BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORWOOD HEALTH CENTER EMPLOYEES
LOCAL 1751, AFSCME, AFL-CIO

and

WOOD COUNTY

Case 149
No. 61597
MA-11998

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 35, Plover, Wisconsin 54467-0035, for the labor organization.

Ruder Ware, by **Mr. Bryan Kleinmaier**, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, for the municipal employer.

ARBITRATION AWARD

Norwood Health Center Employees Local 1751, AFSCME, AFL-CIO and Wood County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide an grievance concerning the meaning and interpretation of the terms of the agreement relating to the employer's elimination of a furnished indoor smoking lounge and its replacement by an outdoor shelter. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held on May 29, 2003, in Marshfield, Wisconsin; it was not transcribed. The County filed its brief on July 9 and a reply on August 29; the Union filed its brief on July 29 and on September 4 waived its right to file a reply.

ISSUE

The Union states the issue as:

Did the employer violate the collective bargaining agreement when it disallowed use of a room in the Norwood facility with certain amenities for use as a smoking room and for breaks? If so, what is the appropriate remedy?

The County states the issue as:

Did the employer violate section 20.01 of the collective bargaining agreement when in October 2001 it converted a smoking break area into a non-smoking break area and informed employees that smoking would only be permitted in the courtyard? If so, what is the appropriate remedy?

I adopt the formulation of the issue as posed by the Union.

RELEVANT CONTRACTUAL LANGUAGE (2000-2001)

ARTICLE 3 – MANAGEMENT RIGHTS

3.01 The Employer possesses the sole right to operate the Northwood Health Center and all management rights repose in it. Except as otherwise specifically provided in this Agreement, the Employer retains all rights and functions of management. These rights include, but are not limited to the following:

3.01.01 To direct all operations of the Norwood Health Center;

3.01.02 To establish reasonable work rules and schedules of work;

. . .

3.01.06 To maintain efficiency of Norwood Health Center operations;

3.01.07 To take whatever action is necessary to comply with state or federal law;

3.01.08 To introduce new or improved methods or facilities;

3.01.09 To change existing methods or facilities;

. . .

3.01.11 To determine the methods, means, and personnel by which Norwood Health Center operations are to be conducted;

. . .

ARTICLE 8 – GRIEVANCE PROCEDURE

. . .

8.05 Procedural Steps:

Step 1: The Union Committee and/or the grievant shall present the grievance in writing to the Supervisor or Department Head within ten (10) working days of the date of the alleged grievance or knowledge of the occurrence giving rise to the grievance. The Supervisor or Department Head shall give an answer to the grievance, in writing, within ten (10) days of receipt of the grievance.

Step 2: If a satisfactory settlement is not reached as outlined in Subsection Step 1, the Union Committee and/or grievant may present the grievance within ten (10) working days from the date of receipt of the Supervisor's or Department Head's answer to the Administrator. A meeting may be scheduled by mutual agreement. However, the Administrator shall give an answer to the grievance in writing within ten (10) working days of the receipt of the grievance at Step 2.

Step 3: If a satisfactory settlement is not reached as outlined in Subsection Step 2, the Union Committee and/or the grievant may present the grievance, within ten (10) working days from the date of receipt of the Administrator's answer, to the Human Resources Director. A meeting may be scheduled by mutual agreement. However, the Human Resources Director shall give an answer to the grievance in writing within ten (10) working days of the receipt of the grievance.

Step 4: If a satisfactory settlement is not reached as outlined in Subsection Step 3, the Union Committee and/or the grievant may present the grievance, within ten (10) working days from the date of receipt of the Human Resources Director's answer, to the Human Resources Committee. A meeting shall be held at a mutually agreeable time between the Human Resources Committee and the Union to discuss the grievance. Following said meeting, the Human Resources Committee shall give its answer in writing, within ten (10) working days.

Step 5: Grievances which are not resolved in Step 4 may be appealed to arbitration by the Union. The Union shall serve notice to the Human Resources Director's office of its interest to do so within ten (10) days of receipt of the Step 4 answer.

The Union shall then petition the Wisconsin Employment Relations Commission to appoint a member of its staff or a commissioner to hear and arbitrate the issue.

. . .

