

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
CITY OF STURGEON BAY (FIRE DEPARTMENT)

and

**STURGEON BAY FIREFIGHTERS ASSOCIATION, LOCAL 2682, IAFF,
AFL-CIO-CLC**

Case 94
No. 69116
MA-14485

Appearances:

The Law Offices of John B. Kiel, LLC, by **John B. Kiel**, Attorney at Law, 3300-252nd Avenue, Salem, Wisconsin, appeared on behalf of the Union.

Buelow, Vetter, Buikema, Olson & Vliet, LLC, by **Joel S. Aziere** and **Brian J. Waterman, Esq.**, Attorneys at Law, 20855 Watertown Road, Waukesha, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

City of Sturgeon Bay (Fire Department), herein referred to as the “Employer,” and Sturgeon Bay Firefighters Association, Local 2682, IAFF, AFL-CIO-CLC, herein referred to as the “Association,” jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The parties waived hearing and filed a stipulation of fact in lieu of hearing on February 8, 2010. Each party filed a post-hearing brief and reply brief, the last of which was received March 26, 2010 and clarifications were concluded April 1, 2010.¹

ISSUES

The parties agreed to the statement of the issues. They are:

1. Did the City of Sturgeon Bay violate the collective bargaining agreement when it unilaterally modified the tobacco use policy set for the under the City of Sturgeon Bay Fire Department Manual of Rules, Section 3.2.K to prohibit firefighters from smoking while away from the fire station. ?
2. If so, what is the appropriate remedy?

¹ On March 31, I addressed a concern about a subject not alluded to in the parties’ brief and gave them an opportunity to request further argument. On April 1, 2010, they responded.

RELEVANT AGREEMENT PROVISIONS

“ . . .

MANAGEMENT RIGHTS RESERVED

The Union recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers of authority which employer has not officially abridged, delegated or modified by the Agreement are retained by Employer and, unless otherwise provided herein, the management of the work and the direction of the working force, including the right to hire, promote, transfer, demote or suspend, employees from duty because of lack of work or other legitimate reasons, is vested exclusively in Employer. Union recognizes the right of Employer to establish, maintain and amend work rules. Such rules shall be reasonable and shall in no way, conflict with the specific provisions of this Agreement.

. . .

EXISTING PRACTICES

All practices existing prior to this Agreement pertaining to wages, hours, and conditions of employment not specifically mentioned in this Agreement shall continue in force as at present until they are adjusted by mutual consent between Employer and Union.

. . .

GRIEVANCE PROCEDURE

A grievance shall be defined as an issue concerning the interpretation or application of the provisions of this Agreement and existing practices.

. . .

STEP THREE: If a satisfactory settlement is not reached using the procedures above, within the time prescribed either Employer or the aggrieved employee, each acting through their respective representatives may request within ten (10) calendar days after receipt of the answer of the Personnel Committee that the matter be submitted to binding arbitration. The parties to this Agreement agree that if Step Three is necessary, the Wisconsin Employment Relations Commission (W.E.R.C.) shall be the chosen arbitrator. The decision of the W.E.R.C. shall be final. The expense of the arbitrator shall be borne

equally by the parties. The expense of a reporter and/or a transcript, if requested by one of the parties, shall be borne by said party. If arbitrator requests a reporter and/or transcript, cost will be borne equally by both parties.

The sole authority of the arbitrator shall be to render a decision as to the meaning and interpretation of the Agreement and/or existing practices as it relates to the grievance; the arbitrator shall have no authority to add to, modify or alter the terms or provisions of the Agreement.

. . . .”²

FACTS

The Employer is a Wisconsin municipality which operates a fire department. The Department is headed by the Fire Chief. The Union represents rank and file firefighters. The unit includes Patrick May. The parties were party to a collective bargaining agreement which they agree was effective for the period of January 1, 2008, to December 31, 2010. The agreement was signed July 20, 2009. There is no evidence as to when negotiations were commenced or concluded. Neither party made any relevant proposals concerning smoking during those negotiations.

The April, 1996, Sturgeon Bay Fire Department “Manual of Rules,” Section 3.2.K contains the following work rule:

3.2.K. USE OF TOBACCO PRODUCTS WHILE ON DUTY: Members and employees shall not smoke in the fire station. On duty members and employees shall not smoke or otherwise use tobacco products while in direct contact with the public. Members shall not smoke while performing fire duties at an emergency scene.

This rule was in effect prior the start of the current collective bargaining agreement and was considered an undisputed established policy of the Employer. It was clarified on various occasions by the Employer. On February 28, 2002, then Fire Chief, Terry MacDonald, issued a memorandum to all firefighters informing them that, in addition to the prohibition on smoking inside fire stations contained in the foregoing language, there was to be no smoking in any City buildings. On November 14, 2006, the City's current Fire Chief, Tim Herlache, issued a memorandum to all firefighters notifying them that the City was again modifying its tobacco use policy to further prohibit smoking in any City owned vehicles.³

On January 23, 2009, Chief Herlache issued another memorandum to all firefighters notifying them in more specific detail where smoking was allowed outside the station and adding the disputed provision: “No smoking is allowed while on duty anywhere away from the station.”

