 2006. Pre-(illegible) grievance worksheet submitted on 10/6/06. which is well beyond the 30 day requirement listed in Article 4/1/4 of Master Contract. KMCI arbitration decision date not applicable.

31. Local 3394 advanced the grievance to the second step, where it was denied on February 12, 2007 by Employment Relations Specialist Gary Kastorff, with the following explanation:

> The master agreement limits the filing period for grievances to no later than 30 days from the date of the cause of the grievance or first knowledge of the cause of such grievance. Local 3394 Vice President was a member of the CCI Smoking Policy committee and thereby had immediate knowledge and involvement in smoking policy changes. Local 3394 did not file a grievance until 10/6/06 which was more than 5 months after the May 1, 2006 CCI smoke free policy implementation. The Kettle Moraine Correctional Institution smoking arbitration decision does not reset the grievance filing clock for Columbia Correctional Institution. This grievance is denied because it was not filed within the required time limits and therefore it has no foundation.

32. On January 25, 2007, Council 24 filed a complaint with the Commission alleging that the employer, by implementing bans on tobacco products at JCI and CCI, had effectively failed and refused to apply Grenig's decision, thereby refusing to accept the terms of an arbitration award. On June 14, 2007, the Respondent, without waiver of any rights or any defense or making any concessions, tendered compliance with the Grenig award at JCI by agreeing to abide by and comply with the language of the Local Agreement that was negotiated between JCI and Local 219.

33. The Grenig Award did not resolve all issues that would be necessary to resolve the grievance which Local 3394 sought to file on October 17, 2006.

34. The language of the respective Local Agreements and the conduct of the local unions constitute significant differences of material facts between the situation at KMCI and CCI relative to the imposition of a ban on tobacco products on May 1, 2006.

On the basis of the above and foregoing Findings of Fact, the Examiner issues the following

CONCLUSIONS OF LAW

1. Because the Grenig Award did not address all issues that would be necessary to resolve the grievance which Local 3394 sought to file on October 17, 2006, the State did not violate sec. 111.84(1)(e), Stats., by refusing to abide by it and allow on-premises possession and use of tobacco products by CCI staff.

2. Because of significant differences of material facts between the Grenig Award and the situation at CCI relative to the imposition of a ban on tobacco products on May 1, 2006, the State did not violate sec. 111.84(1)(e), Stats., by refusing to abide by it and allow on-premises possession and use of tobacco products by CCI staff.

3. Because the State did not violate sec. 111.84(1)(e), Stats. by not complying with the Grenig Award, it did not derivatively violate sec. 111.84(1)(a), Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner issues the following

ORDER

That the complaint in this matter be, and hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 26th day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/
Stuart D. Levitan, Examiner

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

In support of its contention that the complaint should be sustained and relief ordered, the complainant asserts and avers as follows:

> Arbitrator Grenig necessarily decided that the state could not unilaterally impose a ban on smoking where a local agreement permits employees to smoke. The issue of the propriety of a total smoking ban was necessarily decided in the Grenig award and the state failed to properly apply its holding to a subsequent grievance at CCI involving the same material facts.
>
> That the award and the CCI grievance involved precisely the same issue was clear from Local Union 3394's citation of the award in its grievance. Accordingly, the requirement in Luder that there be an identity of issues is satisfied.
>
> There are no material differences in fact between the situation at Kettle Morraine that Grenig addressed and the situation at Columbia Correctional Institution. The material facts are that both facilities are subject to Negotiating Note 5, requiring that rest break agreements be negotiated in local agreements; that both local agreements (at KMCI and CCI) expressly permitted employees to smoke during their rest breaks at their posts, and that both facilities unilaterally imposed a ban on smoking during rest breaks pursuant to implementing the same September 23, 2005 directive from Deputy Secretary Raemisch. Conversely, none of the differences that respondent cites can be considered material, and several are not even factual in nature.
>
> While there are differences in wording between the local agreements at KCMI and CCI, Grenig effectively found that KCMI management had exactly the same discretionary right to dictate where and when smoking could occur as management at CCI but that this right did not extend to imposing a complete ban on tobacco products. The language of both local agreements therefore is effectively the same.
>
> As the CCI warden conceded, the Smoking Policy Review Committee did not even address the local agreement, let alone modify it. He also conceded that Below never stated he was authorized by the Local Union to represent the Local on the committee.

There is no discussion whatsoever in the documentary record of the impact of the complete ban on tobacco on the local agreement. Elimination of a negotiated language in a local agreement cannot be implied by silence. A committee created and appointed solely by management cannot alter the terms of a collective bargaining agreement. An employer covered by SELRA cannot create stacked committees to unilaterally repeal negotiated contract language.

In a companion case, the full commission found that Luder's participation on the Smoking Policy Review Committee was not a materially different fact; that legal conclusion should also be binding here. Just as Luder's participation in the recommendation to go tobacco free was not a materially different fact between his first and second discipline, so too should the existence of the committee not be treated as a materially different fact.

The union did not waive its right to challenge the tobacco ban, and whether or not complainant filed a timely grievance is not before the examiner. Local Union 3394 initially believed that Raemisch had the authority to issue a ban that superseded the local agreement, basing his directive on the Clean Air Act. The union's failure to recognize the counterintuitive legal principal of Sec. 111.93(3), giving priority to a collective bargaining agreement over contradictory state laws, cannot be held a clear and unmistakable waiver by the union.

