

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
: :  
CITY OF BERLIN PROFESSIONAL : Case 37  
POLICEMAN'S ASSOCIATION : No. 44564  
: MA-6342  
and :  
: :  
CITY OF BERLIN :  
: :  
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Appearances:

Mr. James L. Koch, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.  
von Briesen & Purtell, S.C., Attorneys at Law, by Mr. James R. Korom, on behalf of the City.

ARBITRATION AWARD

The above-entitled parties, herein the Union and City, are privy to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this matter on December 19, 1990, in Berlin, Wisconsin. The hearing was not transcribed and both parties filed briefs which were received by January 22, 1991.

Based upon the entire record, I issue the following Award.

ISSUE:

Since the parties did not mutually agree to the issue, I have framed it as follows:

Did the City improperly promulgate a no-smoking policy for its Police Department employees and, if so, what is the appropriate remedy.

DISCUSSION:

Employee Mark Podoll filed a grievance on May 26, 1990, 1/ claiming that the City was violating his rights by permitting employees to smoke on the job and requesting that the City establish a smoke free environment in the Police Department.

Podoll on May 31 appealed his grievance to the second step because he believed it had been denied. Chief of Police James W. Dobson denied Podoll's grievance and Podoll on June 11 appealed his decision to the Police and Fire Commission, the third step of the grievance procedure.

Pursuant to the Union's local By-laws, the Union's membership voted to oppose Podoll's grievance. Union President John F. Trochinski at that time told Podoll that he had to withdraw his grievance and he would be disciplined by the Union if he did not do so.

Podoll on June 16 subsequently told the Police and Fire Commission that he was withdrawing his grievance. By letter dated June 25, Podoll told Dobson that smoking was injurious to his health and that the City on its own should rectify the problem "Before I explore a civil legal remedy . . ." The Union at the time was unaware of said letter.

The Union first learned of Podoll's grievance via a May 30 letter from Dobson to Trochinski stating, inter alia, "I am considering accepting the grievance by declaring a smoke-free work environment for all Police Department facilities and equipment," and that "Before I make a decision on this issue, I want to provide you with an opportunity to provide input."

By letter dated June 2, Trochinski informed Dobson that the Union wanted to negotiate any no-smoking program with the City before it was implemented, but he did not make any proposals over what should be done. By letter dated June 25, Dobson informed Trochinski, "I agree that the impact of the no smoking ordinance is subject to negotiation," and that management "is more than willing to continue to negotiate when Local 514B raises issues with respect to the impact of the 'no smoking ordinance'."

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1/ All dates hereinafter refer to 1990.

By letter dated June 26, Dobson informed Trochinski, inter alia, that employes at a recent May 31 departmental meeting did not object to a proposal to establish a smoke-free work environment and that "since Local 514B has not provided any input up to this point I assume you have no objection to a rule relating to a smoke-free work environment."

On the next day, Trochinski informed Dobson by letter that since there was no grievance pending, any City action on the no-smoking issue would have to be negotiated with the Union and that, "In response to your last paragraph, I think that it is best if nothing is 'assumed'." By letter dated July 1, Trochinski advised Mayor Gordon Schwark that the Union wanted to bargain over the creation of any proposed smoke-free ordinance.

The Berlin City Council on July 10 enacted a City wide no-smoking ordinance, applicable to both the general public and all City employes', which provided that smoking "was prohibited within or upon all buildings and equipment owned, leased or rented by the City of Berlin." Said ordinance also provided for a \$10.00 fine for anyone caught violating the City's no-smoking ban.

On July 11 the City Police and Fire Commission adopted as General Rule 35:

Smoking shall be prohibited by employees within or upon all buildings and enclosed equipment owned, leased or rented by the City of Berlin.

Said Rule thereby effectively repealed the prior Police Department policy which enabled smokers to smoke in two areas in the Police Department building.

Police Captain Michael R. Morehouse via a July 12 Departmental Memorandum advised all Police Department employes that said ordinance was in effect and had been incorporated into the General Rules and that any employe violations of said rule "may result in disciplinary action up to and including discharge from employment."

The Union on July 16 filed the instant grievance over the issuance of said memorandum complaining, inter alia, that the City was refusing to bargain over the promulgation of its no-smoking ban and its incorporation of said ban into the Police and Fire Commission's General Rules. By letter dated July 23, Trochinski informed Dobson that "there has been no attempt to address the impact that this ordinance has on employees," giving as examples "when and where they may go to smoke."

By letter dated September 19, 1990, Union Representative James L. Koch informed City Administrator Jon Syndergard that the City had yet to bargain over the impact its no-smoking ban. By letter dated October 4, Attorney James R. Korom on behalf of the City informed Koch that the City would be willing to discuss the impact of the City's no-smoking ban at an upcoming October 16 meeting with the Union on another matter.

The parties met on October 16 and briefly discussed the effects of the no-smoking ban with the Union. Thereafter, the City on November 7 informed all City employes about the existence of two local no-smoking programs.

