BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MANITOWOC COUNTY HEALTH CARE CENTER EMPLOYEES, LOCAL 1288, AFSCME, AFL-CIO

and

MANITOWOC COUNTY

Case 335
No. 56289
MA-10228

(Smoking Grievance 97-40)

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Manitowoc County Health Care Center Employees, Local 1288, AFSCME, AFL-CIO.

Mr. Steven J. Rollins, Corporation Counsel, on behalf of Manitowoc County.

ARBITRATION AWARD

Manitowoc County Health Care Center Employees, Local 1288, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Manitowoc County, hereinafter the County in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on August 6, 1998, in Manitowoc, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by October 28, 1998. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there are no procedural issues and to the following statement of the substantive issues:

> Did the Employer violate the Collective Bargaining Agreement by changing restrictions on smoking by employes? If so, what is the remedy?

Subsequent to the hearing in this matter, the parties also stipulated that the Arbitrator should similarly rule on the adequacy of the alternative arrangement for smoking instituted by the County on January 15, 1998 (room on 2 West), in addition to the original prohibition on smoking of October 15, 1997 that precipitated this grievance.

CONTRACT

The following provisions are cited:

> Neither party to this Agreement by such act at the time hereto or subsequent hereto, agrees to, or does waive any rights possessed by it or them under any State or Federal laws, regulations, or statutes. Should any of the provisions of this Agreement be found to be in violation of any law of the above listed governing bodies, all other provisions of this Agreement shall remain in full force and effect for the duration of this Agreement.
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> . . .
>
> **ARTICLE 3 – MANAGEMENT RIGHTS RESERVED**
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> . . .
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> Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of the work week and to make such changes in the details of employment of the various employees as it, from time to time, deems necessary for the effective operation of the Institution. The Union agrees, at all times, as far as it has within its powers, to preserve and maintain the best care and all humanitarian considerations of the patients of said Institution and otherwise further the public interest of Manitowoc County. The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

The Employer agrees that all amenities and practices in effect for a minimum of twelve (12) months or more, but not specifically referred to in this Agreement, shall continue for the duration of this Agreement. . .

. . .

ARTICLE 7 – GRIEVANCE PROCEDURE

A. Definition of a Grievance: Should any differences arise between the Employer and the Union as to the meaning and application of this Agreement, or as to any question relating to wages, hours, and working conditions, they shall be settled under the provisions of this Article.

. . .

C. Steps in Procedure

. . .

Step 4 – Arbitration:

. . .

c. Arbitration Hearing: The Arbitrator shall with the consent of both parties, use his or her best efforts to mediate the grievance before the Arbitration Hearing. The parties shall attempt to agree in advance on stipulated facts and issues to be used as well as procedures to be followed at the hearing. The Arbitrator selected or appointed shall meet with the parties at the earliest mutually agreeable date to review the evidence and hear testimony. The Arbitrator shall make a decision on the grievance which shall be final and binding on both parties. The decision shall be submitted in writing as soon as possible after the completion of the hearing.

. . .

f. Decision of the Arbitrator: The Arbitrator shall not modify, add to or delete from the terms of the Agreement.

BACKGROUND

The County maintains and operates the Manitowoc County Health Care Center, a resident health care facility. The Union is the recognized exclusive collective bargaining representative of certain employes of the Center.

For approximately five years prior to October of 1997, employes had been permitted to smoke outside the Center's building and in an employe break area known as the "garage". The garage was a garage that had been converted into a breakroom with snack machines and soda machines where employes could eat and drink, and smoke if they so desired. The garage had an exhaust fan and an air cleaner to take the smoke out of the air and the windows could be opened. There is also a fenced area adjacent to the garage where employes could sit in the warmer months and could also smoke. Residents are not permitted in the garage.

In 1994, the County passed an ordinance that read, in relevant part, as follows:

> 6.35 Indoor Clean Air. In order to promote public and employee health and abate the nuisance of tobacco smoke and consumption within public buildings, the following regulations are adopted to restrict smoking of tobacco within the various facilities owned and operated by Manitowoc County.
>
> (1) Definitions. As used in this section:
>
> (a) "County building" means all enclosed structures owned by Manitowoc County except the University of Wisconsin Center – Manitowoc County.
>
> . . .
>
> (d) "Smoke" means to burn tobacco in any manner, or to burn tobacco substitutes, and includes carrying, using or inhaling smoke of, tobacco products or substitutes, whether contained in pipes, cigars, cigarettes, water pipes or other instrumentality.
>
> (2) It shall be unlawful for any person to smoke in any county building.
>
> (3) No person may remove, deface, hide or mutilate a "No smoking" or "Smoking allowed" sign.

