BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL #1004, AFL-CIO

and

CITY OF WEST ALLIS

Case 102
No. 69990
MP-4599

Appearances:

Sheryl L. Kuhary, Assistant City Attorney, 7525 West Greenfield Avenue, West Allis, Wisconsin, appeared on behalf of the Employer.

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

INTERIM ARBITRATION AWARD

On July 10, 2010, the International Association of Firefighters, Local # 1004, ALF-CIO, herein referred to as the "Union," filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that the City West Allis, herein referred to as the "Employer," has committed prohibited practices in violation of Section 111.70(3)(a)1, 4, and 5 of the Municipal Employment Relations Act by refusing to abide by an alleged settlement agreement under the terms of the parties' collective bargaining agreement relating to the alleged right of unit employees to smoke on the premises of the Employer. The Union filed a collateral action, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, ET AL. V. CITY OF WEST ALLIS, [1] Milwaukee Circuit Court case no. 2010 CV 010685 on July 7, 2010, seeking an order enforcing the same settlement agreement and seeking an injunction banning the implementation of the smoking policy, which effectively banned any smoking by fire fighters and which is disputed herein. Circuit Court Judge Dugan issued an order dated August 17, 2010, denying enforcement of the disputed settlement agreement but enjoining enforcement of the smoking policy. The Commission appointed Stanley H. Michelstetter II, a member of its staff, as the Hearing Examiner by order dated July 23, 2010.

[1] The undersigned take judicial notice of the public records on file therein as to the date of filing.

The Employer filed an answer to that complaint on August 11, 2010. The Examiner held a hearing in West Allis, Wisconsin, on September 17, 2010, during the course of which the parties agreed to the dismissal of the complaint and the submission of the issues in dispute to arbitration, based upon the record developed at the September 17 hearing, with the undersigned acting as arbitrator. The Hearing Examiner dismissed the Complaint by order dated June 21, 2011. Each party filed post-hearing briefs, the last of which was received January 14, 2011.

ISSUES

The parties were unable to agree to a statement of the issues but did agree to allow the arbitrator to state them. I state them as follows:

1. Is there any relevant issue herein which is in part or in whole time-barred or waived?

2. Did the Employer violate any provision of the collective bargaining agreement when it prohibited all smoking on the premises of the Fire Department in its newly adopted Rule 7.42?

3. If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

ARTICLE III

MANAGEMENT RIGHTS

SECTION 1. Any and all rights, powers and authority which existed prior to entering into this Agreement relating to the right to operate and manage its affairs are retained solely and exclusively by the City, except as expressly and specifically abridged, delegated, granted, modified or limited by this Agreement and except as they are subject to the laws of the State of Wisconsin.

SECTION 2. The rights, powers and authorities referred to in Section 1 above shall include, but are not limited to:

(A) The right to determine:

(1) The size and composition of the work force;

(2) The number and location of its facilities;

(3) The services to be rendered and the operations to be conducted;

(4) The organization of the department;

(5) The rules and regulations of the department;

(6) The training and instructional programs;

(7) The practices and procedures for the efficient, disciplined and orderly operation of the Department, including the sole right to discipline, suspend and discharge employees for just cause;

(8) To hire, assign, transfer, promote and determine the qualifications of employees;

(9) The materials, means, equipment and personnel by which any and all operations are conducted and services rendered;

(10) Whether and to what extent the work required in the conduct of its operations and in rendering its services shall be performed by employees covered by this Agreement;

(11) The hours of work and work schedule.

(12) What work is to be performed by the Department, its place of performance and who is to perform it.

(13) The assignments and job duties.

(B) The right to control the buildings, real estate, materials, paths, tools, machinery and all equipment which may be used in the conduct of its operations in the rendering of its services.

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ARTICLE XXV

OFF-DUTY TIME

The City shall not impose regulations primarily related to wages, hours and conditions of employment upon an employee's off-duty time except in the case of a call back for duty and conduct which:

(A) Brings discredit upon the City of West Allis or the West Allis Fire Department; or

(B) Results in the use of public employment for private gain.

Conduct in contravention of this Article shall be subject to disciplinary action. The Board of Police and Fire Commissioners of the City of West Allis may adopt rules, not inconsistent herewith, for the implementation of this Article.

(C) For the reasons stated below the Chief of the West Allis Fire Department shall prohibit employees of the West Allis Fire Department from performing fire fighting duties for municipalities operating a paid or volunteer fire department other than the City of West Allis.