² The collective bargaining agreement was signed July 20, 2009.

³ It is not clear if these changes remain in effect. There is no dispute that the Association never objected to those clarifications. The parties have stipulated that this matter is to proceed on the basis that rule 3.2.K is the sole rule in effect.

On January 22, 2009, Chief Herlache issue an oral warning confirmed the next day to unit firefighter Pat May for allegedly “smoking and leaving the job that you were assigned to.” There is no reference as to whether this occurred at the station or away from the station. On June 2, 2009, Chief Herlache issued a suspension to Firefighter May for conduct allegedly occurring on May 21, 2009, for engaging in smoking on duty while away from the fire station. The latter discipline is on appeal to the Police and Fire Commission, but is in abeyance pending the result in this case.

The Association filed a grievance on June 4, 2009, on behalf of Patrick May and all members affected by the disputed rule. The grievance requested that the rule be rescinded. The parties agree that the discipline of Patrick May is not properly before the arbitrator. They agree that the grievance was properly processed through all of the steps of the grievance procedure to arbitration.

POSITIONS OF THE PARTIES

ASSOCIATION:

The Employer modified the disputed policy on January 23, 2009, and enforced it by discipline relating to an incident June 2, 2009. The subject of this policy was not discussed in negotiations leading to this agreement and the agreement was signed after the disputed incidents. The WERC has held that where a anti-smoking policy is related to the conduct of employees, it is a mandatory subject of bargaining, and only where the policy is related to the use of its facilities or, in the educational sector, dissuading students from smoking, is it not a mandatory subject of bargaining. Here the subject change, prohibiting all smoking away from the Employer’s premises while on duty is a mandatory subject of bargaining. Since the undisputed part of the existing policy dealt with smoking at or around its facilities, the change is a mandatory subject of bargaining. This is not a change dealing with students. It is not a change of city-wide policy to advance public health and safety because it is not applied to any other city employee, and it only applies to firefighters while away from the Employer’s premises. Under these circumstances it cannot be seriously alleged that the January 23, 2009 policy.

The former policy was in effect prior to the execution of the next preceding collective bargaining agreement on December 14, 2007, which was in effect for the calendar years 2008 and 2009. Under the policy firefighters could smoke while away from the station with only two caveats. The Employer is expected to argue that has the right to modify 3.2K under its management rights. Arbitrators have rejected that theory in other cases.

Alternatively, the rule is an over-broad and unreasonable rule. There is no reasonable and legitimate objective of management. This rule does not apply to other employees of the city. It does not apply to the use of all tobacco products, only smoking. What legitimate policy can it serve? The parties agree only the policy is before the arbitrator and not the

discipline which is the subject of another grievance. The Association asks for an order rescinding the policy and order the firefighters be allowed to smoke away from the premises except when in contact with the public or at the scene of an emergency.

EMPLOYER:

The sole issue which the arbitrator should be addressing is whether the instant rule was "reasonable." The other matters argued by the Association are not before the arbitrator. The Association appears to be arguing that the action of the Employer is a unilateral change, but the external law issue of a violation of the Employer's duty to bargain is not before the arbitrator. Even if it were, there is no evidence that the Association ever sought to bargain over this rule change.

The standard for judging the reasonableness of a work rule is whether the rule reasonably relates to a legitimate management objective. While on duty away from the fire station firefighters serve as its face to the public. Additionally, by the nature of their jobs, firefighters are viewed as role models to the community, and its youth in particular. Smoking tobacco is unhealthy, unprofessional and detrimental to the public image of the Employer. Particularly in a quasi-military organization such as a fire department, the public should feel confident that its first responders are disciplined and professional. An individual's addiction to smoking cigarettes demonstrates a lack of both qualities. Additionally, firefighters have long been role models for youth, and for firefighters to be seen smoking in public is contrary to community efforts to dissuade youth tobacco use. The Employer's objective of fostering a positive public image for its fire department is a legitimate interest.

The rule is reasonable because it does not prohibit firefighters from smoking at all time while on duty. They are allowed to smoke outside in designated areas. Due to the public image concerns they are merely not allowed to smoke while away from those areas.

The evidence of past practices shows that the Employer has made changes to the rule in the past without a grievance from the Association. Thus, the Association has acknowledged the Employer's right to change the rule unilaterally. The Association did not grieve the Employer's initial change in this rule on January 23, 2009

The Association's argument that the Existing Practices provision applies is without merit. The Association's construction leaves the rule making provision without meaning. The Employer requests that the grievance be dismissed.