Nor was the union required to demand to bargain over management's unilateral modification of the local agreement. Complainant does not assert respondent has violated sec. 111.84(1)(d) by refusing to bargain; rather, it only alleges a failure to comply with an arbitration award pursuant to subsection (e). The local union had no duty to demand to bargain over the change to a total tobacco ban; its failure to demand bargaining thus has no bearing here.

The implementation of the ban on tobacco products impaired rights to smoke during breaks which were protected by the local agreement.

Finally, that KMCI and CCI have different employing unit identification numbers is not a material difference in fact. Respondent is effectively claiming that each of the hundreds of institutions covered by the Master Agreement is a free-standing employing unit which may adopt whatever local policies it wishes and is not bound by arbitration awards affecting other employing units. This flies in the fact of the agreement, the statute and the parties' uniform practice. The Grenig Award and this complaint each have as its employer party "the State of Wisconsin."

Respondent

In support of its contention that the complaint should be denied and dismissed, the Respondent asserts and avers as follows:

> Precedence establishes the presence of several differences of material fact makes the KMCI award inapplicable to CCI, and thus there can be no violation of SELRA.
>
> The first and foremost difference is the relevant language in the respective Local Agreements. Second, there was no memorandum at CCI which reaffirmed that "past practice and previously agreed local agreements on rest breaks" would continue, as there was at KMCI. Third, there was no settlement agreement at CCI which provided that "the Employer and Union agree that where rest breaks have been locally negotiated they shall remain in place." Fourth, CCI never offered (and have rejected) a proposal to extend the smoking ban to staff. Fifth, CCI has had a different historical practice of increasing the smoking restrictions. Sixth, the CCI acquiescence to the May 1 smoking ban was different than at KMCI. Seventh, Local 3394 effectively waived its right to bargain on the issue. Eight, these differences in fact makes Negotiating Note 5 inapplicable. Finally, KMCI and CCI are different employing units.

Complainant's Reply Brief

> In its reply, complainant further asserts and avers as follows:
>
> Respondent errs by attempting to conflate the inquiry regarding identity of issues with the separate question of whether there are differences in material facts. This is contrary to commission precedent, and shows that the issues are indeed identical. Respondent errs further by confusing factual issues with legal defenses to the merits of the grievance, spending much of its brief arguing the merits of the grievance. But the examiner is not to decide the merits of the second grievance but rather engage only in the limited review necessary to apply sec. 111.84(1)(e), Stats.
>
> Respondent also errs in contending complainant erred in its analysis of whether there exist material differences of fact. As complainant noted in its initial brief, the same material facts are present in each case: both facilities were subject to Negotiating Note No. 5, both facilities had local agreements permitting smoking during rest breaks, and both facilities banned smoking pursuant to the Raemisch directive of September 23, 2005. Respondent errs further in assuming that, if any factual differences exist, they are necessarily material. Instead, the legal analysis is: If Grenig had been faced with the same facts at CCI as were present at KMCI, would he have reached the same decision?

> Respondent errs by attacking Below's credibility in testifying that the union never agreed to a smoking ban. But whether or not the union waived its right to grieve the smoking ban is not a material issue of fact. Whether it did or didn't is an issue to be decided by an arbitrator if the grievance is heard; it is a legal question, not a material fact.
>
> Respondent also errs by contending the operative language in the KMCI and CCI local agreements are not functionally identical, which they are. And, contrary to respondent's claim, just because CCI may have had a practice of unilaterally changing smoking areas without union protest, the language of the CCI local agreement has *not* been effectively eliminated.
>
> Local 3394 bargained for language in its local agreement permitting its members to smoke during rest breaks. It should not be punished for not challenging the Raemisch ban due to its good faith and reasonable belief that the statutory Clean Air Act superseded the local agreement.
>
> To force Local 3394 to arbitrate the identical issue Grenig decided would permit DOC to flaunt the finality provisions of the grievance procedure that Sec. 111.84(1)(e), Stats., was designed to protect.

On November 8, 2007, I invited the parties to file supplemental briefs in light of the issuance of STATE OF WISCONSIN, DEC. NO. 31865-D (WERC, 11/6/2007), in which the commission sustained my conclusion of law that there was not a identity of issues between two arbitration awards and subsequent grievances and set aside my finding that there were also material differences in fact, which it held an unnecessary determination due to the threshold determination that the issues were not the same. Asserting that the instant controversy did feature an identity of issues, and the absence of any material factual differences, the union contends this decision supports its complaint. The respondent drew from the decision that there is effectively a presumption against the application of issue preclusion; that issue preclusion cannot be applied at different agencies or institutions than the one involved in the initial award unless the award clearly indicates that it does so extend, and that there are indeed material differences between the situation at KMCI and CCI, leading to the conclusion that the decision supports its call for dismissal of the complaint.

On February 4, 2008, I asked the parties to respond to two questions:

1. As a matter of law, can a labor organization bring a sec. 111.84(1)(e) complaint when the underlying events occurred prior to the arbitration award at issue?
2. As a matter of law, can a labor organization bring a sec. 111.84(1)(e) complaint in the absence of a timely grievance?