1. The provision of fire protection services to the public is a dangerous occupation requiring highly trained, capable personnel using appropriate methods and equipment under the direction of experienced supervisors. As such, the performance of fire protection duties without the requisite training, methods, equipment, or supervision may threaten the health and well-being of employees and the public.

2. Employees who perform fire protection duties on a voluntary basis or as a result of outside employment are subject to increased exposure to hazardous conditions that may result in a greater incidence of illness or injury. Consequently, the performance of such duties for other municipalities may have a direct bearing on an employee's ability to perform fire protection duties for the City of West Allis.

3. Such statute has established a presumptive relationship between an employee's fire suppression duties and heart and lung disability the employee may develop. The City of West Allis and its taxpayers are financially liable for the employee's disability benefits, and must be confident that such disabilities are the result of the employee's work for the City of West Allis and not for other municipalities.

4. The prohibition against employees of the West Allis Fire Department from performing fire fighting duties for municipalities other than the City of West Allis shall be in effect beginning on the 1st day of April, 1996. Violation of this section, after one written warning shall result in discharge from service of said employee.

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ARTICLE XXVI

GRIEVANCE PROCEDURE

SECTION 1. A grievance shall consist only of a dispute involving the interpretationor application of provisions of this Agreement, including a complaint involving working conditions established by this Agreement and the application of the Fire Department Rules and Regulations which are primarily related to wages, hours and conditions of employment. The grievance procedure shall not apply to departmental operations and proceedings, disciplinary actions, promotional procedures, job classifications, or any other matter contained in Section 62.13, Wisconsin Statutes except as provided in Section 4 herein. All matters subject to the provisions of Section 62.13, Wisconsin Statutes, not covered in this Agreement, shall be processed in accordance with such Statute.

SECTION 2. A grievance shall be governed and controlled by the following procedure:

STEP 1. If the employee has a grievance, he/she shall first present and discuss the grievance orally with the Battalion Chief in charge of his/her platoon or the Battalion Chief on duty, either alone or accompanied by an Association Representative. The employee is to state that he/she is presenting a first step grievance and the Association representative is to identify his/her position and authority. The Battalion Chief shall orally communicate a decision to the employee before the end of the employee's next regularly scheduled workday. In order to be timely, a grievance must be presented at the Step 1 level within five (5) calendar days of knowledge of the circumstances causing the grievance.

STEP 2. The grievance shall be considered settled at the Step 1 level, unless within five (5) business days after the communication of the Battalion Chief's decision, the employee and/or Association Representative shall reduce the grievance to writing and present it to the Chief. The written grievance shall specifically state the provision or provisions of this Agreement, Department rules, regulations or procedures which are alleged to have been violated. The Chief shall meet with the grievant and/or Association Representatives for the purpose of discussing and attempting to resolve the grievance. The meeting shall be scheduled at the mutual convenience of the parties. Within ten

(10) calendar days after the date of said meeting, the Chief shall provide a written answer to the grievant with copies to the Grievance Committee and the Association Representative. The written answer shall state the resolution agreed to for the grievance or the reason(s) for rejecting the grievance, and may state a suggested resolution of the grievance if rejected. The grievance shall be considered settled in accordance with the written answer of the Chief unless written notice is given by either the grievant or the Association of the desire to appeal the grievance to either the Commission or to private arbitration. In order to be timely, the written notice of appeal must be presented to the Chief and Board of Police and Fire Commissioners of the City of West Allis within fifteen (15) calendar days after the date of the Chief's written answer. The written notice shall state the form of arbitration which has been selected.

STEP 3. POLICE AND FIRE COMMISSION APPEAL. The Commission shall schedule and hold a hearing within thirty (30) calendar days or sooner after the date the written notice of appeal is filed. The Commission shall render its decision within ten (10) calendar days after the hearing. A copy of the decision shall be forwarded to the grievant(s), Grievance Committee and the Association. The decision of the Commission shall be final and binding upon the parties. In rendering its decision, the Commission shall neither add to, detract from, nor modify the intent and/or language of this Agreement or departmental rules, regulations and procedures.

STEP 4. ARBITRATION APPEAL. The private arbitration of a grievance shall be governed and controlled by the following procedures:

(a) Absent a mutual agreement as to the selection of an arbitrator, the Association shall make a written request to the Wisconsin Employment Relations Commission to provide a panel of five (5) arbitrators. This request must be made within ten (10) calendar days after the date of the written notice of further appeal.