ARTICLE 20 – GENERAL CONDITIONS

20.01 Smoking: Smoking by employees is prohibited except during authorized break or lunch periods. Smoking is permitted in designated facility smoking areas, or in the courtyard. Smoking is prohibited in Norwood Health Center vehicles. *

* This language first included in the 1992-94 agreement, and thereafter.

ARTICLE 21 – ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the entire Agreement between the parties. Any amendment or agreement supplemental hereto shall not be binding unless mutually agreed to in writing and signed by the County and the Union.

Mandatory subjects may not be deleted from or added to this Labor Agreement except by mutual agreement.

Any actual or alleged "practices" not incorporated into the specific terms of this Agreement are of no binding for or effect whatsoever. For the purpose of this

Labor Agreement, the term "past practice" shall mean practices which are not expressed in the Labor Agreement. "Past practice" shall only serve to interpret the meaning of the express terms incorporated in this Labor Agreement.

PRIOR CONTRACTUAL LANGUAGE
(1990-1991)

EXHIBIT B – EMPLOYEES' RULES

. . .

8. Personnel will not smoke in the hallways, patient rooms, or other designated "no smoking" areas. Nor will they smoke in Health Center vehicles while transporting patients/residents, or while attending to physical needs of a patient/resident or if a patient/resident requests them to stop, even if engaging in a social activity.

OTHER RELEVANT PROVISIONS

NORWOOD HEALTH CENTER PERSONNEL POLICY HANDBOOK
(promulgated 1994)

SMOKING

Medical evidence has shown that smoking is harmful to health. Therefore, in order to consider the needs and concerns of both our smoking and nonsmoking employees, the County abides by elements of the Wisconsin Clean Indoor Air Act.

Smoking on the premises is permitted only in designated areas and only when an employee is on a break or lunch period. Smoking in other areas of the facility and other County premises is strictly prohibited and is considered a fire hazard. Employees found violating this policy will be subject to disciplinary action.

BACKGROUND

Among its other general governmental functions, Wood County maintains and operates the Norwood Health Center (NHC), a residential nursing facility in Marshfield, Wisconsin. This grievance concerns the action by NHC administrators to close a furnished indoor smoking

lounge and replace it with an outdoor shelter, an action the Union contends violated the collective bargaining agreement.

As of October 2001, NHCC featured a room in which employees could take smoking breaks. Amenities in the room included magazines, comfortable furniture, a telephone, radio, a sink, a public address system, and other features.

On October 25, 2001, Shawna Kovach, the then-administrator of the NHC posted the following notice:

> In keeping current with National Healthcare Standards, Norwood Health Center will make an effort to become "smoke-free" effective immediately.
>
> In agreement with multiple employee recommendations, we have decided to "centralize" the employee breakroom. The former employee smoking room will be converted to a centralized breakroom for all Norwood employees to enjoy. Remodeling efforts are currently underway.
>
> Cigarette containers have been purchased, and placed in designated "smoking" areas on facility grounds outside the building. Those areas include the courtyard and east parking lot employee entrance. For our clients safety, please be sure to deposit cigarette butts into containers, and not onto the ground. (emphasis in original).
>
> Thank you for your participation.

On October 31, 2001, the Secretary of Local 1751, Ray Draeger, on behalf of "all smoking Local 1751 members," filed the following grievance:

> On 10/25/01 NHC's employee smoking room was unilaterally closed without prior notice. The privilege of both union & non-union smokers was terminated without any consideration or respect of prior notice or communication, but by changing the lock on the door and placing a memoranda on the door. This grievance is being pursued on behalf of all smoking Local 1751 members.
>
> The above action is in direct violation of contractual language that has been negotiated on several occasions to address this issue, specifically addressed in Article 20 paragraph 20.01 allowing for smoking in a "facility" smoking area, as well as outdoor smoking in the courtyard. Also reference Article 21. (emphasis in original)

Local 1751 seeks re-instatement of the smoking lounge and seeks to be made whole; that contractual language and the previously negotiated arrangement for smoking union & non-union employees will be honored.

