

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
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 MUSKEGO AREA PUBLIC EMPLOYEES : Case 54
 LOCAL 2414, AFSCME, AFL-CIO : No. 45258
 : MA-6541
 and :
 :
 CITY OF MUSKEGO :
 :

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, appearing on behalf of the Union.
Ms. Lisa M. Leemon, Lindner and Marsack, S.C., Attorneys at Law, appearing on behalf of the City, and Mr. Jonathan T. Swain, on brief.

ARBITRATION AWARD

The Union and City named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear and resolve a grievance concerning a smoking policy. A hearing was held on April 16, 1991, in Muskego, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. The parties completed their briefing schedule on July 1, 1991.

ISSUE & CONTRACT LANGUAGE:

The Arbitrator frames the issue as the following:

Did the City violate Section 1.03 of the collective bargaining agreement when it established General Order #20? If so, what is the appropriate remedy?

Section 1.03 of the 1989-1990 collective bargaining agreement states:

The Employer may adopt reasonable rules and amend the same from time to time.

BACKGROUND:

The bargaining unit consists of four full-time dispatchers, one part-time dispatcher, one court clerk and one clerk. Four of the employees smoke. Until 1986, employees were allowed to smoke in the dispatch room on the main floor of the Police Building. Police Chief John Johnson then prohibited smoking except in a smoking lounge located between two locker rooms, and an exception was made for guests and suspects who were allowed to smoke in private offices or meeting rooms with the permission of the employee present. The Union grieved that policy, and in July of 1987, Arbitrator Coleen Burns found the policy to be reasonable and denied the grievance.

On September 26, 1990, Chief Johnson issued General Order #20, which made the Police Building a smoke-free building on October 1, 1990. In a letter to all personnel, Johnson noted that the policy was predicated on the EPA having called secondary smoke a hazardous material, the computer department was going to take the space used for the workout/weight room, with the workout/weight room going to the smoking lounge. He concluded by stating that employees wishing to smoke must do so on break or lunch outside a door accessible from the garage, and that the door must be left ajar or a portable radio taken out so that a smoker could be summoned in case of an emergency. The policy itself states:

The following policy is necessary due to the mounting evidence that secondary smoke is hazardous to one's health. All employees have a right to clean air. This right outweighs any decision to smoke by an individual. Additionally, smoking by on-duty employees in public view tends to lessen the professional image expected of us. Common sense and courtesy as practiced in the past are essential and are assured by this policy.

- (a) Smoking by employees is prohibited while on duty except in the designated area outside the police building.
- (b) All smoking is prohibited within the police building and vehicles.
- (c) Designated smoking areas are:
 Employees:
 (1) Outside the west pedestrian door accessible from the garage.
 Guests, suspects, etc.:
 (1) Private offices or meeting rooms with permission of the employee present.

There was a space problem in the basement of the building where the smoking lounge was located. When the computer room was installed in the workout room, it displaced the workout room, and the Chief considered the workout room to be more important than the smoking lounge. The manufacturer of the computer recommends that the equipment be located in a smoke-free environment.

A number of people -- such as Lieutenant John Daley, Detective Sergeant James Budish, and Detective James Larson -- complained to the Chief about the smell of smoke in the building. Larson is the president of the local police officers' association representing 23 police officers. None of the police officers smoke, and the majority of them complained to Larson about smoke in the building. The Chief did not relay the complaints to the smokers.

The basement area has a ventilation system separate from the main floor system. The smoke from the smoking lounge went into other rooms in the basement area, such as the lunchroom, and up a stairwell to the main floor. The doors on the smoking lounge were not always kept closed, and Daley closed them at times, because if the doors were shut, the smoke was a little less apparent. There is one control for the entire basement area. Daley often found the fan turned off and turned it back on. Budish found smoke to be an irritant, with the smell most prevalent in the lunchroom. Larson uses the workout room infrequently, and knows of two officers who use it frequently. His office is at the top of the stairs, and he could smell smoke there from time to time. He generally found two of the doors to the smoking lounge open, and he often closed the doors.