In its response, the union contended it would be unlawful for an employer to disregard an arbitration award whether the operative facts arose before or after the award sought to be upheld, and that to construe the statute otherwise would be a wooden and eviscerating reading that would undermine its salutary provisions. The union also asserted that sec. 111.84(1)(e) does not even require that a grievance be filed, and that to impose such a requirement would be antithetical to the purpose of the statutory provision. In any event, the union contended the instant grievance was timely, because Local 3394 could not reasonably have foreseen Grenig's construction of sec. 111.93, Wis. Stats, and so the time limit did not begin to run until the local became aware of all the facts as set forth in Grenig's award. Accordingly, the union concluded, both questions should be answered in the affirmative.

In its response, the state contended that there cannot be a violation of sec. 111.84(1)(e) if at the time of the employer's action, an essential element to a (1)(e) claim, namely the arbitration award, has not yet been issued. Allowing a complainant to relate back to events that occurred before the award would be akin to a law improperly creating a violation *ex post facto*. Further, SELRA is not an escape route for a union that failed to file a timely grievance; the commission's jurisdiction to hear a (1)(e) complaint is dependent on a viable, timely grievance. Accordingly, the state concluded, both questions should be answered in the negative.

DISCUSSION

Section 111.84(1)(e), Stats., makes it an unfair labor practice for an employer to violate a collective bargaining agreement, including an agreement to arbitrate "or to accept the terms of an arbitration award, where previously the parties have agreed to accept such an award as final and binding upon them." As with all complaints of prohibited or unfair labor practices, to prevail the complainants must establish by the clear and satisfactory preponderance of the evidence that respondents violated the law. [3]

This case is the third in a recent series of complaints under which Council 24 has alleged the State of Wisconsin has violated Sec. 111.84(1)(e), Wis.Stats., by failing to abide by the terms of an arbitration award. It is useful, therefore, to review the policy and practice the Commission promulgated in those cases.

In STATE OF WISCONSIN (DEPT. OF CORRECTIONS), DECS. NO. 31240-A (LEVITAN, 12/2005) and 31240-B (WERC, 5/2006), also known as LUDER, Local 3394 complained that the State failed to abide by an expedited award by Arbitrator Christine Van Ploeg sustaining a grievance over the discipline of Roger Luder for smoking at his post when it disciplined him again for the same thing over a year-and-a-half later.

I found that there were three material discrepancies of fact between the initial and

[3] Section 11.07(3), Stats., made applicable to this proceeding by Sec. 111.84(4), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

was different, and that in the intervening time Luder had served on a Smoking Policy Review Committee – and so dismissed the complaint. DEC. NO. 31240-A

Affirming my dismissal of the complaint, the commission in DEC. 31240-B set aside my finding of fact and conclusion of law as to there being material differences of fact between the grievances that Van Ploeg arbitrated and the subsequent discipline, and affirmed my other conclusions of law and findings. It also added a new finding of fact and conclusion of law concerning the inability to ascertain whether the Van Ploeg award "resolved any or all of the issues that are the subject of the Union's pending grievances" concerning Luder's subsequent discipline.

The Commission explained the following legal points:

> For issue preclusion purposes … it does not matter whether the same grievant is involved in the subsequent arbitration. What matters, as the Commission held in its seminal decision in WISCONSIN PUBLIC SERVICE CORPORATION … is whether the precise *issue* has been resolved and subsequent circumstances have not called the resolution into question.

The Commission added that:

> As always in a complaint proceeding, the complaining party (here, the Union) bears the burden of establishing the requisite elements of the claims by a clear and satisfactory preponderance of the evidence. See Secs. 111.07(3) and 111.84(4), Stats. Similarly, the party asserting issue preclusion bears a relatively heavy burden to show that a particular issue was actually decided in a previous case. WAUPACA COUNTY, DEC. NO. 30822 [SIC] (WERC, 4/04), and cases cited therein. As the Commission noted in WAUPACA COUNTY, the jurisprudence regarding issue preclusion cautions that the doctrine is "equitable" and should not be applied rigidly to foreclose a party from an opportunity to litigate a claim. [4]

In STATE OF WISCONSIN, DEC. NO. 31865-D (11/2007), the Commission held:

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[4] In WAUPACA COUNTY, DEC. NO. 30882 (WERC, 4/04), the Commission had stated:

> Issue preclusion is the term now applied to what was formerly referred to as collateral estoppel. It is "a flexible doctrine that is bottomed in concerns of fundamental fairness and requires that one must have had a fair opportunity procedurally, substantively and evidentially to litigate the issue before a second litigation will be precluded." DANE COUNTY V. AFSCME LOCAL 65, 210 WIS.2D 268, 565 N.W.2D 540 (CT. APP., 1997). Although issue preclusion does not require an identity of parties, it does require actual litigation of an issue necessary to the outcome of the first action.