On November 16, 2001, Kovach posted the following notice:

To: All employees
Regarding: Smoking alternatives – Update

I wish to express thanks to all employees who have shared their comments and recommendations with me regarding Smoking Alternatives. These suggestions have included: types of smoking shelters, gazebos, placement location of the shelter, location of designated smoking areas on the facility grounds, request for a bench or seating area in the shelter, spears for stats, etc… In response to these requests, we have decided to purchase a smoke shelter immediately, in hopes that it will arrive before the first snowfall. The smoking shelter will be centrally located, outside of the middle courtyard door, and will have a fire-rated seating area included.

Furthermore, multiple recommendations have been made regarding the centralized breakroom (former smokeroom). Suggestions included: heavy duty cleaning, painting, wallpaper, borders, replacement of loveseat, a refrigerator, microwave, television, carpeting, bookshelves, magazine subscriptions, etc… In response to these requests, we have decided to pursue cleaning, painting, wallpaper, borders, loveseat replacement and magazine subscriptions at this time. We are also pricing the refrigerator, tv, and microwave for consideration also. Carpeting and bookshelves will be reviewed in terms of fire-ratings, but if deemed acceptable may be pursued as well.

Your input has been heard and is greatly appreciated!

On November 26, 2001, Draeger wrote to County Human Resources Director Ed Reed as follows:

Enclosed is a copy of Grievance 01-18 which I filed on behalf of Local 1751 when Norwood management unilaterally closed the staff smoking room without any Union involvement. As this decision was made by our Administrator, Shawna Kovach, Step I and Step II of the grievance procedure were combined as this grievance involved her decision versus involvement of a supervisor or department head.

I did meet with Shawna on 11/08/01 to discuss this grievance at which time she requested the Union's feedback for an outdoor "Butt Hutt" and did offer to form a committee to discuss smoking alternatives. Initially, I would have supported this concept if it had been conducted prior to their closing the smoking room in conjunction with union advice, however, at this point I understand such a committee would be a prohibited practice as it involves union language addressing the smoking area which I believe is subject to bargaining.

As of this date I have not received a written response to Local 1751's grievance and so therefore, I am requesting that we advance to Step 3 of the grievance process. Our stance would be re-instatement of the smoking room until the issue can be properly addressed in bargaining.

Please advise when we can meet on this issue.

On December 19, 2001, Kovach wrote to Draeger as follows:

In attempt to remedy grievance 01-18, (re-designation of smoking areas), I agreed to develop a committee of employees to provide input regarding the employee smoking area. The reasons for terminating the employee smoking room were related to facility compliance with the Clean Air Act in hospitals and health care facilities, and also an organizational need for office space development. My questions for the committee members were: where should the new smoking areas be? How can we redecorate the old employee smoking room to serve as a new employee break room? How can we make the new smoking area(s) outside of the building comfortable for staff who choose to smoke in the newly designated smoking areas. Upon informing employees of the committee and it's (sic) purpose, the union decided not to participate in the committee, and cautioned it's (sic) membership against participation. Therefore, several union and non-union members approached me individually with their input. I considered all input, and moved forward with our venture. I contacted a concrete contractor and had concrete poured immediately. Further, I went above and beyond what was requested by staff, and ordered a smoking shelter with a bench to be placed on their concrete pad (located immediately outside the courtyard door). The shelter is strategically placed to protect the employees from the elements, and convenient for immediate entrance/exit to/from the building. Besides the shelter and the 2 other designated smoking areas, employee input regarding normal breakroom expectations, Norwood is providing such improvements as: new paint, wallpaper, border, clock, microwave, refrigerator, couch and seating arrangements, décor, magazines and

> newspapers. All feedback has been positive, and seen as "fair" for all employees overall. (emphasis in original).
>
> Lastly, it is important to note that Norwood did not go against the contract language, rather I would suggest that the union may have "misinterpreted" contract language. Article 20.01 says: **Smoking by employees is prohibited except during authorized break or lunch periods. Smoking is permitted in designated facility smoking areas, or in the courtyard. Smoking is prohibited in Norwood Health Center vehicles).** (**Emphases** in original)
>
> As you can clearly see, we designated a total of 3 smoking areas (as the contract calls for), and I of those areas is in the courtyard (as the contract calls for). Further, nowhere in the contract does it say that a smokeroom must be designated within the walls of the building, clearly is says "designated facility smoking areas, or courtyard.)
>
> For health purposes, employee smoking should have moved outside of the building long ago (as other hospitals have complied with). It is now time for Norwood to follow step. Norwood has provided more than asked for, and more than expected. I hope that the Union can understand the necessity of this movement, realize that no contract violation has occurred, and assist the facility in moving forward in our compliance venture.