The Chief was aware of articles which contend that there are health risks associated with exposure to tobacco smoke, including carcinogenic effects. The Chief was also aware that Section 102.123, Wis. Stats., the Clean Indoor Air Act, allows the person in charge of a place where smoking is regulated to designate areas where smoking is allowed or designate the entire building as smoke free. City Hall, a separate building across a parking lot from the Police Building, is not a smoke-free building, and people are allowed to smoke in a downstairs lounge and in private offices.

The dispatchers send the Chief the following request:

We are placing in writing our request that you
rescind your General Order #20 prior to
the order going into effect on October 1,
1990 due to the following reasons:

1) The unprofessional look of having employees
lounging outside smoking cigarettes which is contrary
to all of your reasoning behind your original General
Order #16.

2) We are also charging that you are neglecting your
responsibility to the safety of the female civilian
employees by demanding they stand outside of the
sanctity of the locked building, while allowing the
perimeter security of the station to be jeopardized by
having the door "left ajar."

We suggest that either you rescind both General Orders,
#16 and #20, and return to the practice of making your
employees comfortable so that the police department can
continue to operate as one, or come up with another
suggestion that would not be putting you and the City
of Muskego in a liable position.

We would be most happy to discuss this issue with you.

Dispatcher Mary Beth McGurk, the Union Steward, is one of the four smokers. She is concerned about the safety of women smokers who are civilian employees standing outside the back door of the police building. Some of them work 2nd and 3rd shifts or swing shifts. She was not aware that other employees complained about the smoke in the building. The dispatchers suggested that the room called the women's locker room (currently shared with one man) could be used for smoking. The locker room is used to store dispatchers' clothes. Budish uses the women's locker room to store uniforms and undercover clothes. He was asked to move out of the men's locker room due to a shortage of space. He would object to having the women's locker room used as a smoking area, because his clothes would smell like smoke.

During bad weather, the Chief has allowed McGurk to stand inside the door between the garage and the outside area, but one dispatcher was not allowed by her commanding officer to stand in the doorway. Smokers have gone to their personal vehicles to smoke. Dispatchers are allowed two 10 minute breaks and a half hour lunch period, except during emergencies. Occasionally, breaks are missed or delayed due to emergencies.

The exceptions to the policy are for prisoners or guests, under certain circumstances, particularly where people are under some stress and cope with it by smoking. While the Chief was not aware of people smoking in the building contrary to the policy, McGurk saw a Waukesha County deputy smoking while walking through the building, and she has seen people smoke in the front lobby. The Chief has never seen anyone smoke in the building under the new policy.

THE PARTIES' POSITIONS:

The Union:

The Union points out that despite the language of General Order #20, the Police Building is not a smoke-free building. Both the new and the old procedures allow smoking by guests, suspects, etc., in private offices or meeting rooms with permission of the employee present.

The Union notes that the proper standard for judging the reasonableness of a work rule is whether the rule is reasonably related to a legitimate management objective. In this case, the City has argued that there is no room for smokers, that smoke may damage the computers, and that other employees should not be subjected to second-hand smoke for health reasons. The Union asserts that there is room available for smokers, which would not damage the computers nor subject other non-smokers to the hazards of second-hand smoke. The provision of the new paragraph 3.23(10) of the Procedural Manual proves that such a room or rooms exist, as the new procedure maintains the provision for smoking by guests, suspects, etc., in private offices or meeting rooms with the permission of the employee present.

Thus, the Union argues, the Police Building is not a smoke-free building, and the Chief of Police has recognized the ability of the building to accommodate smokers. This case is similar to one in Eau Claire County, where the fact that smoking remained permitted under some circumstances was the fatal flaw in management's policy.

While a number of police officers had complained to the Chief and other management personnel about the smoke, these were minor gripes, as the Chief never took those complaints to the alleged offenders. The Union objects to the City's general literature on the subject of smoking while submitting no evidence relating to the specifics of the Police Department here. The failure to provide health evidence relating to the specific workplace has warranted the rejection of a rule totally banning indoor smoking in other arbitration cases.