(b) Upon receipt of the panel of arbitrators from the Wisconsin Employment Relations Commission, the City and the Association, or their designated representatives, shall select an arbitrator to hear and determine the grievance from the panel by the process of elimination.

The City and the Association shall have the right to delete two (2) names from the panel, each in alternate strikes, with the remaining person being the selected arbitrator. The party to strike first shall be determined by a form of chance to be agreed to by the parties.

(c) The arbitrator, so selected, shall hold a hearing at a time and place convenient to the parties, and shall take such evidence as in the judgment of the arbitrator appropriate for the proper determination of the grievance. The arbitrator shall have initial authority to determine whether or not the grievance is arbitrable and when so determined, the arbitrator shall proceed to determine the merits of the grievance submitted to arbitration.

(d) The decision of the arbitrator shall be final and binding on the parties and the arbitrator shall be requested to issue a decision within thirty (30) calendar days after the close of the hearing, or thirty (30) calendar days after the receipt of post hearing briefs. The arbitrator in arriving at a decision shall neither add to, detract from, nor modify the language of this Agreement or departmental rules, regulations or procedures. The arbitrator shall adjudicate and not legislate or determine interests.

(e) If the arbitrator rules that the subject matter is not arbitrable, the Association may submit the matter to the proper jurisdiction.

(f) Expenses for the services of the arbitrator and the proceedings shall be borne equally by the City and the Association. However, each party shall be responsible for compensating its own representatives and witnesses. If either party desires a verbatim record of the proceedings, it may cause such a record to be made providing such party pays for the record. If both parties desire a verbatim record, such costs shall be borne equally between the parties.

SECTION 3. The time limits set forth in the procedures of this Article may be extended by mutual agreement between the parties, but such agreements shall be evidenced in writing.

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ARTICLE XXIX

MAINTENANCE OF STANDARDS

Except where specifically provided for in this agreement or where substantially modified as the result of negotiation, all conditions of employment primarily related to wages, hours of work, and general working conditions, which have been continuous and are known and sanctioned by the Chief of the Fire Department, shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this agreement.

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ARTICLE XXXI

AMENDMENTS AND SAVING CLAUSE

SECTION 1. This Agreement is subject to amendment, alteration, or addition only by subsequent written agreement between and executed by the City and the Association where mutually agreeable. The waiver of any breach, term or condition of this contract by either party hereto shall not constitute a precedent in the future enforcement of all its terms and conditions.

SECTION 2. If any provision of this Agreement, or any addenda thereto, should be held invalid by operation of law or any tribunal of competent jurisdiction, or if compliance with or enforcement of any provision should be restrained or broadened by operation of law or any such tribunal, the remainder of this Agreement and addenda shall not be affected thereby, and the parties shall enter into immediate collective bargaining negotiations for the purpose of arriving at a mutually satisfactory replacement of such provision. In the absence of a mutual agreement, either or both parties may proceed to interest arbitration.

SECTION 3. This Agreement constitutes the entire agreement between the parties and no verbal statement shall supersede any of its provisions.

RELEVANT DEPARTMENTAL RULES

POLICY IN EFFECT 1984 TO May 31, 1990

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21.36 – SMOKING

1. Smoking while on Fire Department apparatus or in Department dormitories is prohibited at all times without exception.

2. Smoking while on duty at fires or other emergencies or while attending training school or practice or when handling hose is prohibited except as permitted by the officer in charge of the operation.

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POLICY IN EFFECT FROM JUNE 1, 1990, UNTIL 2008

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Effective June 1, 1990, smoking is banned in the Fire Stations except as follows:

Station No. 1	Apparatus floor and rear garage
Station No. 2	Apparatus floor and shop floors
Station No. 3	Apparatus floor

Smoking may be banned in these areas during certain times such as during Monday work on the apparatus/equipment, handling of hose and during the use of flammable liquids, etc.

Reminder: No smoking allowed on or in department vehicles/apparatus at any time.

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POLICY 7.37 IN EFFECT FROM 2008 UNTIL 2010

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Use of Tobacco

Unless prohibited by any department policy, rule, order or other directive, tobacco may be used only in designated areas. Members, when in uniform, shall not use tobacco when engaged in alarms, departmental events or drill school. Members in uniform shall not use tobacco when in direct contact with the public or whenever they are in public view. Members hired after January 1, 1996 shall not use tobacco products of any kind, regardless of whether they are on or off duty.