UNION REPLY:

There is no dispute as to the appropriate test. The rule must first be reasonable and, second, it must not conflict with another provision of the agreement. The Employer's argument demonstrates that its stated reason for the rule is without merit. The Employer argues that employees are permitted to smoke outside the station which is in public but

prohibited from doing so while not in contact with the public and/or in private while way from work. The rule change also violates a specific provision of the agreement, the prohibition against changing past practices pertaining to wages, hours and conditions of employment. The cases cited by the Employer do not support its position. The Employer appears to argue that the grievance is untimely, but the Association urges the Arbitrator to refer to the stipulation of the parties that the grievance is properly before him as evidence that timeliness is not in issue in any form. The Association's decision to not object to a past clarification of the rule is irrelevant to this proceeding.

EMPLOYER REPLY:

May's discipline is not before the arbitrator and the Association's statement concerning it should be disregarded. Contrary to the Association's arguments the rule change was not to advance the Chief's personal preference it was to promote a positive image for the Employer's fire department. Promoting that image is clearly related to the management of the Employer's business. However, even assuming *arguendo* that it is related to wages, hours and working conditions, the Employer's most recent amendment is permissible given the Employer's long history of amending its smoking policy without objection from the Association. The fact that this was not discussed in bargaining supports the Employer's position rather than detracting from it. Specifically, had the Association wanted to discuss it, they could have.

The Association's argument that the rule is unreasonable is without merit. First, the Association asserts the rule is unreasonable because it only applies to the Fire Department. However, firefighters have a unique role in the community that distinguishes them from other city employees.

Second the Association argues that the rule is unreasonable because it applies to smoking but not other forms of tobacco use. All rules have distinguished smoking from other forms of tobacco use. Smoking in city vehicles or buildings degrades the air quality: other tobacco use does not. Smoking is less discrete than other tobacco use.

Third, the Association argues that the Employer's modification of its tobacco use work rule is unreasonable because it prohibits smoking while firefighters are on duty away from the fire station, but permits smoking in designated areas outside the fire station. The Association brief asked what policy choice is served "by allowing smoking in certain areas at the station but prohibiting smoking anywhere away from the stations?" [Emphasis is Employer's attorney.] The answer, of course, is that the positive public image the Employer seeks to promote for its fire department is primarily advanced by firefighter when they are out amongst the public, not back at the fire station.

DISCUSSION

The management rights provision of this agreement preserves the right long recognized by arbitrators even in the absence of such a provision of an employer to unilaterally establish

“reasonable” work rules. Arbitrators test the “reasonableness” of work rules by evaluating whether the disputed rule’ is “directly and proximately” related to the legitimate needs of the Employer (nexus).⁴ The Employer bears the burden of producing evidence as to the reasons for its rules and evidence of at least a substantial basis for its determination.

The Association heavily relies upon its Existing Practices provision. Arbitrators have been inconsistent in applying those provisions to prohibit reasonable smoking rules. Those cases are not easily reconciled. Some have avoided the provision entirely, others have reconciled the provision and others have applied it to prohibit even a reasonable rule.⁵ In the absence of bargaining on the subject the Employer has a responsibility to protect the work environment of all employees, smokers and non-smokers, and a legitimate interest in the efficiency of employees performing their duties. Additionally, the parties here have historically recognized the right of the Employer to regulate smoking and the Association has not sought to have that regulation bargained. Although this is a very strongly worded existing practices provision, the nature of the interests involved and the posture of this matter require a reconciling approach between the rules provision and the existing practices provision as to smoking rules.

The added new rule is somewhat ambiguous. It states: No smoking is allowed while on duty anywhere away from the stations.” [Emphasis is mine.] It is not clear from the rule whether it prohibits smoking while on duty while away from the station during authorized breaks. There are other ambiguities as to how this rule would apply to various situations. For example, the current rule prohibits smoking while on duty and in direct contact with the public. There is no challenge to the former rule. It would appear that this rule is, therefore, intended to apply when firefighters are not in direct contact with the public. The Employer’s argument makes it clear that this rule is intended to be broadly applied. This position is given heavy weight herein because I conclude that the rule is overbroad.

There is no evidence as to the process by which the Employer decided upon and adopted the disputed rule change. The argument of the Employer particularly at page 8 of its brief⁶ expresses a number of potential reasons for this rule. The Employer’s attorney has alleged that the basis of this rule is that “smoking is unhealthy, unprofessional and detrimental to the public image of the City.” It goes on to effectively state that smoking cigarettes exhibits an addiction to smoking cigarettes and therefore exhibits a lack of individual discipline and professionalism. It, therefore, argues that this would undermine the public’s confidence in firefighters and particularly exhibits a bad example for children who all see firefighters as role models.⁷

⁴ See, Gorenstein, et al. editors, Labor and Employment Arbitration (Matthew Bender, 2d Ed.), Sec. 37.04(4). See, for example, Galloway Company, WERC case no. 42160 (Shaw, 1989) and Silgan Containers Corporation WERC case no. 49069 (Nielsen, 1993) and cases and commentary cited therein.