On December 20, 2001, prior to receiving Kovach's letter of the previous day, Draeger wrote to County Personnel Committee Chair Norlin Hofmeister as follows:

> Enclosed is a copy of Grievance 01-18 which I filed on behalf of Local 1751. I am requesting that we proceed to step 4 of the Grievance Process as we have not received any written notice from either Ms. Kovach or Mr. Reed on this issue and can only surmise that they did not wish to seriously address this grievance. Please contact our Staff Rep., Jerry Ugland to set up a time to address this in Step 4. Thank you for your attention to this matter which affects not only Local 1751 members but many other NHC non-union employees as well.

On February 7, AFSCME Staff Representative Jerry Ugland wrote County Human Resources Director Ed Reed as follows:

> In the Step 4 grievance hearing today the Employer alleged that the smoking break room at Norwood was closed due to violation of Norwood's license as a hospital. However, it is my understanding that the smoking room was not in the

part of the facility that is licensed as a hospital. As I indicated at the Step 4 hearing, I would like to have a copy of any regulation which the Employer used to close the smoking room. You indicated that you would provide this, for the Union to review.

You also indicated that having a smoking room could result in the Health Care Center not meeting state or federal clean air standards. Therefore, please provide a copy of any inspection report since January 1, 1998, which indicates that the smoking room was found to be in violation of any state or federal statute or regulation.

In the discussion of the grievance the Employer indicated that it is considering building a facility for smoking. Though we have not yet indicated that we will agree to such a facility, you stated that you would provide specifications so that we could review them.

Ms. Kovach said that remodeling of the former smoking break room has already started. I want to point out that no work was started when the room was closed and the lock changed without prior notice or when the grievance was filed. Work on the room occurred while the Employer know (sic) that the grievance was in process.

Ms. Kovach said that the Union suggested that a committee be formed to address the issue of a smoking break room. However, the person who suggested use of a committee did not say that the Employer should make all determinations regarding the formation of the committee. In the instant case the Employer decided the agenda for the committee, the size of the committee, and who would be on the committee. The Union's position is that an issue, which is a mandatory subject of bargaining or which is already addressed in the contract, is to be negotiated, the union President, currently Deb Forth, or this representative should be contacted. We will then discuss the agenda and process for addressing the issue at hand and the Union will chose its representatives. After any tentative agreement on the issue is reached, the Union membership will then vote on whether to accept the tentative agreements. The Employer has no role in choosing who represents the members of the bargaining unit. You will find ample foundation for our opinion in Wis. Stat. 111.70 and case law, particularly the "Electromation" decision with which you are no doubt familiar.

I want to point out that when the grievance was presented to the Administrator, there was no written response as provided in the collective bargaining

> agreement. When the grievance was appealed to the Human Resources Director, there was no timely response for a hearing, nor did the director give a response to the grievance as provide (sic) by the collective bargaining agreement.
>
> Therefore the grievance is now before the Human Resources Committee.

On February 25, 2002, Draeger wrote to H.R. Committee chair Norlin Hofmeister as follows:

> On Feb. 2nd, 2002 Local 1751 met with you and the Human Resources Committee to discuss Grievance #s 01-16 and 01-17 related to the Michelle Bohman termination and Grievance #01-18 related to the closing of the Norwood Health Center Smoking Room. These were all Step 4 of the Grievance process. As more than 10 working days have transpired and we have not received any written response per Article 8.05 of our labor agreement, we are assuming that these 3 grievances have been denied and are informing you of our intention to seek arbitration as a means to settle these issues. We are requesting our Staff Rep. To (sic) petition the Wisconsin Employment Relations Commission to appoint a commissioner to hear and arbitrate these issues.