> Turning to the Union's second argument, the parties and the Examiner recognized that the controlling principles were set forth in the Commission's LUDER decision, where the Commission interpreted subsection (1)(e) to require two things of the State: first, the State must comply "with the specific remedy set forth in a specific arbitration award"; second, based upon issue preclusion principles, the State must comply "with the resolution arbitrators have reached regarding the issues underlying an arbitration award, when the same issues arise subsequently between the same parties and no material facts have changed." LUDER at 6. On the second prong, the question is "what issues were actually resolved and necessary to the outcome?" ID. at 9. The Commission took pains to point out that, "the party asserting issue preclusion bears a relatively heavy burden to show that a particular issue was actually decided in a previous case. … [T]he doctrine is 'equitable' and should not be applied rigidly to foreclose a party from an opportunity to litigate a claim." ID. at 11 (citations omitted).
>
> The commission instructed further as follows:
>
> As the Commission has emphasized innumerable times throughout its jurisprudence, arbitration (where, as here, it is contractually available and designed to be the exclusive mechanism for enforcing the contract) remains the primary forum for enforcing and interpreting contractual provisions. Both parties are entitled to fully litigate issues regarding the meaning of contract language in the arbitration forum. The Commission's jurisdiction under subsection (1)(e) is not a proper vehicle for extrapolating the outcome of issues that were not actually controverted in earlier cases, even if, as here, an earlier case may have been premised upon assumptions regarding those issues. Given the primacy the Commission traditionally places on the arbitration forum, LUDER itself acknowledged the Commission's limited role in cases like this, where one party seeks to avoid arbitration, and the correspondingly elevated burden placed upon that party.

The commission also explained why it set aside my findings of fact and conclusion of law concerning a change in material facts: [5]

> We do take this opportunity to clarify one element of the LUDER paradigm, which appears to have caused some confusion in the Examiner's decision and perhaps between the parties. Having decided that the actual issue underlying the instant set of medical verification grievances has not been conclusively litigated and determined in the prior Torosian or Fleischli arbitration awards, it is not

[5] Contrary to the union's assertion that the commission "reversed" my conclusion as to the materiality of Luder's participation in the smoking policy review committee, the commission actually set it aside.

necessary or appropriate to reach the question of whether material factual

> circumstances have changed since those awards. "Material factual circumstances" means subsequent events that are material to the previous outcome on the issue. If there has been no determination of the issue, then subsequent events are immaterial. Accordingly, there is no need to consider this issue and we have set aside the Examiner's Finding of Fact 14, which found "significant differences in material facts between the Torosian Award and Fleischli Award" and the instant grievances. STATE OF WISCONSIN, DEC. NO. 31865-D (11/2007)

The issue of the preclusive effect of arbitration awards, however, is not of recent vintage, but goes back more than half a century. As was explained in HANDCRAFT COMPANY, INC., DEC. NO. 10300 (Schurke, 5/1971) the Commission in WISCONSIN TELEPHONE COMPANY, DEC. NO. 4471 (WERC, 3/1957), ruled that the Arbitration Award rendered in the case of the discharge of one employee "was conclusive upon the Union and *res judicata* as to the issue presented as to all relief sought in a second grievance, when the issue and relief sought in a second grievance were identical in all respects to the issue and relief sought in the initial grievance."

In the "seminal" case of WISCONSIN PUBLIC SERVICE CORPORATION, DEC. NO. 11954-D (WERC, 5/1974), the Commission stated:

> In prior cases (citations omitted) the Commission has not exhibited any reluctance to make a determination as to whether a particular grievance or fact situation before it is governed by a prior arbitration award. In order to insure the viability of the arbitral process, it is necessary to grant res judicata effect to prior awards in appropriate cases. However, rigid standards will be invoked to guard against unwarranted invasion of the arbitrator's province of deciding the merits of a dispute that is arbitrable under the collective bargaining agreement.
>
> The Commission has held that where the facts of a particular grievance are materially different from those material to a prior arbitration award, it will defer to the arbitrator for a decision on the merits of the grievance. However, where the Commission finds no material difference of fact, it will apply the principle of *res judicata* to the case before it.

Preliminary Considerations

While issue preclusion does not require that the subsequent proceeding involve the same grievant, it does require the same parties. The state has argued that the union's complaint must fail on a preliminary issue, namely that CCI is a separate employer from KMCI, and that any 111.84(1)(e) analysis is thus precluded. It notes that KMCI and CCI have both been appropriately designated as separate "employing units," and that as distinct employing units

fire, discipline, demote, promote, transfer, layoff, assign and compensate employees. Because these are all attributes of being an employer, the state asserts, each employing unit/appointing authority is a separate employer. Thus, the state contends, the very premise of a (1)(e) complaint – that *an* employer has failed honor an arbitration award – is absent.

The state is correct that, under the Master Agreement, each employing unit "represents a unit for layoffs, demotions, transfers, reinstatements, and other related personnel transactions." The state is further correct that each local institution has a local agreement defining its particular practices.

But all that does not make CCI a different "employer" than KMCI in the context of a complaint brought under 111.84(1)(e).

As the union correctly notes, the recognition clause of the master agreement refers only to "the State of Wisconsin and its agencies" as the single employer, reflecting that statutory directive that the State "shall be considered a single employer." Sec. 111.815(1), Stats. Further, the very functions the employer cites as evidencing that each employing unit is a separate employer are described in sec. 230 as "personnel transactions." But having authority for personnel transactions falls short of the full management and control that defines true employer status.

Finally, the union is correct that by requiring each local at each state facility to arbitrate the same legal question with materially identical facts would negate the policy and practicality of 111.84(1)(e).

Accordingly, I reject the State's theory as to non-commonality of employer.