POLICY 7.42

APPLICATION

The policy applies to all sworn and civilian departmental personnel, visitors, employees or any agencies performing work on fire department premises, or anyone using or occupying fire department buildings with or without permission of the fire department or the City of West Allis.

PURPOSE

The purpose of this policy is to describe the fire department's smoking policy for all employees and visitors.

REFERENCES

City of West Allis Revised Municipal Code, Chapter 7.032, "Smoking Prohibition in City-owned Buildings"

2009 Wisconsin Act 12, "Smoking Ban", effective July 5, 2010, Section 101.123, Wis. Stats.

West Allis Fire Department Policy 7.37, "Code of Conduct", specifically p. 11, "Use of Tobacco".

POLICY

It is the policy of the West Allis Fire Department to prohibit smoking in all fire department buildings and on any fire department operated premises or fire department property either inside or outside, including fire department vehicles.

PROCEDURE

Regulation of Smoking

No person shall smoke in any City-owned building at any time. Nor shall any person smoke while on any fire department premises or property.

Fire department employees shall not smoke: 1) while on duty and in uniform; 2) when in uniform and engaged in alarms, departmental events or drill school; and 3) when in uniform and in direct contact with the public or in public view. Members hired after January 1, 1996, shall not smoke regardless of whether they are on or off duty.

For the purposes of this policy, “smoking” means carrying a lighted cigar, cigarette, pipe or other lighted smoking equipment.

Exceptions

The prohibition of smoking has no exceptions for any fire department property or premises, either inside or outside, including fire department vehicles.

Designated Smoking Areas

The fire department has no designated smoking areas. The prohibition of smoking applies to all fire department buildings, premises and property, whether inside or outside, including all fire department vehicles.

Penalties

Any employee who violates this policy, or who witnesses another employee violating this policy and fails to report the violation to a supervisor shall be subject to disciplinary action.

Any employee who willfully allows any person to violate this policy shall be subject to disciplinary action.

Any supervisor who fails to take corrective action toward employees or members of the public who violate this policy shall be subject to disciplinary action.

Any person who willfully violates this policy shall be subject to legal prosecution, including the penalties/forfeitures set forth in Section 101.123, Wis. Stats.

Employees who are subjected to penalties imposed by law shall not be exempt from disciplinary action.

Injunction

City officials or any affected party may institute an action in any court with jurisdiction to enjoin repeated violations of this section.

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FACTS

The Employer is a Wisconsin municipality which operates a fire department. The Union is the collective bargaining representative of rank and file fire fighters employed by the Employer. The Employer has continuously prohibited employees hired as fire fighters on or after January 1, 1996 from using tobacco products on or off duty. Fire fighters hired before that date have been allowed to smoke off duty and off the premises of the Employer. They have also been allowed to smoke only in a designated smoking area at each fire station (essentially the apparatus floor at each station) while on break or in non-duty hours at work since 1990 and to smoke outdoors under limited circumstances. The Fire Chief adopted policy 7.37 dated January 22, 2008, which prohibited those fire fighters who were allowed to use tobacco products from smoking other than in designated areas and from smoking while on a tour of duty in uniform while in direct contact with members of the public or when they are in public view. Fire fighters who were on their tour of duty continued to smoke outdoors near their assigned fire station and in the designated area (apparatus floor). The State of Wisconsin changed laws regarding indoor smoking which effectively outlawed smoking on apparatus floors. This required a change in Policy 7.37. On May 11, 2010, the Fire Chief adopted a new policy (Policy 7.42) without negotiation with the Union but with the approval of the West Allis Police and Fire Commission. It effectively prohibited anyone in Fire Department buildings or on Fire Department property from smoking by eliminating all designated smoking areas. It also required that unit employees report any other employee whom they observed smoking.

The Union filed a grievance dated June 2, 2010 protesting the rule and also made a demand that the Employer bargain over the new rule. The parties met on June 10, 2010, to discuss the grievance in the grievance procedure. The Union contends, but the Employer denies, that the parties reached an agreement to allow on-duty unit employees who were hired before January 1, 1996, to smoke outdoors near their assigned fire station. The Union sent a letter on June 11, 2010, to Fire Chief Hook confirming in detail what it believed to be the settlement. The letter stated:

> Local 1004 hereby confirms that the above described agreement represents a satisfactory replacement for the designated smoking areas affected by the Wisconsin Indoor Smoking Ban and satisfied Local 1004's demand to bargain under Article XXXI of the collective bargaining agreement.
>
> On the basis of the above, Local 1004 withdraws the smoking ban grievance.