Also on that date, the Wood County Human Resources Committee wrote to Draeger as follows:

> The H.R. Committee agrees that the change in the smoking area could have been handled in a more participative manner with the Union and also agrees with the Union's understanding of how employees should be selected to represent the Union on committees. However, it is the committees (sic) understanding that the new smoke shelter has now arrived and is being put together. Therefore we are requesting a continuation of this grievance until March 31, 2002 to assess the new shelter in light of the unions (sic) concerns and to provide the Union with the information requested at the meeting.

On September 19, 2002, AFSCME Staff Representative Jerry Ugland filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration. On September 23, 2002, County Human Resources Director Edward Reed wrote to Ugland as follows:

> I just received a copy of the "Request to initiate grievance arbitration" which you sent to the WERC regarding AFSCME 1751, 01-18. In Section 8.05,

> Step 5, the contract clearly states "Grievances which are not resolved in step 4 may be appealed to arbitration by the union. The union shall serve notice to the Human Resources Director of its interest to do so within ten (10) days of receipt of the step 4 answer." The step 4 answer was dated and mailed to you on 2/25/02. The union did not respond to the county and did not furnish notice to me within the required ten days of the intent to proceed to arbitration as required by the contract. Therefore Wood County considers the grievance closed and no longer arbitrable.

The smoking policy has been a subject of collective bargaining between the parties on several occasions over many years.

The first reference the record makes to smoking is in an appendix to the 1990-91 collective bargaining agreement, listing "Employees' Rules." These rules, which are separate from a list of acts which could lead to discipline and discharge, included provisions about sick leave notice, chest x-rays, punctuality and visits. As noted above, the provision of particular interest reads:

> 8. Personnel will not smoke in the hallways, patient rooms, or other designated "no smoking" areas. Nor will they smoke in Health Center vehicles while transporting patients/residents, or while attending to physical needs of a patient/resident or if a patient/resident requests them to stop, even if engaging in a social activity.

That is, employees could smoke anywhere except in patient rooms and hallways, "or any other designated non-smoking area," or while transporting patients in facility vehicles.

During bargaining for a successor agreement, the County proposed to rewrite this rule this way:

> Personnel will not be allowed to smoke, except during authorized break or lunch periods, and then only in designated smoking areas. Smoking is prohibited in Norwood Health Center vehicles and while transporting residents/patients, or while attending to physical needs of a resident/patient, or if a resident/patient requests that the employee stop smoking, even if engaged in social activity. Designation of smoking areas will periodically be publicized by facility administrators.

That is, this amendment would have reversed the presumptions, so that employees could *not* smoke except at authorized times and in authorized places. It would prohibit

smoking in facility vehicles regardless of whether patients were present, as well as while transporting patients in non-County vehicles.

The Union did not agree with this amendment, and the parties ultimately adopted a new 20.01, as follows:

> Smoking: Smoking by employees is prohibited except during authorized break or lunch periods. Smoking is permitted in designated facility smoking areas, or in the courtyard. Smoking is prohibited in Norwood Health Center vehicles.

This is, this amendment, most likely proposed by the Union, adopts the essential concepts of the County's proposal, namely restricting smoking to particular times and in particular places.

During the negotiations for the 2000-2001 collective bargaining agreement, the County proposed to amend the 1992-94 language by replacing it with the following:

> Smoking by Norwood employees or vendors will be restricted to designated areas out side the facility.

The Union did not accept this proposal, and the text remained unchanged.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

> This grievance is arbitrable because the Union complied with the applicable provisions of the collective bargaining agreement regarding notice of its intent to arbitrate. After giving notice of its intent, the Union waited and considered the county's newly installed "butt hutt," filing for arbitration after determining that no acceptable solution had been reached. The Union's flexibility should not be held against it. Besides, the collective bargaining agreement allows wide latitude because there is no time limit set for filing for arbitration. After the employer failed to respond to time limits throughout the grievance process, the employer should not then be able to impose a limitation which does not exist in the collective bargaining agreement, particularly when the employer wanted the union to consider its proposed accommodation.
>
> As to the merits, the collective bargaining agreement clearly refers to the employees having smoking privileges. Generally accepted arbitral opinion is

that a practice giving meaning to a provision of the collective bargaining agreement cannot be removed by repudiation. A practice could be removed by a change which is known to the Union and ignored or by agreement of the parties. That is not the case here.