⁵ See, Labor and Employment Arbitration supra, Sec. 37.04(2) and cases cited therein. See, Galloway, supra.

⁶ summarized in the next paragraph

⁷ It has emphasized the “public image” rationale.

I note that this rule was not adopted by the public body of the Employer. The public policy issues are not before me and will not be addressed here. If the purpose of the rule were to effectively force all firefighters to quit smoking, by severely limiting their smoking, it goes beyond the legitimate interests of the Employer and would not be a reasonable rule. It would also violate the Existing Practice provision because the parties have expressly recognized over a long period of time that employees have the right to smoke when not on duty. There is no evidence beyond speculation that the Employer made any considered judgment based upon facts to make this decision. Arbitrators have long recognized in many forms that life style choices not affecting the performance of an employee's duties or its image are beyond regulation by the Employer. In this case, some firefighters would be able to smoke outside the station while possibly others were effectively prevented from doing so. The evidence is insufficient to support a reasonable interest of the Employer in that purpose or that the rule is reasonably related to that interest. Additionally, any attempt to force firefighters to quit smoking would require adequate notice to the Association so that it could bargain the impact of that ban.⁸ There is no evidence that the Employer ever notified the Association of the existence of a broad purpose to affect personal habits. Therefore, the Association has never had an opportunity to request bargaining on the decision or the impact thereof.⁹

The former rule prohibits smoking while a firefighter is on duty and in direct contact with the public. The change is, therefore, primarily directed at firefighters while performing their duties when out of direct contact with the public, when on authorized breaks away from the fire station, and when traveling by foot or in their personal vehicle while on duty.¹⁰ The current rule effectively limits firefighter smoking while on duty at the station to break times. The parties have recognized that work time is for work and to the extent a firefighter is actually performing work away from the station, the rule is consistent with the existing policy.

However, because the rule does not distinguish break times or other work time when a firefighter may not be performing duties for the Employer it must be evaluated from that standpoint. The sole reason for this broad rule is that if members of the public, particularly children, would chance to see a firefighter smoking they would lose confidence in the discipline and professionalism of the department.¹¹ There is no evidence other than sheer speculation that this result would occur. It is entirely unbelievable for adults. As to children it is exceedingly tenuous. First, children not in school would have to see the firefighter

⁸ See, Silgan, dicta page 8.

⁹ This constitutes a violation of the Existing Practices provision.

¹⁰ It is undisputed that smoking in Employer owned vehicles is banned and was banned before the adoption of this rule.

¹¹ It appears, for example, that the current rule would prohibit firefighters from smoking while making presentations at a school because they would be in direct contact with the public. Even if they were not in direct contact, the rules of the school system would confine smoking to the same places, if any, teachers smoke. The Employer has a legitimate interest in requiring firefighters to abide by the regulation of smoking in places they visit. If smoking were allowed, the new rule would be stricter for firefighters than teachers. There are other potential situations in which the rule would either be cumulative or be entirely inconsistent with the mores of the public concerning smoking. There is no evidence that the Employer ever evaluated the mores in any logical or systematic way.

smoking. Then they would have to be of sufficient maturity to recognize that the firefighter is in uniform. They would then have to recognize that the person smoking was a firefighter, not a police officer or member of the military. They would then have to recognize that they were employed by the Sturgeon Bay Fire Department and not a neighboring fire department. Next, the question is whether the purpose of the rule is to discourage the child from smoking or to instill the child's confidence in the fire department. If the former, there is no nexus of relationship to the Employer's legitimate interests. If the latter, there is no evidence that any child has ever lost confidence in an entire fire department because he or she observed one of its firefighters smoking. The Employer has failed to establish a reasonable nexus to the application of the rule to breaks and down times. The rule is, therefore overbroad and does not have direct and proximate relationship with the legitimate interests of the Employer. It also violates the Existing Practices provision because it is overbroad.

The appropriate remedy is to order the rule rescinded. There is no evidence available to sustain an award striking merely the parts of it which are overbroad and retaining those parts which are not. A question exists as to whether the rule should be rescinded effective on the date of this award or retroactive to its adoption. Because there is no evidence that the Employer took any steps to gather evidence in support of this rule and because it was obviously overbroad, I order that it be rescinded effective the date of its adoption as if it had never existed. I note that there are disciplinary issues arising under the new rule. Those issues are not before me and I no opinion is expressed thereon.

AWARD

The new smoking rule is overbroad and it is ordered rescinded in its entirety as if it never existed.

Dated at Madison, Wisconsin, this 2nd day of April, 2010.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator