BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
Eau Claire Joint Council of Unions AFSCME, AFL-CIO, Local 1744	
and	Case 168 No. 43071 MA-5889
Eau Claire County (Center of Care)	

Appearances:
Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 17 Woodridge Drive, Eau Claire, Wisconsin 54701, for the Union.
Mr. Keith R. Zehms, Corporation Counsel, Eau Claire County Courthouse, 721 Ox

ARBITRATION AWARD

The above-captioned parties, herein the Union and the County, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Eau Claire, Wisconsin, on March 21, 1990. The transcript was received April 9, 1990. Briefs were exchanged on May 23, 1990. The County submitted a reply brief on June 1, 1990. On June 13, 1990, the Union gave notice that it declined to submit a reply brief.

ISSUE

At the hearing, the parties agreed to the following statement of one of the issues:

> Was the initial grievance, dated July 10, 1989, filed in a timely manner pursuant to Section 2.01(C) of the collective bargaining agreement?

The parties were unable to agree to a statement of the second issue, and the Arbitrator states that issue as follows:

> Did the County violate the collective bargaining agreement by eliminating the breakroom designated for employes who smoke?

BACKGROUND

The County has regulated smoking at its facilities since 1977 when the Eau Claire County Clean Indoor Air Act was enacted. This grievance regards smoking regulations at the County's Center of Care, the residential nursing facility which has 150 permanent residents and another 30 temporary residents. Since May 12, 1988, employes who wanted to smoke on their break had a separate breakroom, located in the basement, B006. On May 16, 1989, the County Board amended the ordinance in the following manner:

ORDINANCE

TO REPEAL AND RECREATE SECTION 9.60.045 OF THE CODE; SMOKING ALLOWED
The County Board of Supervisors of the County of Eau Claire does ordain as follows:
SECTION 1. That Section 9.60.045 of the Code be repealed and recreated to read:
9.60.045 Smoking allowed. There shall be no smoking in any County facility including, but not limited to, the Ag Center, Airport, FBO, Beaver Creek Reserve, Center of Care, Courthouse, Department of Human Services, Parks and Forest Shop and Shelter Care facility. There shall be no smoking in any County-owned motor vehicle.

A. The following are exceptions to the general prohibition against smoking.
1. Residents at the Center of Care may smoke only in resident designated day rooms.
2. Smoking is allowed in County owned facilities that are leased, only in designated areas. (Eg. FBO-break-room and waiting room, restaurant, bar and coffee shop and waiting room.)
3. Jail inmates may only smoke in inmate living areas.
4. County employees will be permitted to smoke only in the employee break and/or lunch room in those county

facilities where smoking and non-smoking break/lunch rooms are available.

B. The Personnel Department shall develop a plan to assist those employees who wish to quit smoking.

SECTION 2. That this ordinance shall become effective 90 days after adoption.

ADOPTED: May 16, 1989

On June 29, 1989, the following memo from Administrator Avon Karpenske to all Center of Care staff was posted by the time clock:

M E M O

TO: ALL CENTER OF CARE STAFF

FROM: AVON KARPENSKE, R.N., N.H.A.
ADMINISTRATOR

DATE: JUNE 29, 1989

RE: SMOKING ORDINANCE

By County Board Action on May 16, 1989, the only smoking areas allowed at the Center of Care will be the resident dayrooms on each floor. Therefore, as of August 14, 1989, the converted locker room #B006 will no longer be a smoking breakroom.

Employees wishing to smoke on their breaks will have to do so outside the building. Appropriate disposal of cigarette butts is required in receptacles.

Should problems occur in this area, disciplinary action will result.

On July 10, 1989, the instant grievance was filed.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

AGREEMENT

This Agreement is made and entered into, by and between Eau Claire County, Wisconsin hereinafter called the Employer and the Eau Claire County Joint Council of Unions, AFSCME, AFL-CIO, Locals 254 (Highway Department Employees; Parks and Forest Department Employees), 1744 (Institutions Employees; Licensed Practical Nurses), 1744-A (Registered Nurses), 2223 (Human Services, Courthouse Professional Employees, and Courthouse Employees) of Eau Claire County, Wisconsin, hereinafter called the Union for the purpose of maintaining harmonious labor relations, improving employee efficiency and the quality of services rendered to the County and public; maintaining a uniform scale of wages, working conditions and hours of work; and to facilitate a peaceful adjustment of all grievances which may arise between the Employer and employees represented by the Union.

. . .

ARTICLE 1

RECOGNITION AND MANAGEMENT RIGHTS

. . .

1.06 The Employer shall have the right to:

(b) Manage the employees; to hire, promote, transfer, assign, or retain employees and, in that regard, to establish reasonable work rules.

. . . .

ARTICLE 2

GRIEVANCE PROCEDURE

. . . .

C. Filing Deadlines. Step A of all grievances shall be filed within twenty (20) working days of the date the grievance occurred or was known or reasonably ought

to have been known by the grievant.

. . .

POSITIONS OF THE PARTIES

The Union

As to the timeliness issue, the Union contends neither the informal meeting May 17, 1989 between Karpenske and Erdman nor the publishing of the minutes of the meetings of the Veterans Affairs and Long-Term Care Committee constituted such notice that established the commencement of the timeliness of the grievance procedure. Furthermore, the change in the work rules is a continuing violation of the collective bargaining agreement and could be grieved at any time.

Addressing the work rule itself, the Union uses a five-part test to assess the reasonableness of the work rule eliminating the smoking breakroom. For the first prong, whether the rule violates any part of the contract, the Union acknowledges smoking is not explicitly addressed by the collective bargaining agreement, but it notes the preface to the agreement announces the parties' intent to maintain "a uniform scale of wages, working conditions and hours of work." In a second test, the new work rule is measured against past practice which allowed employes to smoke in the separate breakroom for approximately a year prior to May 16, 1989, and before that had been allowed to smoke in the combined breakroom. Thirdly, the Union questions whether the rule serves a legitimate employer interest. It concludes neither concerns of image, cost, efficiency or employe health are served by the rule. Finally, it finds that the work rule is arbitrary, capricious and discriminatory, since the Committee on Veterans' Affairs and Long-Term Care did not consider contract compliance and since the smoking ordinance passed by the County Board allowed smoking rooms. Rather, contends the Union, the rule was based on the personal preferences of the Committee and the Administrator. As its fifth and final test, the Union examines the application of the rule and argues that the rule was discrimin-atorily applied since other County facilities did not lose their smoking facilities.

The County

The County insists the grievance is not arbitrable, arguing the explicit time limits of the collective bargaining agreement were never waived, and formal, written notification of the event is not required to begin the running of those limits. It believes the time for filing the grievance began to run when the County Board amended the Clean Indoor Air Ordinance at its May 16, 1989 meeting attended by Local 2223 President Carol Bowe. It also argues the Union was given notice by copies of the County Board agendas and minutes that were sent to it and the conversation that occurred May 17, 1989 between Administrator Avon Karpenske and Chief Steward Connie Erdman. It contends a finding of arbitrability would alter the collective bargaining agreement's grievance procedure.

According to the County, its authority to regulate smoking cannot be usurped by the Arbitrator. Several arbitration awards were cited for the proposition that smoking is not a condition of employment but a privilege that exists at the discretion of the employer. Similarly, there is no federal or state constitutional or statutory right to smoke. The County disputes the Union's allegation of disparate treatment since both management and bargaining unit members are prohibited from smoking at the Center of Care. Additionally, restricting smoking is reasonably related to cost considerations. Finally, the County argues that if the Union should prevail, the arbitrator does not have authority to order the County to designate space in which smoking was allowed, but could order the County to provide in-service training for those employes who wish to quit smoking.

In its reply brief, the County reiterates its arguments regarding the notice received by the Union, adding that if the Arbitrator finds the grievance timely based on a theory of the facts make out a continuing violation, the Arbitrator would thereby modify the contractual grievance procedure. The reply brief also emphasizes the County's authority to regulate smoking which it has always exercised.