There also the two legal questions I posed to the parties: As a matter of law, can a labor organization bring a 111.84(1)(e) complaint when the underlying events occurred prior to the arbitration award at issue, or in the absence of a timely grievance?

Although I think these are critical questions of law which the commission must someday answer, I have concluded that, given my dismissal of the complaint on other grounds, this is not the appropriate case for me to do so.

I turn now to considering this matter on its merits.

There is no allegation that the state failed to comply with the specific remedy Grenig ordered, thus satisfying the first prong of LUDER. The questions thus become whether "the same issues (have) arise(n) subsequently between the same parties, and no material facts have changed," such that the State is required to comply with the resolution Grenig reached "regarding the issues underlying" that award.

As noted above, and explained below, I have dismissed the complaint on alternate grounds. Either Grenig did not resolve an issue central to this controversy, namely what constitutes the "mutual agreement" necessary to change the existing practice under negotiating note 5. Or else he did resolve all relevant issues, but material facts – the language of the respective local agreements, and the distinctly different behavior by the respective locals – were substantially different.

Did the Grenig Award resolve all relevant legal issues?

As the commission stated in LUDER, "(t)he first question is what issues were actually resolved and necessary to the outcome," keeping in mind that "the party asserting issue preclusion bears a relatively heavy burden to show that a particular issue was actually decided in a previous case…." DEC. 31240-B, p. 11. The commission's jurisdiction under subsection (1)(e) "is not a proper vehicle for extrapolating the outcome of issues that were not actually controverted in earlier cases …." DEC. 31865-D, p. 8

The jurisprudence regarding issue preclusion "cautions that the doctrine is 'equitable' and should not be applied rigidly to foreclose a party from an opportunity to litigate a claim," and why the party asserting issue preclusion "bears a relatively heavy burden to show that a particular issue was actually decided in a previous case." Issue preclusion requires "actual litigation of an issue necessary to the outcome of the first action." DEC. 31240-B

The parties stipulated that the issue before Grenig was:

> "Did the Employer violate the collective bargaining agreement when it banned tobacco products from Kettle Moraine Correctional Institution? If so, what is the appropriate remedy?"

With the substitution of Columbia Correctional Institution for Kettle Moraine Correctional Institution, that would be precisely the issue before an arbitrator hearing the grievance which the union sought to file on October 17, 2006. But that is not the end of the inquiry.

The sub-issues which Grenig resolved, with his answers, were:

1. Did the employer's actions violate Section 11/7/1 of the collective bargaining agreement? (Yes.)[6]
2. Was the rule totally banning smoking reasonable? (No.)
3. Was the rule totally banning smoking in conflict with Negotiating Note 5? (Yes.)

[6] Section11/7/1: Work Rules reads, "The Employer agrees to establish reasonable work rules. These work rules shall not conflict with any provision of this Agreement …

4. Does the employer have the authority to make reasonable rules designating smoking areas? (Yes.)
5. Under the settlement agreement and the negotiating note, can the employer totally ban smoking during rest breaks? (No.)

Again, these sub-issues also directly track the issues that would be before an arbitrator hearing a grievance from CCI or any other facility covered by both the contract and the Raemisch directive. But these are not all the issues that would so arise.

By his holding that the total smoking ban violated Negotiating Note 5, Grenig necessarily held that its imposition at KMCI was absent mutual agreement. However, because KMCI management never claimed it was with the union's agreement, and the facts clearly established that it wasn't, Grenig had no cause to consider what would constitute such agreement.

The facts before Grenig included a steadfast refusal by the union to participate in the planning to go tobacco free, no consultation or negotiation when a later tobacco-free policy was announced, and a timely union grievance of its imposition. Because the facts so clearly established that no mutual agreement (indeed, the state didn't even claim that there was), the issue of defining "mutual agreement" never arose. Grenig thus did not discuss or resolve what it would take to *have* such an agreement under Negotiating Note 5.

But the question of what constitutes "agreement" under Note 5, *would* undoubtedly have been an issue before an arbitrator hearing a grievance over the imposition of the ban at CCI. The state would certainly have argued, as it did here, that the extensive participation by Local 3394 in the Smoking Policy Review Committee in 2004, and its acquiescence to the announcement and imposition of the total tobacco ban in 2005-2006 would have constituted "mutual agreement," while the union would have countered, as it did here, that the leaders and members of 3394 who participated in the committee were not authorized to negotiate on the union's behalf, that the committee never considered the implications of the negotiating note, that the local agreement cannot be amended by silence, that management cannot create a committee to amend the agreement, and that the failure to grieve in 2006 was reasonable.

All of those would be good arguments (although some would be better than others). But they are arguments completely unresolved by the Grenig award, because answering them was not necessary for that award. Because Grenig's award does not answer all relevant issues, it is unavailable to the union for an (1)(e) complaint.

Accordingly, I have dismissed the complaint.

If the Grenig award did resolve all legal issues, were there significant differences in material facts between the situation at CCI and the situation at KMCI?

I am aware of the commission's counsel that, once a decision has been made that the two grievances lacked a complete commonality of issues, it is neither necessary nor appropriate for an examiner to consider whether material facts had changed. "If there has been no determination of the issue, then subsequent events are immaterial." Dec. 31865-D.

