BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL UNION 1258, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO (AFSCME)	Case 276 No. 49592 MA-7998
and	
ROCK COUNTY, WISCONSIN	

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511-3808, appearing on behalf of Local Union 1258, American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME), referred to below as the Union.

Mr. Thomas A. Schroeder, Rock County Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of Rock County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed as a class action. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on October 26, 1993, in Janesville, Wisconsin. The hearing was not transcribed, and the parties filed briefs by December 8, 1993.

ISSUES

The parties stipulated the following issues for decision:

> Did the County violate the terms of the collective bargaining agreement when the County Board of Supervisors adopted an ordinance restricting smoking in County owned buildings?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I - MANAGEMENT RIGHTS

1.01 The Management of Rock County and the direction of the work force is vested exclusively in the Employer to be exercised through the Department Head, including but not limited to the right to . . . create, promulgate and enforce reasonable work rules . . .

ARTICLE XVI - NO STRIKE, NO LOCKOUT

. . .

16.04 The Employer and Union agree that there shall be no discrimination against any employees or prospective employees because of race, creed, color, age, sex, national origin or handicapping condition.

BACKGROUND

The grievance, dated June 10, 1992, 1/ alleges the "County created a smoking ordinance that causes hardship on many employees" in violation of Sections 1.01 and 16.04. The grievance seeks, as the remedy for this violation, that the Employer "create County ordinance that sets designated smoking areas."

The ordinance, which became Section 23.04 of the County Ordinances, was adopted by the County Board on May 28, and reads thus:

. . .

2. Purpose, Authority, and Intent:

This ordinance is designed to protect the health and comfort of the public through the regulation of smoking, according to the authority granted to this County by Section 101.123(2)(C) Statutes (also known as the Wisconsin Clean Indoor Air Act).

3. Regulation of Smoking: Smoking will not be permitted in any area of county rented or owned buildings or vehicles except for the following:

. . .

1/ References to dates are to 1992, unless otherwise noted.

B. Such portions of the nursing home and psychiatric hospital as designated by the administration of those programs for smoking by residents.

. . .

6. This ordinance will take effect 30 days after passage by the County Board of Supervisors.

Prior to the implementation of Section 23.04, the County's Health Care Center, which consists of two buildings, contained separate break rooms for smoking and for non-smoking employes. With the implementation of Section 23.04, employes who wished to smoke had to smoke in designated areas outside of the buildings.

Terry Scieszinski is the Administrator of the nursing home component of the Health Care Center. He noted that the original draft of this ordinance permitted the administration of the facility to designate smoking areas, and that he advocated for the continuation of the separate smoking/non-smoking break rooms. He noted each smoking break room had air exchange equipment, but he could not unequivocally state more equipment might not be needed or that it was impossible for smoke to escape into the building. Cathy Hinds, the Union Steward who filed the grievance, testified that each smoking room was closed off from the hallway leading to the rest of the building by a fire door which remains closed except when an employe enters or leaves the room. Vending machines are kept in the non-smoking break rooms and the break rooms are physically separated from resident rooms.

Scieszinski testified that residents were permitted to smoke only in designated areas. Those areas do not include resident's rooms, but do include certain open hallways. He noted that the County based this exception on its understanding of relevant State policy, which views smoking as a right of residents whom the County knowingly admits into the Health Care Center with a smoking habit. He noted that employes must accompany residents who smoke, and may have to assist them while they smoke. He acknowledged employes work double shifts more often than the County would like, and he noted that the County accommodated employes who object to working with residents who smoke.

Hinds testified that employes who wish to smoke on night shifts must leave the building, typically one at a time. They must smoke in dimly lit areas which are within a few hundred yards of the County jail. On night shifts, the doors are locked, and an employe can be locked out of the building, if the employe neglects to take a key.

James Bryant III is the County's Personnel Director. He noted he drafted the original ordinance which was rejected by the County Board. He stated he sent various letters out concerning the Board's deliberations to various Union officials. The County self-funds part of its insurance coverage, and Bryant noted that smokers cost the County more, per employe, than non-smokers.

The parties entered the following stipulation into the record:

> IT IS HEREBY STIPULATED by and between the County of Rock and Local 1258, AFSCME, AFL-CIO that for purposes of the class action grievance . . . the following facts are agreed to without the necessity of putting on any testimony:
>
> The smoking of tobacco products and other

substances indoors has a recognized adverse health impact not only on the individuals smoking but also on others.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

After a review of the facts, the Union acknowledges that "smoking is generally considered to have an adverse health impact." The Union asserts that this impact is irrelevant to the County's policy, since it "does not prevent exposure to smoke by either residents or employees." The policy's regulation of smoking does not ban smoking and thus is, the Union argues, "a mandatory subject of bargaining." The attempt "to deal with a mandatory subject of bargaining through the adoption of an ordinance" is, the Union contends, invalid. The attempt to lease the use of space for smoking, according to the Union, "shows that the policy is arbitrary and capricious." Because the statutes permit the County to establish smoking areas, and because the County has not banned smoking, the Union concludes that the attempt to unilaterally regulate the workplace by ordinance violates the contract. Dismissing the County's citation of its "health benefit plan" as irrelevant, the Union concludes that the "Employer's denial of the employees the continued access to a smoking break room constitutes the unilateral denial of a benefit and as such should be over turned."