(4) Chewing tobacco or spitting tobacco juice is absolutely prohibited in all county buildings.

(5) Any person violating this ordinance may be required to forfeit not less than $10 nor more than $50. Each instance of smoking shall constitute a separate offense. No one may be prosecuted unless they have first been warned of the consequences of violating this ordinance by a law enforcement officer. This ordinance may be enforced by issuance of a citation, in which case the deposit amount shall be $10 together with costs, assessments and fees as set by the legislature.

The ordinance had not been enforced at the Center with respect to residents or employes, because, the County alleges, it would have been a hardship on residents who have been long-time smokers. The County further alleges that it received complaints about the no-smoking ordinance not being enforced at the Center and that the amendment to the 1994 ordinance, Sec. 6.35, was a result of those complaints. The following amendment to Chapter 6 of the County Code was enacted on October 14, 1997, to take effect on December 15, 1997:

WHEREAS, Manitowoc County Code ss. 6.35(2) provides that it shall be unlawful for any person to smoke in any county building; and

WHEREAS, Manitowoc County Code ss. 6.35(2) has not been and is not being enforced at the Manitowoc Health Care Center with respect to residents or employees; and

WHEREAS, immediate enforcement of Manitowoc County Code ss. 6.35(2) with respect to residents of the Manitowoc Health Care Center could impose a hardship on those residents who smoke;

NOW, THEREFORE, the Board of Supervisors of the County of Manitowoc, Wisconsin does ordain as follows:

That section 6.35(5) of the Manitowoc County Code be and hereby is renumbered to section 6.35(6);

That section 6.35(4) of the Manitowoc County Code be and hereby is renumbered to section 6.35(5);

That section 6.35(3) of the Manitowoc County Code be and hereby is renumbered to section 6.35(4);

That section 6.35(3) of the Manitowoc County Code be and hereby created to read:

(3) Exception. It shall not be lawful for any person who voluntarily or involuntarily resides on a temporary or long term basis at the Manitowoc Health Care Center to smoke in a designated indoor smoking area at the Manitowoc Health Care Center provided that:

(a) the designated smoking area is posted as a smoking area in accordance with the requirements of Wis. Stats. ss. 101.123(4)(b).

(b) the designated smoking area is enclosed and exhausted directly to the outside and away from air intake ducts;

(c) the designated smoking area is maintained under sufficient negative pressure with respect to all surrounding space to contain all tobacco smoke within the designated area, and

(d) no Manitowoc County Care Center or other Manitowoc County employee, except in an emergency, shall be required to enter the designated smoking area while smoking is occurring or while tobacco smoke is present.

On October 15, 1997, signs were posted, including on the door to the "garage", prohibiting employes from smoking anywhere indoors in the Center. The indoor smoking ban for employes was subsequently grieved.

A room on 2 West was remodeled and converted into a smoking room for residents and is the only place indoors in the Center where residents are permitted to smoke. There are approximately 26 residents who smoke and some are in wheelchairs. On January 15, 1998, in an effort to resolve this dispute, Center management began also permitting employes to smoke in 2 West on breaks; however, no food or drink is permitted in 2 West. Union Steward Linda Decker testified that in the approximately 10 times she has used 2 West (when it was cold), there has been an average of 10 residents and eight employes utilizing the room when she was there. Decker also testified that while 2 West is nicer than the garage, there are only eight chairs in the room, and that there are two doors to go through to the room and that the doors open the opposite way. In Decker's opinion, 2 West is smoke-filled and too crowded and a safety problem as far as being able to get residents out of the room in a hurry if that becomes necessary. The present Administrator at the Center, Michael Thomas, and the Center's Environmental Services Director, Gary Kalas, testified that complaints were received about too

much smoke in 2 West and that as a result, the exhaust system that had been installed in the room was modified from a 650 CFM removal rate to 1100-1750 CFM.

While employes may still smoke in certain outdoor areas at the Center, these areas have in the past changed with changes in administrators at the Center. Those changes have not been grieved.