However, I believe it is appropriate and necessary to consider any differences in material facts as part of an alternate theory of the case. That is, notwithstanding my determination that the complaint should be dismissed because of the above legal analysis, it is entirely appropriate for me to continue to evaluate the complaint *in case the commission reverses that conclusion of law*. Although I have confidence in my analysis, it is possible I may have erred in finding that the Grenig award did not resolve all legal issues that would have arisen in consideration of a CCI grievance. If the legal issues at KMCI and CCI *were* determined to be the same, as the union contends, the commission would then have to consider whether that there were any significant differences in material fact between the Grenig award and CCI.

Having the greatest familiarity with the record, I think it is entirely appropriate for me to analyze the complaint under this second Luder prong as well. Otherwise, the commission would have to consider this *de novo* – and without any opportunity to the parties to provide any meaningful commentary thereon.

Thus assuming for the sake of discussion that the union *did* meet the standard as to legal issues, I now review the facts, and find that two material differences do indeed exist – the language of the respective local agreements, and the position of the respective unions to their facilities going tobacco-free.

As noted above, the rest break agreement at KMCI defined Type A breaks as "(t)hose posts where staff could reduce their activity and break informally by drinking coffee, smoking a cigarette, etc., while remaining at their post…." The "method of relief" section provided that officers on a Type A break "may drink coffee and smoke." The KMCI rest break agreement contained no provisions relating to restrictions on where employees could smoke.

In contrast, the rest break agreement at CCI explicitly provided for such restrictions:

> Staff may drink coffee or similar beverages on their post. Staff may smoke on their post, *assuming it is not a 'no smoking' area. Supervisors have the discretion to dictate, in writing, when and where this behavior is appropriate. [emphasis* added.]

The union argues that since Grenig found that even under the language before him, KMCI had discretion to designate some (but not all) areas as no smoking, the language in the respective rest break agreements are functionally equivalent. They are not. Grenig started with

language that did *not* provide for supervisory discretion to declare areas as no-smoking, and found that such a power did exist, within limits. Had he started with language that explicitly

did provide for such supervisory discretion, without any stated limits, it is impossible to state with any certainty what limits, if any, he would have read into the language.

I believe the difference in the respective rest break agreements is sufficiently material and significant to prevent the union from using the Grenig award to strike down the ban on tobacco at CCI. Certainly, this language calls into question whether Grenig's determination that a full tobacco ban, unreasonable at KMCI, would also be unreasonable at CCI. However, because there is a far more explicit and far more significant discrepancy between the two situations - - namely the conduct of the respective unions -- I need not rely on this textual deviation to decide this case.

In considering the significance of the difference in attitude and action between Locals 163 and 3394, Grenig's comments are instructive:

> While the express provisions of the contract are an important source for determining the parties' intent, *in cases such as this one* the arbitrator must go beyond the contract provisions and consider the conduct of the parties as an additional indicator of intent. [*emphasis* added]

Grenig's award notes that when KMCI banned inmates from possessing any tobacco products in June, 2001, it proposed to the Union that this ban be extended to employees. Grenig relates that the Union "rejected the proposal, indicating that the Union wishes to continue to exercise its rights under Item 12. KMCI then dropped the proposal." As the former president of Local 163 testified before Grenig, when management made its proposal, he told them that "we have a binding agreement that says we can smoke, and I didn't agree with that (i.e., banning tobacco). And it was dropped at that time."

The next event Grenig cites is the Raemisch directive of September 23, 2005, followed by KMCI's October 11 announcement that it would be going entirely tobacco-free on May 1, 2006.

That is, Grenig cites no events at KMCI related to tobacco curtailment between the Union's refusal to consider altering the policy in June, 2001 and the move to go tobacco-free due to the Raemisch directive more than four years later, followed by the union's timely grievance. I must conclude, therefore, that there were none.

What a far cry that is from the events at CCI, where those four years saw the union knowingly participating in – and never raising any objection to -- management's stated plan of going tobacco-free, culminating in the union's decision not to grieve any aspect of the ban on tobacco once implemented.

First, there was the participation by Local 3394 Executive Board members Below and Wech, and other designated union representatives, in the 2004 Smoking Policy Review Committee, which culminated in the Committee's recommendation that "CCI buildings,

grounds, and State-owned vehicles become tobacco free for all inmates, visitors, contractors, delivery drivers and staff effective on October 1, 2004."

The union is correct that its members were outnumbered by as much as 3:1, and that Grams had already stated that the facility was to go smoke free. Below and the others couldn't stop it – but at any time, they and the union could have challenged the policy and directive. At the very least, they could have put some opposition on the record; they did not.

On April 6, 2004 Grams told the Smoking Policy Review Committee that he wanted to curtail staff smoking. Through its representatives on the committee, the union had constructive and timely knowledge of this, and raised no objection.

The union also had constructive and timely knowledge of the discussion the committee had on April 21, which covered several operational issues about banning tobacco for staff, but did not address any implications for the collective bargaining agreement.

The union had constructive and timely knowledge that on May 19, 2004, the committee recommended banning tobacco for staff. Local 3394 executive board members were asked on May 24, 2004 for any comments on Grams' memo to the warden conveying the "Suggested Policy on Tobacco Use" as the recommendation of the committee. None of the union leaders or members responded with any objections or other comments.