THE COUNTY'S POSITION

After a review of the facts, the County contends that there is no evidence to establish the ordinance violates Section 16.04 or Section 1.01. The County contends that the ordinance cannot be considered a work rule, but is "a legislative enactment by the County Board of Supervisors." The validity of this enactment flows from Chapter 59, Stats., through Section 22 of Article 4 of the Wisconsin Constitution, and has been affirmed in an analogous setting by the Wisconsin Supreme Court, according to the County. The County asserts that the ordinance was, in any event, adopted before negotiations "for a 1992-1993 Collective Bargaining Agreement were finalized." The Union has, the County asserts, failed to bargain the issue or to file a petition for declaratory ruling. That the Union seeks bargaining as the appropriate remedy to the grievance underscores, the County asserts, that "(i)f they have a right to any remedy, it clearly is not through the grievance arbitration process." Even if the ordinance is considered a work rule, the County asserts it is not unreasonable. More specifically, the County contends that the adverse impacts of smoking are known, and have a direct impact on the County's self-funded health insurance plan. Since, according to the County, the test of the reasonableness of a work rule is "whether or not the rule is reasonably related to a legitimate objective of management," the ordinance must be considered reasonable. The County argues that the ordinance is not arbitrary because it is based on considerable input, including that of Union members. Beyond this, the County argues that the ordinance is not discriminatory because the residents' right is distinguishable from employes', all of whom are not permitted to smoke in the building. It follows, according to the County, that the ordinance "was a reasonable enactment by the County Board." The County concludes the grievance must be denied.

DISCUSSION

The parties stipulated the issue for decision, but analysis of that issue is difficult. Strictly read, the issue links a contract violation to the adoption of Section 23.04. The remedy sought by the grievance is the creation of a new ordinance. The creation or recreation of an ordinance is a legal matter within the authority of the County Board, not of a grievance arbitrator.

To address the stipulated issue requires that it be focused on the contractual ramifications of the enforcement of the ordinance. Contract interpretation can have legal implications, and the parties can by contract or by stipulation seek an arbitrator's view of law outside the contract. In this case, each party has argued the role of outside law.

The grievance is, however, not well-suited to an analysis of its legal implications. The Union contends that the ordinance is a unilateral action on a mandatory issue of bargaining, and that the Wisconsin Clean Indoor Air Act does not affect this contention. The County disputes the Union's contention on the mandatory nature of Section 23.04, and questions whether grievance arbitration is an appropriate forum for a declaratory ruling type of issue. Beyond this, the County posits that the ordinance is well grounded in its authority under Chapter 59, Stats., and the Wisconsin Constitution. There is in this mix no clear stipulation on which, if any, of these legal issues fall within my authority. Such a stipulation is essential. Legal issues are ultimately reserved for courts. Arbitration is meant to operate as an inexpensive, informal and expeditious means of dispute resolution. To bring legal issues into this process undercuts the likelihood that arbitration can inexpensively, informally or expeditiously resolve a dispute. The parties' stipulation that legal issues should be addressed offers a necessary assurance that the dispute is resolvable by arbitration. In the absence of such a stipulation, arbitration becomes a time consuming and unnecessary adjunct to civil litigation.

Because the labor agreement does not put the legal implications of the ordinance at issue, and because the parties' arguments do not mutually clarify how, if at all, external law applies to this grievance, the stipulated issue must be addressed as a matter of contract. The issue is, then, how, if at all, the enforcement of the ordinance violates the contract.

The grievance cites Sections 1.01 and 16.04 as the governing contract provisions. Section 16.04 plays no role in the resolution of the grievance. To bring the ordinance within that section, smoking would have to be considered a "handicapping condition." The Union offers, and I can see, no persuasive reason to do so.

Section 1.01 authorizes the County to "create, promulgate and enforce reasonable work rules" and bears indirectly on the stipulated issue. The section bears indirectly because the ordinance was more than the creation or promulgation of a work rule. The ordinance is not restricted to this unit or to County employes generally. It is, then, something more than a work rule. Beyond this, the Union does not seek a reasonableness review of Section 23.04 as a work rule. Rather, the grievance challenges a unilateral change in a condition of employment.

Section 23.04 can be viewed as a work rule, but a more appropriate means of analyzing the parties' positions is to treat the enforcement of Section 23.04 as the abrogation of a practice. The practice is the provision of break rooms for smokers.