Witness testimony indicated that the language in the collective bargaining agreement meant that employees had the option of smoking in a room inside the facility or in the courtyard. It was an employee option that was discussed and agreed to.

The employer unsuccessfully bargained to change the contract language to permit smoking only outside the facility. The employer and Union did not agree on this change. Then the employer tried to get the change unilaterally by closing the inside facility and building the "butt hut."

In support of its position that the grievance should be denied, the County asserts and avers as follows:

Due to the Union's unreasonable delay of seven months in initiating a request for grievance arbitration, this grievance is not arbitrable. The equitable doctrine of *laches* applies, in that there was an unreasonable delay on the Union's part in pursuing its claim, the Union had knowledge of the events giving rise to its claim, and the County was prejudiced by the Union's delay in pursuing the claim because it left the County unable to access material evidence, including testimony. In particular, the County was unable to present testimony rebutting union testimony about bargaining history because the relevant former administrators had left the County and/or the County's employment by the time the Union filed for arbitration.

Even if the grievance is held to be arbitrable, the County's decision in October 2001 to convert the smoking break area into a non-smoking break area and inform employees that smoking would only be permitted in the courtyard did not violate the collective bargaining agreement. The County's inherent management rights as well as its rights expressly set forth in the agreement prove the County did not violate the clear and unambiguous language at issue.

It is well-established that management retains all rights not expressly prohibited or limited by the agreement or statutes. Pursuant to its inherent rights and the explicit provisions of this agreement, the County possesses the right to control where employee smoking is permitted. Section 20.01 of the collective

bargaining agreement limits the County's ability to prohibit employee smoking entirely, but, contrary to the Union, it does not require the County to permit employees to smoke in both the facility and in the courtyard. Had the parties meant to provide for employee smoking in both the courtyard and the facility, they would have used the conjunction "and" in Section 20.01; their use of the conjunction "or" indicates that the County retained its inherent discretion in this regard. The County complied with this provision by continuing to allow employees to smoke in the courtyard.

Even if the language of Section 20.01 is found to be ambiguous, the County is only required to permit employee smoking in designated facility smoking areas or in the courtyard.

In its response, the County further posits as follows:

The Union errs in contending that the delay in the grievance was in deference to the employer; the purported testimony the Union cites in support of this argument was attributed to a Union official who did not testify at hearing. It was the employer, not the Union, which suffered due to the Union's unreasonable delay in consideration of the grievance, such that the grievance is barred by the doctrine of *laches*.

The Union further errs in contending that the County has any responsibility of providing amenities in the area or areas in which the county permits employee smoking. It was the County that put the amenities in the smoking room, and the County which has the management right to remove them. The County's exercise of its managerial discretion is not subject to mutual agreement.

DISCUSSION

In this arbitration, the Union seeks an award ordering the County to restore the employee smoking lounge within the Norwood Health Center, with amenities "including but not limited to" couches, tables, "two air filters," a wetbar, encyclopedias, magazines and other reading material, "a public address system to receive Norwood facility messages and personal pages," a radio, and "a telephone for making personal telephone calls." The County counters that all the collective bargaining agreement requires is access to the courtyard, which it provides and even supplements with an outdoor shelter.

Before I may consider the merits of the matter, I must first address the County's claim that because the Union waited until September 19, 2002 to file its request for grievance

arbitration with the Wisconsin Employment Relations Commission, the arbitration is barred by the doctrine of *laches*.

In its brief, the County accurately states the parameters of that doctrine. As our supreme court has explained, "if there is unreasonable delay, knowledge of the course of events and acquiescence therein, together with prejudice to the party asserting the defense, a claim is barred." YOCHERER V. FARMERS INS. EXCHANGE, 252 WIS. 2D 114, 140 (2002), citing PATTERSON V. PATTERSON, 73 WIS. 2D 150 (1976).

Normally, timeliness in the processing of a grievance is easily measured simply by counting the days between various steps. Here, however, the collective bargaining agreement does not specify how many days the Union has to advance the matter to arbitration. Instead, while it specifies that the Union "shall serve notice … of its interest" to proceed to arbitration within ten days of receipt of the Step 4 answer, it does not give a firm timeline for the Union actually taking the necessary step, but merely provides that the Union "shall then petition" the Wisconsin Employment Relations Commission to appoint an arbitrator. The County essentially asks me to infer the requirement of reasonableness in the length of time it takes the Union to "then petition" the Commission for an arbitrator. As indicated by YOCHERER, that is an appropriate inference to draw.