The union contends that the union members serving on the various committees "participated solely as individuals, not in any official capacity." That is true for the rank-and-file members. But as for Below and Wech, I disagree. Below first testified that he served on the Smoking Policy Review Committee "as a representative of the union," but he agreed with the union lawyer's statement/question that "you did not secure the consent of the local union executive board."

But when a member of the leadership cadre of either the union or the employer serves as a representative of labor or management on an LMC or a committee such as the Smoking Policy Review committee, they do so with certain obligations – primarily that they will convey the committee's activities to their membership, or at least a core leadership group, and that they will bring back that group's response.

That is the whole point of such committees. When two members of the union's executive board serve on a committee, it must be presumed that they are sharing with the other union leaders the activities of their respective committees, and sharing with the committee their, and their colleagues', reaction and comment. To seek and hold a leadership position is to accept certain responsibilities. Conveying information and attitude back and forth is one of the easier tasks, and is so fundamental that both sides are entitled to rely on it being done.

That the CCI warden never implemented the recommendation does not negate the impact of the union's involvement in and acceptance of the tobacco ban in 2004. While

management's failure to implement the policy would have stayed the grievance time limit for a certain duration in 2004, it is the union's conduct which is relevant four years later. Although the time limits for filing a grievance do not begin to toll with management's mere announcement of an intent to impose a policy -- between management's ideas and the reality of their implementation, the shadow of inaction often falls – the committee's recommendation that CCI go tobacco-free, and its conveyance to the warden, constituted distinct acts which could have occasioned opposition. And Local 3394 acted in a distinctly different manner than did Local 163.

It did so again in 2006. The union's failure to grieve the tobacco-free policy in a timely manner after the May 1, 2006 effective date does not necessarily constitute "mutual agreement" on its part; as noted in the previous discussion, whether it did or didn't would have been an issue for an arbitrator if the union had filed a timely grievance. However, as the respondent rightly notes, Local 3394's participation and acquiescence in the tobacco-free policy is markedly different from the course followed by the union in the Grenig arbitration. As noted above, the Local 163 president told management at Kettle Moraine that banning tobacco by staff was "non-negotiable," and that there was "a binding agreement" enabling staff to smoke, after which the proposal was "dropped at that time." The difference between explicitly *rejecting* a proposal to go tobacco-free and *acquiescing and participating* in the implementation of such a policy constitutes a material difference of fact that prevents Local 3394 from capitalizing on the Grenig Award in a complaint proceeding such as this.

Local 163 was so against the tobacco ban it grieved the announcement in October, 2005 of a May 1, 2006 effective date, more than eight months before it had to in order to maintain timeliness. Given that not all policy announcements are put in place, the time limits for a grievance would not start to toll until its actual implementation on May 1, 2006. That Local 163 would file the grievance in October, 2005 shows its 2001 opposition to a tobacco ban remained in place. The pro-active grievance is a significant material fact in defining the union's conduct.

Contrast Local 163's immediate opposition to the tobacco ban to Local 3394's decision not to grieve or raise any objection to the following separate acts and events:

1. The September 23, 2005 Raemish directive banning tobacco products from all DOC correctional facilities by September 1, 2006;
2. The October 10, 2005 announcement by Grams that the facility would be going entirely tobacco-free on May 1, 2006;
3. The January 15, 2006 update on the "Tobacco-Free Policy Implementation Plan;"
4. Grams' reminder at the April 4, 2006 Labor/Management Committee that management did not "want to discipline staff but will follow the

discipline track as appropriate if they are using tobacco products on grounds during paid work hours;"

5. The April 28, 2006 memo from Grams, entitled "Tobacco Free Institution" Policy Update, reiterating that CCI would go entirely tobacco-free on May 1, and that all tobacco, tobacco products and ignition products would be considered contraband as of that date;
6. The May 1, 2006 implementation policy making CCI entirely tobacco-free.

Local 3394 did not even react when Local 163 filed its grievance on October 11, 2005. It was not until after release of the Grenig award on September 28, 2006 that Local 3394 grieved the matter (on October 17, 2006)

There were thus four separate events, over a seven-month period, that could have triggered a grievance, each with its own 30-day window to file: the Raemish directive of September 23; Gram's announcement on October 10; Grams' April 28 memo; the May 1 implementation. That it failed to grieve any is compelling evidence.

If "the conduct of the parties" instructs as to the meaning of the contract, such disparate conduct must show different conclusions. If Local 3394 believed that a total tobacco ban violated the agreement, it would have acted differently, possibly before, but certainly at its implementation.

The union says whether it waived its right to file a grievance is not a material issue of fact, but a legal question "to be decided by an arbitrator if the grievance is heard." Such a contention is problematic.

First, I do not understand complainant's references to the CCI controversy as a grievance, particularly the instruction that I "must not decide the merits of the second grievance," but only "engage in a limited review (of) the issues and facts presented" under 111.84(1)(e). The union says determining whether it waived its right to file a grievance due to its participation "is an issue to be decided by an arbitrator if the grievance is heard." But since the record does not reflect that there is either any pending grievance or a pending complaint challenging the employer's refusal to process the grievance filed on October 17, 2006, and the union is not seeking an order sending this controversy to arbitration, I fail to understand how this matter could ever get before an arbitrator.