The Union contends that there is a good reason to keep an indoor smoking area for employees, as a potential personal safety problem has arisen. The new policy requires employees to stand outside, whether in the cold or dark, without any protection from the elements or from someone lurking outside looking for trouble.

Further, the Union states the City Hall does not have an absolute ban on indoor smoking, and employees may smoke in private offices as well as in a smokers' lounge. There is no evidence that the Police Department building has any greater problem in accommodating smokers or that its non-smokers have a great exposure to the ill effects of second-hand smoke. There is no showing that the smoking previously permitted inside the building had any detrimental effect on the health of non-smoking employees.

Therefore, the Union asserts that the work rule banning indoor smoking is unreasonable and should be set aside, and a reasonable accommodation should be made for an indoor smoking area.

The City:

The City argues that General Order #20 is inherently reasonable and legitimately promulgated pursuant to Section 1.03 of the collective bargaining agreement. A number of employees complained about the smell of smoke which permeated the entire basement of the Police Building. The ventilation system circulates the air throughout the downstairs area, and no one room is separately ventilated. An employer has a right to take action in light of employee complaints regarding cigarette smoke in the workplace. Chief Johnson took the only reasonable course of action available, given the ventilation system and space limitations in the building.

The Chief also amended the smoking policy due to the research of governmental agencies on the danger of second-hand smoke. The Chief read articles on the conclusions of the EPA, the U.S. Surgeon General's 1986 report on the consequences of second-hand smoke, and the American Lung Association's findings. An employer has an inherent obligation as well as a legal obligation to provide its employees with a safe work environment. After the Chief became aware of the dangers of second-hand smoke in the workplace, he had a legal obligation to eradicate the hazard. Thus, a policy designed for the protection of employees' health is a legitimate management objective and is inherently reasonable.

The City asserts that Wisconsin's Clean Indoor Air Act, Section 101.123, Stats., grants authority to one in charge of a public building to completely ban smoking in the building, and state law supporting an employer's smoking prohibition is an indicator of the reasonableness of the prohibition. Arbitrator Burns found the City presented a number of valid reasons for promulgating the smoking policy, including its interest in maintaining a smoke-free environment for other employees.

The City's concern regarding the effect of cigarette smoke on its computer system is a valid management objective in promulgating a ban on smoking. The Union's proposed alternative -- moving the smoking lounge into the women's locker room -- is unworkable, due to the ventilation system.

The City asserts that the Union failed to present any basis upon which to find the smoking policy to be unreasonable. Smoking is allowed outside the building, and a picnic table has been set up for smokers. Employees are allowed to stand just inside a doorway during inclement weather or they may smoke in their own vehicles. McGurk still smokes about the same number of cigarettes while on duty that she smoked before, she receives the same number of breaks, and the only change is the location in which employees are allowed to smoke.

The City contends that the fact that smokers were not informed by the Chief about complaints from others does not render the smoking policy unreasonable. The fact that City Hall is not entirely smoke free does not render the Police Department's policy unreasonable. A smoking policy different from other locations to accommodate space limitations is not discriminatory. The City has no duty to spend money to improve the ventilation system.

In replying to the Union, the City states that the provision in the policy which allows for certain exceptions does not render the policy unreasonable. Those exceptions were in the policy when Arbitrator Burns ruled that the policy was reasonable, and the Union has waived its right to make this argument for the first time in this case. The City takes issue with other cases cited by the Union and notes factual distinctions, such as Eau Claire County where exceptions to the smoking rule were wide spread and negated the employer's objectives, and the difference in ventilation systems between the case here and one noted by the Union.

DISCUSSION:

Section 1.03 of the parties' collective bargaining agreement gives the Employer the right to adopt reasonable rules and amend them. The parties agree that the standard by which to test the reasonableness of a rule is whether or not it is reasonably related to a legitimate objective of management.