The parties attempted to resolve their dispute, but were unsuccessful, and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that employes were permitted to eat and drink in the garage, a room that had soda and snack machines, was heated and had an exhaust fan and a "smoke eater" to remove smoke. The garage opens onto a fenced area which was frequently used by employes for breaks in the summer. Employes could smoke, eat and drink in the garage and mix with non-smoker employes, and no residents were allowed to use the garage. Subsequent to October 15, 1997, the County made another room available for employes who smoke; however, that room is inadequate, as there would be approximately 26 residents and 10 to 15 employes using the room for smoking during employe breaks, with some residents in wheelchairs. Because the two doors to the room open in conflict with one another, it poses a problem for residents in wheelchairs to leave the room quickly. Further, employes are not permitted to eat or drink in 2 West. The Union also asserts that there is another break room where smoking has not been permitted in the past and which would still be available to non-smoking employes.

The Union asserts that the County does not deny the facts set forth above. In considering its smoking policy, the County changed its regulation regarding smoking by first prohibiting it, then permitting it in an area in which employes are not allowed to eat or drink and which does not allow them to be away from residents for their break in a heated room. The Union also notes that it is grieving all aspects of the past practice with regard to the beneficial aspects of the "garage", including it being a heated and ventilated room in which employes could eat or drink and smoke if they wished, and associate with smokers and non-smokers away from residents. The 2 West smoking room is still an attempt to change the past practice in that employes are not permitted to be away from residents or to eat or drink. The County has not demonstrated any reasons why the garage is not an acceptable location for employes to smoke on break, and has not recognized that smoking in a room with features like the garage is a benefit which employes have enjoyed, and which is an enforceable past practice. In that latter regard, the Union cites the decision of Arbitrator Greco in CLARK COUNTY and Arbitrator Buffett in EAU CLAIRE COUNTY (CENTER OF CARE).

In its reply brief, the Union first notes that Wisconsin Statutes permit the designation of "smoking areas in the places where smoking is regulated under sub. (2)(a) unless a fire marshal, law, ordinance or resolution prohibits smoking." Sec. 101.123(4)(a), Stats. Until October 15, 1997, the garage was the designated smoking area where employes were permitted to smoke during their breaks. The County unilaterally changed that circumstance by first forbidding smoking by employes at the Center and then by only permitting it in the room where residents also smoke. The Union asserts that unilateral change is a violation of Article 3 – Management Rights Reserved, of the parties' Agreement.

The Union notes that the County has also requested that the Arbitrator decide whether the designation of the smoking room on 2 West as of January 15, 1998 is adequate under the contract, as well as deciding the issue of the complete smoking prohibition at the Center for employes. The Union notes that it concurs in the County's request in that regard. The Union asserts that the use of the garage for employe smoking on breaks is a past practice or amenity under the above contract provision, and that the employes are entitled to all aspects of that practice. The Union requests that the County be directed to permit the use of smoking in the building in a heated, adequately sized and ventilated room where employes will be allowed to eat, sit, have soda and snack machines available, and be away from residents, preferably the "garage". The Union also requests that the County be directed to immediately notify all employes in the bargaining unit, in writing, in that regard.

County

The County first cites the Wisconsin Clean Indoor Air Act that prohibits anyone from smoking in any enclosed, indoor area of a county building. The Act also expressly prohibits anyone from smoking in an inpatient health care facility. Under the Act, it would be illegal for anyone to smoke at the Center. Although the statute grants limited authority for the person in charge of a building to create an exception by designating a smoking area, that authority is removed by operation of state law where a county ordinance prohibits smoking. The County adopted a clean indoor air ordinance in 1985 which was amended in 1993 and renumbered in 1994. The purpose of the ordinance was to "promote public and employe health and abate the nuisance of tobacco smoke and consumption within public buildings." The amended code provided that "it shall be unlawful for any person to smoke in any county building."