ADDITIONAL FACTS AND DISCUSSION

Timeliness

The Employer's action being grieved is the discontinuation of the right to smoke in Room B006, which, in effect, prohibited employes from smoking anywhere inside the Center of Care. The parties dispute the date when the Union had sufficient notice of the action and the time for filing a grievance began to run. The County insists the Union had effective notice on either May 16, 1/ when the Ordinance was enacted, or May 17, when an informal

1/ Unless otherwise noted, all dates refer to 1989.

encounter took place between Administrator Karpenske and a union steward. (It is significant to note these dates are 90, and 89 days, respectively, before the implementation of the new rule.) The undersigned rejects the notion that the Union can be held responsible for attending all County Board meetings and correctly inferring the impact of all Board actions upon contractual rights. The language of the grievance provision does not require the Union to speculate on forthcoming Employer actions in order for it to file grievances in a timely manner.

Nor was the brief encounter between Administrator Avon Karpenske and a Union Steward, either Connie Erdman or Kathy Luhm, sufficient to give the Union notice of the rule change. On her way to the breakroom, Karpenske chanced to meet either Erdman or Luhm. (Indeed, the encounter was so brief and superficial that Karpenske could not remember which of the two women she met.) Karpenske made a remark to the effect that the smoking room would soon end. Despite the County's accurate observation that the contract does not require written notice, this offhand remark, that did not include any date of the coming change, was not effective notice of the rule change. Surely this is not the kind of formal notice referred to by the arbitrator in the award issued in an earlier dispute between these parties and cited by the County. (Greco, 12/84).

There is no doubt that the months of discussion in the Committee on Veterans Affairs and Long-term Care, reported in the minutes the Union received and the general rumors would have alerted the Union that some action regarding smoking was under serious consideration. The Union does not try to deny that it was aware of activity regarding smoking, but general awareness of impending change cannot be used to begin the running of the grievance procedure time limits.

On May 29, 1989, the Administrator posted the memo quoted above which stated that after August 14, smoking would no longer be allowed in B006. The County argues that the memo was posted only for the benefit of employes who had been hired after May 16. Notwithstanding that contention, since the evidence shows that posting notices by the time clock was the one of the administration's commonly-used methods of communicating with employes, I draw the inference that the memo was posted by the timeclock because the administration, itself, recognized that there had not yet been any clear and unambiguous notice detailing and dating the coming change in the smoking room privilege.

Addressed to all employes, and ending with the admonition that "problems" would result in disciplinary action, the June 29 memo indicated how and when the new smoking prohibition would take effect. Since the filing of July 10, 1989, occurred only 11 days after the posting of the memo, the grievance was timely filed, and procedurally arbitrable.

The Merits

Although the County forcefully argues that the Ordinance underlying the elimination of the breakroom for smokers at the Center of Care enjoys a presumption of validity, the lawfulness of the Ordinance is not at issue here. Rather, it must be decided whether the County's actions violated the collective bargaining agreement. The jurisdiction of the arbitrator is the interpretation and application of the contract, and the parties must justify their positions by reference to the contract.

The Union, however, misplaces its reliance on the preface to the agreement which states as the agreement's intent, among other things, "maintaining a uniform scale of wages, working conditions and hours of work..." This broad statement of purpose cannot be inflated into a provision requiring the County to provide identical working conditions for all its employes.

The contract does not directly address the question of the employes' right to smoke, nevertheless, the County's action must comply with Article I which gives the management the right to, among other things, establish reasonable work rules. This provision both bestows a right and imposes a responsibility: the County may unilaterally promulgate work rules, but those rules must meet the test of reasonableness.

In judging the County's action, the undersigned rejects the Union's assertion that a work rule cannot be found reasonable if it materially changes a past practice or working condition. If such a standard were to be accepted, it would nearly eliminate an employer's right to establish work rules, and such a significant restraint should not be inferred from so simple a phrase in the management rights clause.

The proper standard for judging reasonableness is whether the rule is reasonably related to a legitimate management objective. As to its objectives, the testimony of Karpenske and County Supervisor Fran Grugel indicate the County has three major concerns: one, the Center of Care is a health facility; two, the Center of Care is the permanent residence of 150 of its 180 residents; and three, the continued maintenance of a smoking room is costly.

