BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | : | |
| CITY OF MENASHA | : | Case 83 No. 50084 MA-8144 |
| and | : | |
| MENASHA CITY EMPLOYEES LOCAL 1035, AFSCME, AFL-CIO | : | |

Appearances:

Mr. Jeffrey S. Brandt, City Attorney, 140 Main Street, Menasha, Wisconsin 54952-3190, on behalf of the City.

Mr. Gregory N. Spring, Staff Representative, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, on behalf of the Union.

## ARBITRATION AWARD

The above-captioned parties, hereinafter the City and the Union respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to said agreement, the parties jointly requested the undersigned, a member of the staff of the Wisconsin Employment Relations Commission at that time, to hear the instant dispute. Hearing was held on January 19, 1994, in Menasha, Wisconsin. No stenographic transcript was made. The parties completed their briefing schedule on March 2, 1994. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

## ISSUE

The parties could not stipulate to the framing of the issue in the instant dispute.

The Union proposed the following:

> Did the City violate the collective bargaining agreement by prohibiting smoking in the City Garage and in all City vehicles? If so, what is the appropriate remedy?

The City proposed the following:

> Did the City violate Article 2B by not providing notice to the Union of an ordinance passed by the City Council prohibiting smoking in City Buildings and City vehicles?

The undersigned frames the issue as follows:

> Did the City violate the collective bargaining agreement when it passed an ordinance prohibiting smoking in the City Garage and in City vehicles? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II - MANAGEMENT RIGHTS RESERVED

A. General: Unless as otherwise herein provided, the management of the work and the direction of the working forces, including but not limited to, the right to hire, promote, demote, suspend or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer.

B. Work Rules: 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 Employer, such rules and regulations shall be submitted to the Union, if possible prior to their effective date, for its consideration.

C. Union Action: Action to amend, alter or otherwise change said rules and/or regulations shall be taken through the grievance procedure, in this Agreement.

D. Subcontracting: The Employer may contract out for any goods and services, but before doing so the Employer agrees to meet and negotiate with the Union in the event such subcontracting affects any employee in the bargaining unit.

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ARTICLE XV - GRIEVANCE AND ARBITRATION PROCEDURE

A. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this

contract.

B. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated and the signature of the grievant and the date. Matters involving a union grievance shall be signed and processed by a Union officer or representative.

C. Time Limitation: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

D. Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

E. Steps in Procedure:

Step 1: The employee, alone or with his representative shall orally discuss his complaint to his supervisor no later than five (5) working days after he knew or should have known of the cause of such complaint. The employee shall perform his normal work task and present his complaint later unless safety is an issue. If the issue is not resolved during the discussion the employee may file a written grievance as described in Step 2 of this article.

Step 2: If the grievance is not settled at the first step, the employee and/or his representative shall prepare a written grievance and present it to the supervisor within five (5) working days of the Step 1 decision. The supervisor will further investigate the grievance

and submit the decision to the employee and his representative in writing within five (5) working days after receiving written notice of the grievance.

Step 3: If the grievance is not settled at the second step, the employee and/or his representative may appeal in writing to the Department Head within five (5) working days of the Step 2 decision. If the Department Head is the immediate supervisor, Step 3 shall be omitted. The Department Head will further investigate the grievance and submit his decision to the employee and his representative in writing within five (5) working days after receiving notice of the grievance.

Step 4: If the grievance is not settled at the third step, the Union may appeal in writing to the Chairman of the Personnel Committee, with a copy to the Personnel Director, within five (5) working days after receipt of the written decision of the Department Head. The Personnel Committee shall discuss the grievance, within ten (10) working days of the appeal, with the employee, and the Union representative shall be afforded the opportunity to be present at this conference.

F. Arbitration:

1. Time Limit: If a satisfactory settlement is not reached in Step 4, the Union must notify the Chairman of the Personnel Committee in writing within ten (10) working days that they intend to process the grievance to arbitration.

2. Arbitration Board: The Union and the City shall each select one (1) person to serve as a member of the Arbitration Board and these two (2) members shall attempt to mutually agree to the selection of a third member to act as Chairperson of the Arbitration Board. If the members cannot agree on the Chairperson, the parties shall each select three

(3) arbitrators from the Wisconsin Employment Relations Commission Staff. From those six arbitrators, five names will be drawn. The parties shall then proceed to alternately strike names from that panel until an arbitrator is selected. The striking order shall be determined by a coin toss.

3. Arbitration Hearing: The Arbitration Board selected or appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance.

4. Costs: Both parties shall share equally the costs and expenses of the arbitration proceedings, including transcript fees and fees of the arbitrator, if any. Each party, however, shall bear its own costs for the Board member selected by it, witnesses and all other out-of-pocket expenses including possible attorneys' fees, except that an employee shall not suffer a loss of pay for reasonable and necessary witness time. The arbitration hearing shall be conducted in the City Hall.

5. Transcript: There shall be a transcript prepared for each arbitration hearing. The parties may mutually agree to waive the transcript.

6. Decision of the Arbitration Board: The powers of the Arbitration Board are limited as follows: Its function is limited to that of interpreting and applying the provisions of this Agreement. It shall have no power to add to, subtract from or modify any of the terms of this Agreement. The decision of the majority of the Board shall be rendered promptly following the hearing and if

exercised in accordance with the terms of this Agreement and consistent with federal, state and local laws, shall be final and binding upon both parties.

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ARTICLE XXII - ENTIRE AGREEMENT

A. Amendments: This agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

B. Waiver: The parties further acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and the opportunities as set forth in this Agreement. Therefore, the City and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter specifically referred to in this Agreement, or any subject or matters that arose during bargaining, but which were not agreed to by the parties.

C. Ordinances and Resolutions: All existing ordinances and resolutions of the Common Council affecting wages, hours and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth. To the extent that the provisions of this Agreement are in conflict with the existing ordinances, resolutions or rules, such ordinances, resolutions or rules shall be modified to reflect the

agreements herein contained.

BACKGROUND

The facts of this case are not in serious dispute. For many years, employes of the Department of Public Works represented by the Union were permitted to smoke cigarettes at the City Garage with no limitations as to location in the Garage and in City vehicles. Such was not the case for other City employes in other City locations. When the City Hall was relocated to its present site in April of 1987, then-Mayor Ciske prohibited smoking inside the new City Hall. Upon the election of a new mayor in 1988, this absolute smoking prohibition in City Hall was amended to permit smoking in private offices. This modification of smokers' rights was extended even further in March of 1991, when smoking was also permitted in a designated smoking area in the basement break room and elsewhere in private offices after the close of business.

In 1990, the City Police and Fire Chiefs prohibited smoking in the City's police and fire vehicles and provided that smoking would be confined to designated areas in the Safety Building. With respect to the Parks Department, there was no smoking in either Parks offices or Parks vehicles by employe-management joint determination.

The City's smoking policy had been the subject of discussion between employes and the City for some time. At the City Garage in 1992, the employes in the Department of Public Works sat down with their supervisors, in particular Street Supervisor Tim Jacobson and Assistant Street Superintendent Adam Alix, and agreed to limit smoking to the outdoors, a designated area within the Garage and to certain designated vehicles usually operated by smokers. Smoking was prohibited in the lunch room. Employes could smoke in non-designated vehicles only with the express permission of the operator to which the vehicle was normally assigned. The vehicle agreement was reduced to writing with certain vehicles designated smoking and others designated non-smoking.

Smoking rules at City Hall continued to be attacked by non-smoking employes and employes in the City's Health Department. These discussions culminated in an universal ban of smoking in all City-owned buildings and vehicles by way of City Ordinance 0-3-93 adopted on or about March 5, 1993. This Ordinance states, in pertinent part, as follows:

AN ORDINANCE RELATING TO SMOKING IN CITY BUILDINGS AND VEHICLES

Introduced by the Board of Health

The Common Council of the City of Menasha does ordain as follows:

SECTION 1: Section 8-1-9 is created to read as follows:

(a) No person may smoke, carry or possess a lighted cigar, cigarette, pipe, or any other lighted smoking equipment in any City-owned building or motor vehicle.

(b) The prohibition in 8-1-9(a) does not apply to any park pavilion, the recycling center, or any other open-air structure.

(c) Any violation of Section 8-1-9(a) shall be punishable pursuant to Section 1-1-7.

SECTION 2. This Ordinance shall become effective upon its passage and publication as provided by law.

Attorney's Note: This ordinance was drafted at the direction of the Board of Health. The penalty would be a fine from $1 to $500 plus costs. I would recommend that the bond schedule be established at $45.00, which is $10.00 plus costs.

Employes were notified that violation of said ordinance would subject them to discipline as well as the above-referred to fines. With the implementation of the ordinance, Street Department employes who wished to smoke had to leave the Garage or the City vehicle which they were operating, even in inclement weather, in order to smoke. The Union then challenged the ordinance by filing the instant grievance on March 19, 1993.

STIPULATION OF PARTIES

The parties expressly stipulate that the issue of notice to the Union of the City's consideration of the Ordinance is not before the Arbitrator in this matter.

POSITIONS OF THE PARTIES

Union

The Union points to Article XXII, Section "C", as providing that "existing" ordinances are to be incorporated into the collective bargaining agreement unless they are contrary to the agreement. The presumption, it asserts, is that the Union had the opportunity to negotiate regarding these "existing" ordinances prior to the execution of the agreement. This is not the case insofar as the "no smoking" ordinance is concerned. Noting that the same article expressly states that "any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto", the "no smoking" ordinance should not impact on the employes covered by the agreement during its term because it was unilaterally adopted and implemented.

The Union also takes the position that the ordinance constitutes an unreasonable work rule in violation of Article II, Section "B". Citing arbitral precedent, it submits that the tests of "reasonableness" which are most frequently invoked by arbitrators include whether the rule in question violates any part of the contract; whether it materially changes a past practice or working condition; whether it is related to a legitimate business interest or objective of management; and whether it is reasonable as applied. In comparing these standards to the ordinance, the Union believes that the adoption of the ordinance is contrary to Article XXII as cited above. The Union stresses that the ordinance clearly changed the existing practice. Noting that the third test is the most important and universally accepted, the test of reasonableness, the Union maintains that the purpose of the rule is to protect non-smokers from smokers and smokers from themselves. The rule, in the Union's view, accomplishes neither objective. The Garage is still smoky because trucks are still warmed up inside each morning. The air quality in the Garage has not noticeably improved. As far as protecting smokers from themselves, the rule poses more of a danger to the employe than smoking inside the vehicle does especially where employes are exposed to inclement weather and to excessive traffic.

In response to City contentions that it has adopted similar bans on smoking in City Hall and in Police Department vehicles, the Union argues that there may exist legitimate business objectives in prohibiting smoking in City Hall and in Police Department vehicles which do not apply to the instant bargaining unit. It notes that the public, including children, has access to City Hall and may ride in police and fire vehicles, but that this is not the case with respect to the City Garage or Public Works vehicles. Therefore, the imposition of the no-smoking rule serves no legitimate business interest and is unreasonable as a violation of the agreement.

The Union disputes the City's contention that it has no authority to change a City ordinance. It requests that the arbitrator sustain the grievance and order the City to modify the ordinance to allow smoking as in the past. In the event that the arbitrator finds that the City has a legitimate business interest to prohibit smoking in the City Garage, the Union requests that the arbitrator require the City to provide an indoor smoking area that non-smokers can avoid. In the alternative, the Union asks that the arbitrator find that the prohibition on smoking in vehicles occupied solely by smokers is unreasonable and order the City to modify that portion of the ordinance accordingly.

City

The City makes several arguments in support of its contention that the ordinance is a reasonable work rule. It stresses that the only evidence submitted by the Union to support its position is that prohibiting smoking during instances when an employe must plow snow for lengthy periods somehow creates an unreasonable inconvenience to those employes who smoke. In response, it notes that the rule does not prohibit such employes from smoking. Rather, it limits where they may smoke. It concedes that exiting a snowplow for a few minutes in order to smoke may create an inconvenience, but this, in the City's view, stops far short of being unreasonable. Stressing that many businesses and employers have established non-smoking environments, the City submits that such rules are inconvenient -- but not unreasonable. Smoking, it stresses, does not in any way enhance the work function.

Pointing to the history of the enactment of the ordinance, the City asserts that fairness dictated that the ban be universally applied to all City-owned buildings and vehicles. The City relies upon a recently released study by the Environmental Protection Agency regarding the effects of second-hand smoke and upon the Clean Indoor Air Act and Wisconsin's Safe Work Place Statutes to support the reasonableness of its actions. In the face of these statutes, there can be little doubt, according to the City, that the Common Council acted in a responsible manner in passing the ordinance.

Noting that there are only a very limited number of people who are inconvenienced by the rule, the City submits that to claim a rule which affects at most only three of twenty-seven bargaining unit employes is unreasonable begs the question indeed. In particular, it claims that the arrangement regarding the vehicles had the effect of eliminating management from the establishment of work rules and gave absolute authority for smoking or not smoking in the vehicles to the usual operator of the assigned vehicle. This alleged arrangement, in the City's view, clearly violates Section II A and II B of the collective bargaining agreement.

Stressing that none of the other bargaining units filed grievances over the implementation of the ordinance, the City avers that none of these other units believed the rule to be unreasonable or they would have filed similar grievances.

Citing arbitral precedent, the City submits that arbitrators have generally upheld an employer's right to designate smoking areas for the benefit of its employes absent contract language to the contrary. A plant rule prohibiting smoking within the facility has been found to be reasonable based upon the common law obligation on the part of an employer to maintain a smoke-free working environment. Some arbitrators have even referred to the

dangers of "passive smoking", i.e., smoke inhaled by nonsmokers which causes harm to the nonsmokers. The arbitrator in at least one case premised his conclusion as to the reasonableness of the rule on the necessity of protecting nonsmokers from second-hand smoke. The City alleges that the ordinance is reasonably related to the legitimate interest of the employer in protecting its employes and visitors from the health hazards of passive smoking.

It argues that the Union has not met the burden of demonstrating the unreasonableness of the ordinance; that there are several compelling reasons that the City has demonstrated regarding the reasonableness of the rule; and that the grievance should be denied.

DISCUSSION

Whether or not City Ordinance 0-3-93 violates the collective bargaining agreement involves a determination as to whether it violates Article II and/or Article XXII. There is no question in the mind of this arbitrator that the ordinance runs contrary to the established past practice of the parties. For many years, there was no regulation of smoking at the City's Garage or in the City's Public Works vehicles. The bargaining unit employes and the management in the Public Works Department (apparently seeing the proverbial writing on the wall) sought to forestall a complete ban by negotiating their own agreement, some of the terms and conditions being reflected in Union Exhibit No. 10. Management and employe representatives agreed to limit smoking to the outdoors, a designated area within the Garage, and to certain designated vehicles usually operated by smokers. The latter agreement regarding the designated vehicles was reduced to writing. This modified practice was in place for at least a year prior to the adoption of the ordinance. The undersigned finds that, at least with respect to the designation of smoking and non-smoking vehicles as reflected in Union 10, a binding past practice existed which did not contravene Article XXII, Section A. Article XXII, Section A makes it clear that no verbal statements shall supersede any of the provisions of the agreement and that any amendment or agreement supplemental to the collective bargaining agreement must be reduced to writing. Accordingly, this arbitrator cannot conclude that the verbal agreement limiting smoking to the outdoors and a designated smoking area within the Garage should be given the same weight as the practice designating smoking and non-smoking vehicles which was reduced to writing in Union 10.

"Practice" in general can clarify language or establish an enforceable condition of employment. 1/ The practice which

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

exists, at least with respect to the designation of the vehicles, establishes just such an enforceable condition of employment. 2/ Ordinance 0-3-93 abrogates this narrow but known benefit during the term of the collective bargaining agreement. The City cannot abrogate such a practice during the term of the agreement unless it retains that right pursuant to some other provision of the agreement to do so. The City, citing Article B, argues that it possesses this right via the right to make reasonable work rules during the term of the agreement.

The Union disputes the City's right, placing great reliance on Article XXII, Section C, where the parties make it clear that "all existing ordinances and resolutions affecting wages, hours and conditions of employment not inconsistent with the agreement are incorporated into said agreement." To the extent that the provisions of the agreement are in conflict with the existing ordinances, resolutions, or rules, they shall be modified to reflect the agreements contained in the collective bargaining agreement. This, the Union argues, makes the "no-smoking" ban a unilaterally adopted and implemented rule which does not fall into the agreed-upon "existing" ordinances incorporated into the collective bargaining agreement.