The County asserts that as a result of complaints to the Sheriff's Department in 1997, it was learned that employes and residents were smoking at the Center in violation of State law and County code. The County Board discussed the situation and ultimately amended the ordinance to create an exception for residents at the Center. That amendment was adopted on October 14, 1997, and was to become effective December 15, 1997. After the amendment was passed, the Center began constructing a "smoking room" that would comply with the standards set forth in the code. Those standards included creating an enclosed area,

maintained under sufficient negative pressure with respect to surrounding space, to contain all the tobacco smoke, with air exhausted directly to the outside and away from air intake ducts. When the smoking room was completed, it was the only area in the building where residents were permitted to smoke. The then-Acting Administrator at the Center subsequently issued a memorandum to staff on January 15, 1998, advising them that staff could smoke in the recently-remodeled smoking room on 2 West. As a result of complaints that the air in that room was too smoky, changes were made to increase the volume of air exhausted from the room. Complaints were not received after those changes were made. Employes have been permitted to smoke in that room pending resolution of this grievance.

The County asserts that it did not violate the parties' Agreement by prohibiting employes from smoking in the Center. The Agreement does not contain a provision expressly authorizing employes to smoke at the Center. State law prohibits smoking at the Center because it is an inpatient health care facility and because it is a County building, although an exception to that prohibition is permitted by creating a designated smoking area. That exception, however, is not required to be made and in fact State statutes withdraw that authority if a county ordinance prohibits smoking. In this case, the County has enacted such an ordinance prohibiting smoking by anyone in any County building.

There are also several problems with the Union's claim that it has a "right" to a place to smoke as a "past practice". First, smoking is not a right, it is a privilege, and exists at the discretion of the employer, not as a condition of employment. There are no federal or state constitutional or statutory rights to smoke. Second, the fact that employes illegally smoked at the Center cannot create a lawful past practice. To hold otherwise would improperly intrude into the constitutional powers of the legislature and would permit criminals to rewrite the laws by their misconduct. Third, the claim ignores the Union's contractual obligation to comply with state laws and county ordinances, which regulate smoking at the Center. Further, Article 3 of the Agreement provides, in part, "The Union agrees, at all times, as far as it has within its powers, to . . .further the public interest of Manitowoc County." The findings of both the County's Board of Health and the County Board demonstrate that it is in the public interest of the County to eliminate smoking in public buildings to the greatest degree possible. Fourth, the County has the explicit right under Article 3 to "make such changes in the details of employment of the various employes as it, from time to time, deems necessary for the effective operation of the Institution." Further, the County may "adopt reasonable work rules except as otherwise provided in this Agreement." There is no provision in the Agreement that directly addresses smoking. Conversely, the work rule the County adopted is reasonable, as it is the only rule possible consistent with the requirements of law.

The County also asserts that it did not violate the Agreement by changing the location where employes had been permitted to smoke at the Center. The Union contends that the change in location is itself a violation of the Agreement and complains that the smoking room

is "inadequate". However, the Union's first witness testified that while she thought the ventilation in the smoking room was inadequate, she also testified that she was not aware of any employe complaints to management in that regard, and also acknowledged that the smoking room was much nicer than the "garage" where employes had been smoking. More significant, the testimony of the Union's only other witness, an ex-smoker, while testifying that it was hard to breathe in the smoking room, also compared the air quality with the smoking room in the garage and testified that it was "very comparable. . ." Additionally, management responded to complaints about air quality in the smoking room, and made changes that significantly increased the ventilation and thereafter received no further complaints.

Further, the County has the right to adopt reasonable work rules, and a new or modified work rule can materially change a past practice or working condition. If that were not the case, an employer's ability to establish work rules would, for all practical purposes, be eliminated. This was implicitly acknowledged by Decker when she testified that management had made changes in the designated smoking areas outside the building on many occasions, and that the Union had never grieved those changes. Recognizing that an employer has the right to modify work rules, the test of whether a change falls within management's right is whether the resulting rule is reasonably related to a legitimate management objective. In this case, the work rule requiring employes who smoke in the building to use the smoking room satisfies the following management objectives:

> It segregates smokers from non-smokers, minimizes employee exposure to tobacco smoke, reduces the employee's risk of contracting lung cancer and heart disease, and provides for a generally healthier work environment.
>
> It saves the expense of establishing and maintaining two separate smoking rooms, one for the residents and one for employees.
>
> It saves the expense of maintaining an employee smoking room at the Health Care Center – an expense which the County does not incur at any other location because smoking is completely prohibited in all other county buildings.
>
> It complies with the requirements of state law which prohibit smoking in county buildings and inpatient health care facilities.