The facts fit the first tripartite prong used to evaluate whether *laches* applies. The indoor smoking lounge was closed on October 25, 2001. The shelter, or "Butt Hutt," was operational by March 2002. It is reasonable to expect that the smokers would have known within a month or two whether the shelter was satisfactory. It is reasonable to expect that if the smokers found the situation unsatisfactory, they would have complained to the Union. It is reasonable to expect that if the Union received complaints, it would have resumed its prosecution of this grievance and advance the matter to arbitration. But the Union did not submit its request for arbitration to the Wisconsin Employment Relations Commission until September 2002. That six-month delay was unreasonable.

The second standard, however, is only partially met, for blame for a good part of the delay falls squarely on the County. As the County candidly acknowledges in its reply brief, Kovach took 49 days (October 31, 2001 to December 19, 2001) to submit a response due in ten. While not completely absolving the Union of its still-excessive delay, the County's own transgressions of timeliness makes the Union's delay somewhat less unreasonable. Moreover, the County further contributed to the delay, when it asked the Union on February 25, 2002 for a five-week "continuation of this grievance." Although neither Kovach's tardiness nor the County's requested continuance fully overlapped the period from the Union's notice of intent to arbitrate and its request for a Commission arbitrator, this record of the employer's delay significantly weakens its criticisms of the Union on that score.

Finally, the County is incorrect in contending that the delay necessarily prejudiced its interest. While the County has made a convincing case that it has been *inconvenienced*, it has offered no evidence beyond assertions that it has actually been *prejudiced*.

The County correctly cites VETERANS ADMIN. REG'L OFFICE, 92 LA 1211 (Stephens, 1989) and UNION-SCIOTO BD. OF EDUC., 106 LA 337 (Dworkin, 1996) for the proposition that a union's delay in pursuing a grievance may so materially affect the employer's ability to procure and submit material evidence that a grievance must be dismissed. But the County incorrectly applies the facts to that law.

True, critical witnesses are no longer in Marshfield and close by. Kovach, the administrator who unilaterally shut the lounge and started this whole affair, no longer works at NHC, but has moved to northwestern Wisconsin. The record indicates she left NHC in September 2002, but does not establish whether her departure was before or after September 23, when the County learned of the Union's request for appointment of an arbitrator. Her predecessor, former administrator Randy Bestil, resigned from NHC in 1999 and moved to Stevens Point, where he remained until leaving Wisconsin in late 2002.

Kovach and Bestil would have been critical witnesses. That's why I would not have scheduled this hearing at a time or on a day they couldn't attend. And once a mutually acceptable date was chosen, if either Kovach or Bestil were unexpectedly prevented from attending due to sudden illness or emergency, I would allow a continuance. Yes, they would have been critical witnesses.

The County states that because the Union's delay in filing for arbitration resulted in the hearing not being held until July 2003, Kovach "was not available as a witness for the County." But it doesn't say why she wasn't. The mere assertion that Kovach "was not available" doesn't make it so.

Obviously, it would have been better for the County to have had the hearing at a time Kovach was still an employee and living in the Marshfield area, and Bestil was as close as the next county. But failing that, the County should still have been able to offer their testimony, or explain why it couldn't. But it did neither.

Certainly, the fact that Kovach has left the area and Bestil has left the state complicates the County's preparation and presentation of this case.

However, arbitration hearings frequently involve testimony from witnesses who are no longer employed by the party employer, or who no longer reside in the immediate area. Electronic, digital and voice communications offer easy and affordable means of taking

testimony from distant witnesses. Telephone, videophone, webcasts and instant messaging are just some of the possibilities the County could have pursued in presenting testimony from Kovach and Bestil at hearing.

But there is nothing in the record to show the County even tried something as simple as a speakerphone to produce either witness. Had the County attempted to produce Kovach and Bestil, and been unsuccessful, its claim of prejudice would carry greater weight; but it didn't even try.