The difficulty with this argument is that the City is correct when it asserts that it has reserved to itself in Article II, Section B, the right to make reasonable work rules provided that they are submitted to the Union, if possible, prior to their effective date. This second proviso ensures that the Union has an opportunity to negotiate over these proposed rules.

Notwithstanding the stipulation that notice to the Union of the City's consideration of the ordinance is not before this Arbitrator, the provision in the agreement providing for such notice, by inference, suggests that the City may, on some occasions, enact reasonable work rules at mid-term in the contract provided that the rules are reasonable. Thus, the underlying issue revolves around the reasonableness of the no-smoking ordinance.

The City makes numerous arguments regarding the advisability of saving non-smokers from smokers and smokers from themselves. It is unnecessary to detail the inadvisability of smoking or subjecting others, especially the general public, to second-hand cigarette smoke. The inadvisability of smoking and the negative effects of employes' smoking do not, however, establish the reasonableness of the instant smoking ban in the workplace.

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2/ 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).

Evaluation of the ordinance, the legitimate business interests of the City in passing the ordinance, and the strength of the past practice is necessary.

The reasonableness of the ordinance differs significantly as it applies to the Garage and the Department of Public Works vehicles. The City Garage, however large, is a confined space in which all bargaining unit employes, smokers and non-smokers alike, must work. Each employe is entitled to access to all parts of the Garage. Second-hand smoke potentially affects all who must work within this confined area. The City's arguments with respect to the Garage are meritorious, especially when there is a strong possibility that failure to ban smoking within the confines of the Garage may violate the Clean Indoor Air Act and/or the Safe Workplace Act. It has established that a legitimate business reason exists sufficient to ban smoking from the Garage locale. When the established unwritten practice is pitted against this legitimate business reason, the undersigned cannot find that the ordinance insofar as it bans smoking from the interior of the Garage is unreasonable.

The same cannot be said for the ban as it applies to smoking in all Department of Public Works vehicles. There is in existence a viable past practice which has been reduced to writing designating smoking and non-smoking vehicles. The City's objections that this arrangement eliminates management's right to enact work rules must fail in view of the fact that management exercised its right by acquiescing and agreeing to the practice. Neither the public nor non-smoking bargaining unit members need ride in the designated smoking vehicles. There is a substantial inconvenience to smokers who must leave their vehicles, at times in inclement weather or in unsafe traffic conditions to engage in an addictive habit. Moreover, the City has failed to advance any real rationale for the total prohibition of smoking in the vehicles, other than to protect smoking employes from themselves. The Ordinance, as it applies to the designated vehicles, is not reasonable.

In short, the City has simply not provided sufficient rationale to abrogate the past practice as it applies to Department of Public Works vehicles during the term of the collective bargaining agreement. The work rule is too broad, all encompassing, and cannot be upheld.

REMEDY

The issue of remedy is difficult to address. This arbitrator questions whether or not she has the authority to modify a lawfully-passed ordinance. As a grievance arbitrator, she does not have the authority to address the legal implications accompanying the ordinance issue. Rather, the issue is how, if at all, the enforcement of the ordinance violates the parties'

collective bargaining agreement. Having concluded that the non-smoking ban provided in the ordinance does abrogate an existing past practice and that the ordinance is an unreasonable work rule insofar as it extends to smokers smoking in the Department of Public Works vehicles, the undersigned directs the City to return to the status quo prior to the enactment of the ban with regard to the designation of smoking and non-smoking Department of Public Works vehicles and to permit smoking in the vehicles which had previously been designated as smoking vehicles.

Accordingly, it is my decision and

AWARD

The City did not violate the collective bargaining agreement when it passed an ordinance banning smoking in the City Garage.

The City did violate the collective bargaining agreement when it passed an ordinance prohibiting smoking in City Department of Public Works vehicles.

The City is directed to permit smoking in Department of Public Works vehicles pursuant to an established past practice which it unilaterally abrogated.

Dated at Madison, Wisconsin this 6th day of May, 1994.

By Mary Jo Schiavoni /s/

Mary Jo Schiavoni, Arbitrator