The record shows the smoking break rooms were a benefit confined to smokers. There is no demonstrated impact of the smoking break rooms on non-smokers or residents. In sum, the grievance is more analogous to the

abrogation of a past practice benefit than to the imposition of a policy-based work rule.

Past practice has been variously defined, but draws its binding force from the mutual agreement manifested in the bargaining parties' conduct. In this case, it is apparent that the smoking break room was a benefit sufficiently recognized to be considered a past practice. Scieszinski was aware of the practice, and advocated for its continuance. Hinds, as Union Steward, was also aware of it and also advocated for its continuance. The mutuality of the conduct recognizing the practice is apparent.

The effect of a practice is tied to the purpose it serves. Practice can clarify contract language or establish an enforceable condition of employment. 2/ When used as a means to clarify contract language, the practice is terminable only by a change in the language it clarifies. 3/ In this case, the practice does not clarify the scope of Section 1.01 regarding work rules. Rather, the practice at issue here establishes an enforceable condition of employment. The effect of such a practice has been stated thus:

2/ See, generally, How Arbitration Works, Elkouri & Elkouri (Fourth Ed., BNA, 1989) at Chapter 12.

3/ See Mittenthal, Past Practice And Administration Of Bargaining Agreements, from Arbitration And Public Policy, The Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators, (BNA, 1961).

> Consider . . . a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement . . . (I)f a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect. 4/

Section 23.04 sought to abrogate a narrow, but known, benefit during the term of the agreement. The County asserts the Board's actions were sufficiently well known to require bargaining from the Union, but neither party brought the issue to the table. The politics of the ordinance were in flux throughout the bargaining process. At its inception, the ordinance effectively recognized the practice, and apparently some effort was made to modify the ordinance even after its passage in a form abrogating the practice. The June 10 grievance was asserted when these efforts failed, and the contract agreed upon by the parties was retroactive to January 1. Whatever is said of this background, it is apparent that the County acted during the term of the agreement to abrogate the practice.

The ordinance thus served notice on the Union that the County wished to terminate the practice. The attempt to unilaterally abrogate the practice during the term of the agreement, however, violated the agreement.

The issue of remedy is, at best, difficult to address. The record was closed within a few weeks of the nominal expiration of the agreement. The Union sought, at hearing, bargaining on the point, and the County's implementation of Section 23.04 effectively denied it this opportunity. The Award stated below grants the Union's request to bargain, suspending the enforcement of Section 23.04 until bargaining on the point can occur. This attempts to make the best of a difficult situation. The abrogation of the practice wrongfully denied the benefit for a portion of the agreement. The Award entered below maintains the benefit until the parties have addressed it in bargaining. Whether Section 23.04 can stand as a work rule or as a provision of a successor labor agreement must be left to the bargaining process. This does not bring finality to this dispute, but reflects the finality this record will support.

Before closing, it is necessary to touch on certain arguments raised by the County. The County disputed that Section 23.04 could be treated as a work rule, but argued that if it was, it could withstand a reasonableness review. The Union, as noted above, did not address the reasonableness review. The issue of reasonableness is not fully argued here, and this is not an insignificant point.

4/ Ibid., at 56.

The County's assertion of the reasonableness of the rule is not sufficiently compelling to accept in the absence of full argument. Section 23.04 is not a public or employment based policy decision to ban smoking as a health hazard. By its terms and in its effect Section 23.04 regulates smoking. Certain County arguments attempting to justify the work rule based on the deleterious effect of smoking on users and on its health care rates thus miss the mark of the regulation. Section 23.04 does not ban employe smoking. Rather, it moves its location. Nor does the regulation demonstrably impact smoke infiltration into the building where it can be inhaled by residents or by non-smoking employes. At most, the record shows smoke left the confines of the break room when an employe entered or left the room. That this happened or happened to any measurable degree is speculative. The room is separate from resident rooms and non-smokers' break areas, and is equipped with air-exchange or circulation mechanisms. Thus, the record shows no demonstrable dispersal of secondary smoke into the Health Care Center facilities.

This is not to say Section 23.04 cannot withstand a reasonableness review, if adopted as a work rule. That issue is not, however, self-evident. This issue must be left to the parties to bargain. If the point must be litigated, it must be litigated on a full record before a grievance arbitrator if Section 23.04 is created and promulgated as a work rule, or before an interest arbitrator if the point becomes an impasse issue.

AWARD

The County did violate the terms of the collective bargaining agreement by abrogating a past practice during the term of the agreement when the County Board of Supervisors adopted an ordinance restricting smoking in County owned buildings.

As the remedy appropriate to this violation, the County shall permit smoking in the smoking break rooms of the Health Care Center until the issue of enforcement of Section 23.04 is addressed in collective bargaining.

Dated at Madison, Wisconsin, this 7th day of March, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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