Accordingly, because the County shares some responsibility for the delay in advancing this grievance to arbitration, and because the delay did not, on the record, cause irreparable prejudice to the County, the doctrine of *laches* does not require dismissal of this grievance. Accordingly, I turn now to consideration of the matter on its merits.

The Union's best argument is bargaining history, which makes clear that the County tried – but failed -- to get through negotiations the same power (closing the smoking lounge) it later exercised unilaterally. As the Union suggests, to some there is something unseemly about an employer unilaterally implementing a proposal it failed to attain through bargaining. But whether doing so constitutes a violation of the collective bargaining agreement may be another matter.

On November 8, 1999, County Human Resources Director Ed Reed submitted to then-AFSCME Staff Representative Jeffrey Wickland a series of proposed changes the County sought for a successor collective bargaining agreement to the parties' 1997-1999 agreement. By the correspondence, the County stated its proposal to amend Section 20.01 to read as follows:

> Smoking by Norwood employees or vendors will be restricted to designated areas outside the facility.

Since the natural course in collective bargaining is not to ask for something you already have, this proposal would seem to indicate that the County didn't already have the power to expel employee smoking from the NHC building. The County explains Reed's proposal as his attempt to "clarify what he believed could be construed as ambiguous language." But the County does not explain, however, how this assertion of ambiguity (at least in Reed's mind) can coexist with its earlier declaration that 20.01 is clear and unambiguous.

The Union did not agree to this modification of the existing language, and the County dropped its proposal by the third negotiating session. The provisions of the collective bargaining agreement remained as in the 1992-1994 agreement. The County thus failed to

achieve this bargaining objective and obtain clear authority to remove employee smoking from inside the facility. The Union is correct that this element of bargaining history supports its position.

The Union is also correct that the County has failed to pursue and document its "national healthcare standards" defense, asserted in Kovach's memo of October 25, 2001. While common sense teaches that smoking in a residential health care facility is not a good thing, the record is absent any citation to state or federal statutes or regulations restricting employee smoking as existed at NHC in October 2001. Thus, the County cannot rely on 3.01.07 as grounds for closing the indoor smoking room.

Several other sections of the article on management rights, however, are available to the County. The collective bargaining agreement grants to the County "all rights and functions of management" to operate the NHC, except as "specifically provided" otherwise in the agreement. Those rights include directing all operations of NHC, maintaining efficiency of the center, and changing existing facilities. In order to sustain this grievance, I would have to find language in the collective bargaining agreement which "specifically provided" for a furnished, indoor smoking lounge.

The only specific provisions relating to smoking in the collective bargaining agreement establish that employees (a), may smoke during authorized break or lunch periods, and (b), may smoke only in "designated facility smoking areas, or in the courtyard." This means that the County cannot forbid employees from smoking during their authorized break/lunch periods, and that employees may smoke in the courtyard or in any smoking areas which the facility designates. The use of the connector "or," indicates the smoking sites are in the alternative, rather than cumulative, as would have been indicated by use of the connector "and." The phrase "designated facility smoking areas" does not mean that the County has to designate a smoking area inside the facility.

As the Union asserts, the bargaining history shows the Union resisting the County's efforts to curtail employee smoking. But the same bargaining history also shows the County making those efforts. This seriously complicates the Union's argument that the County explicitly accepted the union's counter in the 1992-94 negotiations as enshrining an indoor smoking lounge. Indeed, given the County's long-term effort in restricting employee smoking, I simply cannot find in this record that the County agreed to continue a furnished indoor smoking lounge indefinitely.

In its grievance, the Union complained that the County had terminated "the privilege of both union and non-union smokers" having an indoor smoking room. That the precisely the

word to describe the lounge – a privilege the County maintained at its own discretion, not a right protected by the collective bargaining agreement.

Since the 1992-1994 collective bargaining agreement, management at NHC has had the right to designate facility smoking areas, or not, as it saw fit. For several years it chose to designate such an area inside the facility itself, and to provide therein many amenities. Now it has chosen to exercise its managerial control in a less permissive manner, and to restrict employee smoking to the courtyard and the employee entrance by the east parking lot. In so doing, it has not violated any provision of the collective bargaining agreement.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin, this 20th day of November, 2003.

Stuart Levitan /s/
Stuart Levitan, Arbitrator

SDL/gjc
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