The Administrator testified that the only reason employes would be permitted to smoke at the Center was because residents were permitted to smoke. By restricting employes who wanted to smoke to the smoking room, they have been permitted to smoke in exactly the same areas as the residents. As the employes' smoking privilege is derivative of the residents' privilege, it is both reasonable and fair that the employe smoking area be the same as for the residents.

In its reply brief, the County asserts that the Union's reliance upon the amenities and practice clause takes that clause out of context and ignores the management rights clause, as well as its duty to advance the public interest, and ignores the requirements of State law. The Union also fails to properly compare the facts in the arbitration awards it cites with those in the present case. Management has the right to adopt reasonable work rules even if doing so alters a past practice. While the amenities and practices clause places some limits on management, it does not create an absolute prohibition against the adoption of the work rules. This was recognized in the EAU CLAIRE COUNTY award cited by the Union and in which that Arbitrator ruled:

> In judging the County's action, the arbitrator expressly 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.

That Arbitrator also ruled that "the proper standard for judging reasonableness is whether the rule is reasonably related to a legitimate management objective." The County asserts that it has established that its work rule prohibiting employes from smoking is reasonable in that regard. The Union does not dispute that the work rule serves a legitimate objective, but merely argues that it is an "enforceable past practice" and should therefore be permitted to continue. Further, even if the County were required to provide a smoking room for employes, it retains the right to designate which room is to be used. The Union alleges that the room on 2 West is inadequate for various reasons, and argues it should be allowed to use the garage that had been converted to a break room, cavalierly suggesting that the non-smoking employes can go elsewhere. The Union's reliance upon the EAU CLAIRE COUNTY award is misplaced as the arbitrator in that case, while ordering the County to re-establish a smokers' break room, concluded:

> The County's argument that the determination of which room shall be designated as the smokers' break room is a management prerogative is well taken, and the order set forth below does not limit the County to using Room B006 (the former smokers' room) as the smokers' break room ordered herein.

The Union has not shown that another break room would provide non-smokers with the same amenities they presently have in the garage, e.g., there is no evidence that the other break room contains the same soda machine, snack machine, or offers access to the outdoor break area. It appears then, that the Union is proposing that non-smokers bear the burden of any inconvenience. The County also asserts that both the statute and the County ordinance are proper and constitutional legislative enactments and both contain enforcement mechanisms

granting certain powers to law enforcement officers or affected persons, or both. Even if the County were prevented from adopting a work rule consistent with those laws, and could not discipline an employe for violating such a work rule, the Agreement cannot shield employes from enforcement actions taken by law enforcement officers or other persons, pursuant to State law or County code. Finally, the Union's citation of the CLARK COUNTY arbitration award is not persuasive. The Union has made no showing that either the contractual language or the facts in the CLARK COUNTY case bear any resemblance to those in this case. That award does not identify the contract language upon which it is purportedly based, nor does the award indicate whether the contract reserved rights under the State law or obligated the Union to support practices to advance the employer's public interest. Essentially, the award is silent on all the factors that are at issue in this case, and provides no factual background essential to understanding and applying the award to any other case. Further, the CLARK COUNTY award indicates that the disputed prohibition on smoking was at both the Courthouse and Health Care Center, but the award was limited to the Courthouse, and the Union has failed to provide information with respect to the outcome at Clark County's Health Care Center. The County requests that the grievance be denied.

DISCUSSION

It is first necessary to note what issues are or are not before the Arbitrator. The Arbitrator's jurisdiction is limited to determining the parties' rights and obligations under their Collective Bargaining Agreement. Absent agreement of the parties, the Arbitrator's jurisdiction does not extend to deciding whether the County may legally permit the employes at the Center to smoke inside under state statutes, nor does it extend to determining whether the no-smoking rule is a mandatory or permissive subject of bargaining under Wisconsin law.

With regard to the parties' rights under their Agreement, both parties rely upon Article 3 – Management Rights Reserved. The County cites language in Article 3 that gives it the right "to make such changes in the details of employment of the various employes as it, from time to time, deems necessary for the effective operation of the Institution. . .", and to "adopt reasonable work rules except as otherwise provided in this Agreement." It also cites language in that Article which states that the Union agrees to "further the public interest of Manitowoc County."

The Union relies upon the following language in Article 3:

> The Employer agrees that all amenities and practices in effect for a minimum of twelve (12) months or more, but not specifically referred to in this Agreement, shall continue for the duration of this Agreement. . .