The ban on smoking inside the Police Building had several objectives. One was to alleviate complaints from non-smokers who comprise the vast majority of employees using the building. Since the majority of employees found cigarette smoke offensive to them, it was a legitimate management objective to address that concern. The ban on smoking inside the building is obviously related to this objective. The Union considers the concerns of other employees to be minor gripes and notes that the Chief Johnson did not bring the complaints to the attention of the smokers. Adequate forewarning and some action to assist employees in a transition may be a preferable way to implement such a rule, but the lack of such forewarning and assistance does not render the rule unreasonable. Given the state of the ventilation system, it appears that nothing the smokers might have done to change their behavior would likely satisfy the non-smokers.

Another management objective was to reduce potential health risks. This is certainly a legitimate objective. The medical and scientific evidence may be subject to debate, and arbitrators cannot resolve the ongoing dispute between the Surgeon General and the tobacco industry. However, there is a growing concern in this country regarding the potential health hazards associated with smoke and so-called second-hand smoke. For example, smoking is no longer permitted on domestic airline flights. An employer need not wait for absolute proof of the hazards when it is aware of the potential harm. If both the smokers and non-smokers were exposed to noxious fumes which were potentially dangerous, whatever the source, it would be a legitimate management objective to eradicate the fumes from the workplace.

The complaints from employees and the potential health hazards are the two main concerns. The City also cites potential damage to its computer equipment, as the manufacturer suggests that the computer equipment be kept in a smoke-free environment. The data concerning smoke damage to computers may be more debatable than the data concerning the effects of secondary smoke on people. Nonetheless, the City has purchased expensive equipment which the manufacturer believes may be damaged by smoke. It is a legitimate management objective to maintain its equipment in proper working order.

The ban on smoking is reasonable related to those three legitimate management objectives. A work rule must also be reasonable in its application. The ventilation system has certain limitations, and it is not possible to

accommodate the smokers by providing one space indoors without spreading the smoke to other rooms in the building. Under those circumstances, it is a reasonable rule to ban smoking indoors entirely, while allowing smokers certain options, such as smoking outdoors, in their own vehicles, or standing in a back doorway during bad weather. The City is not obligated to improve its ventilation system to accommodate smokers. The application of the indoor smoking ban is not a significant change, as smokers were not allowed to smoke any time other than their breaks and lunch periods. When smoking was allowed in the smokers' lounge, McGurk smoked about seven cigarettes, and under the new rule, she smokes about five cigarettes.

The main complaint of the smokers is the level of discomfort they must endure to maintain their smoking habit, particularly given the climate of this state. The smokers' discomfort is both short-lived and self-imposed, in direct contradiction to the non-smokers' discomfort under the former smoking policy. The fact that the smokers may be exposed to bad weather does not overcome the City's need to respond to complaints and concerns over health, its legitimate objectives. Generally, smoking is not considered to be a condition of employment. 1/

The Union argues that there is a safety issue -- that these are female civilian dispatchers and someone may be lurking outside the building. It would appear to the Arbitrator that being 10 feet outside of the Muskego Police Building is hardly a dangerous place to be. The real safety issue lies not with smoking outside a police building, a place which perpetrators of crimes hardly frequent, but with the smoke lingering inside.

The exceptions allowed by the smoking policy do not negate the policy in this case. The exceptions are so limited and so seldom used that they do not swallow up the rule, unlike the case in Eau Claire County. There is no smoking allowed on a permanent, on-going basis in this case. The exceptions are not creating the problem of smokey air in the building. To the contrary, all the complaints have been generated by the smoke from the smoking employees, not the guests or an occasional exception.

Cases involving smoking policies and bans on smoking are highly factual, and under all the facts and circumstances of this case, I find the smoking policy promulgated by the Chief to be reasonable. Accordingly, the City did not violate the collective bargaining agreement when it established General Order #20.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 8th day of July, 1991.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

1/ See Acorn Building Components, Inc., 89-1 CCH ARB Para. 8243 (Roumell, Jr., 1988) at page 4211.