Addressing the County's economic concern first, it is clear that the continued maintenance of a smokers' breakroom in the basement would cause additional expense for the County: the costs of converting a room other than B006 for smoking in order to comport with fire department directives, the costs of cleaning a room subjected to concentrated amounts of smoke, and the cost of installing a proper ventilation system. 2/ While economic efficiency is certainly a legitimate management objective, these expenses cannot be the deciding factor in this case, for the County has not shown that providing a smokers' breakroom at the Center of Care would be more costly than at the Courthouse of the Department of Human Services where the County has made such provisions.

The more significant management objective is related to the Center's mission as a health care facility and the permanent home to most of its residents. Presumably, by its frequent references to being a health care facility, and the documents regarding the harmful effects of smoking which the County introduced into the record, and the County's reference to the no-smoking policy at the local hospitals, the County has decided that smoke in the environment is harmful to the health of its residents. Surely, enhancing the health of the frail and/or elderly residents is a legitimate management objective. Similarly, since the Center is the permanent home of most of its residents, enhancing the comfort of those who do not like smoke and live in the Center twenty-four hours a day is likewise a reasonable objective.

The flaw in the County's policy is that it has, in fact, not eliminated smoke from the Center, for residents are allowed to smoke in the day rooms, which according to uncontroverted evidence, sometimes become very smokey. It is true that the matter of residents' smoking is not entirely within the control of County: state regulations do not permit the County to prohibit current residents from smoking. Nevertheless, the County is free to implement a policy whereby anyone admitted to the Center after the implementation date could be prohibited from smoking. Obviously, in the natural course of events, the turnover of residents would eventually lead to a resident population which could be lawfully prevented from smoking.

For whatever reason, the County, as of the date of the hearing, has not taken such action. The County, then, cannot be heard to argue that to achieve its mission of being a health care facility which is also the permanent home of most of its residents, it must prohibit all employe smoking, when it has not taken the other steps it lawfully could take to create a smoke free environment. Or, stated in another manner, the County's failure to prohibit new residents from smoking demonstrates that it does not have a consistent policy of striving for a smoke-free environment. At most, it has a policy of enhancing the residents' health and comfort by restricting the amount of smoke in the environment. This policy of limiting, but not eliminating, smoke does not require and cannot justify a work rule totally banning employe smoking.

In summary, since the economic cost of maintaining a room designated for employes who wish to smoke during their break has not been shown to be greater at the Center of Care than at other County worksites where such rooms exist, and since the total prohibition of smoking is overly broad for the goal of merely limiting environmental smoke as demonstrated by the County's acceptance of smoking residents, the rule which in effect prohibits all employe smoking within the building is found to not be reasonable and thereby in violation of the contract.

The Remedy

The undersigned must reject the County's argument that in light of the County Ordinance, the only possible remedy is to order the County to offer in-service training or smoking cessation classes for those employes who currently smoke. As discussed above, the County Ordinance does not resolve this dispute regarding rights pursuant to the collective bargaining agreement. Since the County's work rule has been found to be unreasonable, it must be rescinded, and that recision by definition requires the re-establishment of a room where smoking is permitted. The County's argument that the determination of which room shall be designated as the smokers' breakroom is a management prerogative is well taken, and the order set forth below does not limit the County to using Room B006 as the smokers' breakroom ordered herein.

In the light of the record and the above discussion, the Arbitrator issues the following

AWARD

2/ Contrary to the Union's contention, the record does not prove that there is a smoke eater in the sewing room, available to ventilate a smoking break room, but merely that Supervisor Grugel does not know that there is a smoke eater. There is no affirmative evidence that an available smoke eater exists. See transcript p.129.

1. The initial grievance, dated July 10, 1989, was filed in a timely manner pursuant to Section 2.01(C) of the collective bargaining agreement.

2. The County violated the collective bargaining agreement by eliminating the breakroom designated for employes who smoke.

3. The County is hereby ordered to designate a breakroom where employes are permitted to smoke.

Dated at Madison, Wisconsin this 20th day of September, 1990.

By _____
Jane B. Buffett, Arbitrator