In interpreting a contract, it must be read as a whole and all provisions must be given effect. The language upon which the County relies gives it the right to make changes in the "details of employment of employes" for operational purposes and to adopt reasonable work rules in order to maintain a safe and orderly workplace. In both cases, however, those rights are qualified. The first is prefaced by the words "Unless otherwise herein provided. . .", and the latter is followed by the words "except as otherwise provided in this Agreement." Thus, those rights may not be exercised in such a manner as to violate another provision of the Agreement.

That wording of Article 3 relied upon by the Union is what is commonly referred to as a "maintenance of benefits" clause and requires the County to maintain for the life of the agreement all "amenities and practices" not specifically referred to in the Agreement and which have been in existence for at least twelve months. The County correctly asserts that language should not be read so broadly as to eliminate its right to make reasonable work rules. However, the right to make reasonable work rules also may not be interpreted so broadly as to render that language meaningless. It is also noted that the EAU CLAIRE COUNTY case did not involve a "maintenance of benefits" provision, such as is present in the parties' Agreement, rather, the Arbitrator in that case was determining only whether a newly-imposed "no smoking" rule was a "reasonable" work rule in dismissing the argument that a rule could not be "reasonable" if it altered a practice.

With regard to the application of the maintenance of benefits clause to the situation in question, the detrimental effects of smoking on one's health notwithstanding, a room where employes have been permitted to smoke indoors during their break times is of sufficiently substantial benefit to those employes so as to constitute an "amenity" or "practice" within the meaning of that clause. The County's argument that an activity illegal under county ordinance cannot establish a practice under this clause is not well taken. Again, absent an agreement of the parties to expand this Arbitrator's jurisdiction to making such a determination, the question of the legality of employes smoking at the Center is not an issue to be addressed in this forum. The facts are the employes were permitted to smoke in the "garage" on their break time and it was done with the knowledge and consent of the Center's management. The general language in Article 3 by which the Union agrees to further the public interest of the County is too vague as to its purpose to serve as a basis for overcoming the more specific wording of the language requiring the County to maintain existing amenities and practices for the duration of the parties' Agreement. Thus, despite its good intentions, by unilaterally discontinuing that amenity in October of 1997, the County violated the maintenance of benefits clause in Article 3 of the Agreement.

The parties have also stipulated to having this Arbitrator decide whether the arrangement instituted by management in January of 1998 permitting employes to smoke only in the smoking room on 2 West violates the terms of their existing Agreement. (The parties

have agreed to continue to operate under the terms of their 1996-1997 Agreement until a successor agreement is reached.)

The record indicates that the primary differences between the pre-October 15, 1997 arrangement and the present arrangement are that under the former arrangement employes had the convenience of the snack and soda machines in the room, could eat and drink in the garage and were away from the residents, whereas now they are in the same room with residents and may not eat or drink in that room. While there was testimony that the room on 2 West was more smoke-filled, another Union witness testified that it was about the same as the garage in that regard and testimony established that the ventilation and exhaust capacities of the room on 2 West had recently been significantly increased. The practice of being able to smoke on break in a room away from the residents and the convenience of being able to eat and drink on break as well, are of sufficiently significant benefit to the affected employes so as to constitute "amenities" within the meaning of Article 3. As the new arrangement did not continue those amenities, that arrangement also violates the maintenance of benefits clause of Article 3.

With regard to remedy, the County is obligated to provide an adequately ventilated room in the Center where employes may smoke, as well as eat and drink, away from the residents on their break time, for the duration of the parties' Agreement. It is not necessary that the County provide snack and soda machines in the same room, as long as such machines are reasonably available to employes on their break time. The Arbitrator also does not deem it necessary to require the County to notify its employes in writing in this regard and will leave it to the County as to the manner in which it will inform the employes of the location of the room.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The grievance is sustained as to the October 15, 1997 prohibition against employes smoking indoors at the Health Care Center.

2. The grievance is sustained as to the alternative arrangement for employe smoking instituted on January 15, 1998 at the Health Care Center.

Therefore, the County is directed to provide for the duration of the parties' Agreement, as soon as is reasonably possible, an adequately ventilated room of sufficient size in the Health Care Center in which employes may smoke, as well as eat and drink, away from the residents during their break times.

Dated at Madison, Wisconsin this 25th day of January, 1999.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc
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