In support of its grievance, the Union argues that the City failed to bargain in good faith and acted unlawfully when it unilaterally implemented its no-smoking policy; when it eliminated its prior smoking accommodations for bargaining unit members who smoked; and when the City's Police and Fire Commission incorporated the City's no-smoking ban into the General Rules of the Berlin Police and Fire Departments. The Union states that it "recognizes the need for the Employer to have some flexibility to make changes" in its smoking policy, but nonetheless maintains that the City was required to bargain with it over the changes it enacted here. As a remedy, the Union requests that the City be ordered to rescind adoption of the no-smoking ordinance from the General Rules; that the ordinance itself be rescinded; and that the prior smoking policy which allowed employes to smoke in one part of the building be re-established.

In response, the City basically maintains that the implementation of its no-smoking ordinance "was a reasonable exercise" of its management rights; that the 30 day notice provision of the contract was not violated and that it therefore satisfied its obligation to the Union to bargain over the effects of its no-smoking ordinance; and that it properly placed its ordinance in the Police and Fire Commission's Rules pursuant to its management rights to do so.

In resolving the various issues herein, it perhaps should be noted at the outset that this case crystallizes the various competing interests surrounding efforts such as here to limit smoking, in whole or in part, within the context

of a collective bargaining relationship.

Podoll, for instance, was justifiably concerned over a situation where he was forced to inhale and smell noxious cigarette smoke from several smokers who worked along side him during part of his regular work day. He therefore is part of the ever growing number of employes who find such smoking highly offensive and who wish to limit smoking within the work place.

The smokers here, however, were hired by the City with the knowledge that they smoked and that they wanted to do so on the job. As a result, they no doubt believed that their rights were being violated via promulgation of a City ordinance and General Rule which suddenly prevented them from smoking on the job -- something they apparently had done for several years. Since it is universally recognized by everyone -- except perhaps by the folks at the Tobacco Institute who are still trying to convince us that smoking is as healthy as drinking chocolate milk -- that nicotine is addictive, these smokers therefore were forced to withdraw from smoking for most of their work day, thereby subjecting them to considerable discomfort.

The City, in turn, has responded to ever growing public concern over smoking and its effects by promulgating an ordinance prohibiting smoking in all public buildings. It has done so in recognition of the fact that a smoker's right to smoke ends at the beginning of someone else's nose and that one's nose in public should be protected from cigarette smoke.

The Union has been forced to react to all this, first by opposing Podoll's grievance and by insisting that he withdraw it and then by insisting that the City first bargain with it over that matter. The Union's case is buttressed by the fact that Article III of the contract, entitled "Management Rights," provides in pertinent part that:

. . . the employer may adopt and publish reasonable rules which may be amended from time to time. Except for rules, regulations and directives from the State of Wisconsin or any other governmental agency having jurisdiction over the city, such rules shall be submitted for the union thirty (30) days prior to their effective dates. Action to amend or otherwise alter or change such rules and regulations by the union shall be taken through the grievance procedure in this agreement. If any action taken by the employer under the established work rules and after the grievance procedures have been completed is determined as unjustified, any wages or benefits lost by the employee as a result of such action shall be restored . . .

Contrary to the Union's claim, I find that the City has complied with this provision, as well as its statutorily mandated duty to bargain, as it stood ready since May 30 to negotiate with the Union over its proposed no-smoking ban before its enactment on July 10, 1990. Furthermore, Dobson by letter dated June 25 told Union President Trochinski that the City was "more than willing to continue to negotiate when Local 514B raises issues with respect to the impact of the 'no-smoking ordinance'."

The Union, however, never made any concrete proposals to the City prior to enactment of the no-smoking ban. That being so, the City can hardly be faulted for enacting its City-wide smoking ban when it did, since the Union before then had been given thirty (30) days to bargain over said matter.

The City likewise cannot be faulted for doing away with its prior practice of allowing smoking in one of the rooms in its Police Department building. To be sure, that was a term and condition of employment which had to be negotiated with the Union. But again, the Union had the opportunity to bargain with the City over this particular issue once it learned that the City wanted to change this practice and once it learned via Dobson's May 30 letter to Trochinski that he wanted to provide the Union "with an opportunity to provide input."

That leaves for consideration the promulgating of the no-smoking ban into the Police and Fire Commission's Rules and Regulations. The Union on this score is concerned that the City's no-smoking ordinance some day maybe repealed, while at the same time leaving intact the Rule to that effect.

That is a legitimate concern. But, it is also a premature concern because there is no evidence in the record that the City is not enforcing its no-smoking ban in an even handed fashion with its other employes. If the City some day does repeal the ban for its other employes while at the same time enforcing it here, the Union at that point can rightfully raise the question of unequal treatment. But until the City does that, there is no basis for finding that mere promulgating of the no-smoking ban into the General Rules, without more, is improper.

In light of the above, it is my

AWARD

That the City did not improperly promulgate a no-smoking policy for its Police Department employes; the Union's grievance is therefore denied.

Dated at Madison, Wisconsin this 18th day of June, 1991.

By \_\_\_\_\_  
Amedeo Greco, Arbitrator