Moreover, by identifying *any* legal issue that would have remained to be decided by an arbitrator, complainant implicitly acknowledges that the Grenig award did *not* resolve all issues relevant and necessary to the outcome of a grievance at CCI, as the prior discussion posits.

The union makes a number of accurate assertions. It is true that the Smoking Policy Review Committee did not address the local agreement, let alone modify it. And it is true that the union "never formally agreed" to modify the LA's provision permitting smoking.

Those facts could be significant to an arbitrator considering whether the imposition of a ban on tobacco at CCI violated Negotiating Note 5 or Section 11/7/1 of the collective bargaining agreement. But they are not particularly relevant in considering whether CCI failed to abide by the Grenig award.

Contrary to the union's analysis, I do not read Grenig's award to hold that a total ban on tobacco would *necessarily* be unreasonable. In particular, I note his comment (p. 11) that "there is no evidence that the Union has ever agreed that the Employer's designating smoking areas could result in the Employer designating the entire institution as 'unauthorized' for smoking." That statement establishes that the Union's conduct is a critical factor in determining whether a total ban on tobacco would be reasonable or not.

The union contends that the existence of the Smoking Policy Review Committee at CCI should "not be treated as a materially different fact," from the situation at KMCI and notes that the Commission disagreed with my Finding of Fact and Conclusion of Law that it was significant in assessing Luder's discipline after the Van Ploeg award in DEC. 31240-B.

To the extent that LUDER and the instant controversy both involve 111.84(1)(e) complaints concerning staff smoking at CCI, they are, as the union contends, companion cases. Thus, the union asserts, the facts which the commission found in that case "should also be binding here," particularly as relates to the Smoking Policy Review Committee. Specifically, the union seeks to incorporate herein my finding, affirmed by the commission, that the committee "met three or four times over the next eighteen to twenty-four months, but failed to agree on any changes to the smoking policy." It also wants me bound by the commission's action setting aside my finding that Luder's service on the committee constituted a materially different fact from the prior situation.

But because the two cases have such different records, different contexts and different legal questions, I am not bound by either of these findings. The commission's conclusions of law are binding on this case; its findings of fact – made on an entirely different record – are not.

The union rightly recalls my finding, affirmed by the commission, describing the committee as "inconclusive," because it "failed to agree on any changes in the smoking policy."

But as the state notes, the documentary evidence on this point in the LUDER record was limited to a single memo, the May 28, 2002 memo organizing the Smoking Policy Review

Committee (referenced herein at Finding of Fact 11).[7] I have also reviewed the entire record in LUDER, and find that the testimony on the activities of the committee consisted of the following colloquy between Roger Luder and the union's attorney:

Q: Did the committee have meetings?

A: Yes, we met three or four times over the next year and a half or two years.

Q: And was there any change to the smoking policy prior to the discipline that you received early in 2003 as a result of the meetings of this committee?

A: Were there any changes in effect at this time?

Q: Right.

A: No, sir, there were none.

Q: The committee just met to discuss –

A: Correct.

Q: -- changes in policy?

A: Correct.

Q: But no changes were made?

A: That is correct.

One memo at the start of the process, and only a few lines of testimony. In contrast, the record in the instant proceeding includes the minutes of four separate meetings at which the committee discussed in detail the policy, and then the operational issues, involved in the facility going entirely tobacco free (referenced at Findings of Fact 10-17), culminating in the recommendation that it do so. The record also includes Grams' memorandum to the committee implementing its recommendation that CCI go entirely tobacco-free on October 1, 2004. Because the Smoking Policy Review Committee was not central to LUDER, it was not litigated fully, with the resultant inadequate record. But this committee *was* critical to the instant controversy, and its focused litigation left a full record.

Moreover, the finding in LUDER that the Smoking Policy Review Committee "failed to

[7] Inexplicably, the memo in the record in Dec. 31240-A is dated May 28, 2002 and is signed by Grams, while the memo in this record – otherwise identical but for the lack of a signature – is dated May 29.

agree on any changes to the smoking policy" was not accurate, either in the context of that record, or in the more detailed record before me now. In response to the question, "(b)ut no changes were made?," Luder said, "That is correct." On the limited testimony and documentary evidence before me, I erroneously understood that to mean that the *committee* did not recommend any changes. But as the record now before me makes very clear, the Smoking Policy Review Committee – which included Local 3394 leaders Below and Wech, and member

Luder – *did* agree to changes to the smoking policy, namely that the facility go tobacco-free. The fact that no "changes were in effect at this time" was due entirely to the refusal of the warden to implement the committee's recommendation.

Given that the issue of the committee's work was not fully litigated in LUDER, that its record therein was incomplete, and that my finding of fact was not historically accurate, I do not feel bound by that finding in light of the comprehensive and conclusive evidence in the record now before me.

Nor is there any continuing significance to the commission's conclusion that Luder's participation on the committee was not a "materially different" fact than had pertained in an earlier disciplinary arbitration, for the same reason.

Accordingly, because the Grenig Award did not resolve all issues that would be necessary to resolve the grievance which Local 3394 sought to file on October 17, 2007, and because there were significant differences over material facts between the situation at KMCI and CCI relative to the imposition of a ban on tobacco products on May 1, 2006, I have dismissed the complaint.

Dated at Madison, Wisconsin, this 26th day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

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