The Fire Chief never responded to that letter.

The Fire Chief prepared a proposed revision of Policy 7.42 which conformed to the terms of the settlement. Fire Chief Hook prepared an answer to the grievance dated June 18, 2010, and gave it to the Union. He met with the Police and Fire Commission at its next meeting June 17, 2010. He presented the proposed revised Policy 7.42 and recommended that

the Police and Fire Commission approve it. The Police and Fire Commission did not approve the revision. Fire Chief Hook informed the Union of the Police and Fire Commission's rejection on June 18, 2010. As noted above, on July 7, 2010, the Union filed a civil action seeking to enjoin the enforcement of the new policy and requiring the Employer to abide by the putative settlement. On July 10, 2010, the Union filed the prohibited practice with the WERC. The Union never requested that the Employer arbitrate the June 2, 2010 grievance until the agreement reached at the hearing herein.

POSITIONS OF THE PARTIES

Union

The Employer contends that smoking was only allowed indoors since 2008. This is without merit. The historic rules designating the indoor smoking areas related only to indoor areas. Smoking was allowed outside station buildings. The Employer may argue that smoking outdoors was effectively banned by the adoption of Policy 7.37 because it banned smoking in view of the public. The 1990 order was based upon a letter from the Chairman of the West Allis Board of Public Works designating smoking areas in response to the adoption of the Wisconsin Indoor Clean Air Act, in buildings throughout the city. Outdoor smoking was not a concern in that letter. At that time smoking was always allowed outside city-owned buildings. The Employer admits that its other employees are allowed to smoke outside its buildings. The Police Department rule does not prohibit police employees from smoking outside city-owned buildings while on duty. Simply put, there was no ban on outdoor smoking by any employees of the Employer prior to July 5, 2010. Union President Volk, a smoker, and others credibly testified that he and other unit employees were allowed to smoke outdoors at fire stations prior to July 5, 2010. Past supervisors and Fire Chiefs have smoked outdoors regularly.

The Employer's complete ban on smoking by on-duty firefighters is unreasonable and violates the Employer's duty to bargain. Every contract, including labor contracts, imposes a duty of good faith and fair dealing. Here, it appears that the Employer takes the position that it has the sole and exclusive discretion to do whatever it pleases with regard to smoking. However, the appropriate test is whether a work rule is "directly and proximately" related to the legitimate needs of the Employer. An outright ban on smoking is not "directly and proximately" related to the Employer's legitimate needs. The Employer is expected to argue that a managerial concern is accountability to taxpayers in connection with Section 891.45, Stats[2]. This became the law before Chief Hook became a firefighter. Now, suddenly, 30 years

[2] Section 891.45, Stats, reads as of now:

> **891.45 Presumption of employment connected disease; heart or respiratory impairment or disease. (1)** In this section:
> (a) "County fire fighter" means any person employed by a county whose duties primarily include active fire suppression or prevention.
> (b) "Municipal fire fighter" includes any person designated as primarily a fire fighter under s. 61.66 (2) and any person under s. 61.66 whose duties as a fire fighter during the 5 year qualifying period took up at least two-thirds of his or her working hours.

later, after Chief Hook joins the department, they now assert the direct and proximate justification. The evidence in this case supports the conclusion that the purpose of this rule is effectively to force those firefighters who smoke to quit.

The Employer's action violates the maintenance of standards provision of the collective bargaining agreement. It is likely that the Employer will argue that, since it prohibits smoking by all persons while on fire department property, employees and non-employees alike, the smoking ban is therefore a permissive subject of bargaining. The WERC has employed a balancing test in determining mandatory subjects of bargaining. The unique twenty-four hour schedule of firefighters points to the mandatory nature of the issue of smoking. The fact that this is an attempted ban on outdoor smoking is also a distinguishing factor. Further, the ban on smoking outdoors at the fire department does not apply to smoking outdoors at other city-owned property. The smoking ban adopted by the Employer does not ban smoking outside the Police Department located at 113th and Lincoln, where the Police and Fire Commission often

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(c) "State fire fighter" means any person employed by the state whose duties primarily include active fire suppression or prevention and who is a protective occupation participant, as defined in s. 40.02 (48).

(2) Except as provided in s. 891.453, in any proceeding involving the application by a state, county, or municipal fire fighter or his or her beneficiary for disability or death benefits under s. 40.65 (2) or any pension or retirement system applicable to fire fighters, where at the time of death or filing of application for disability benefits the deceased or disabled fire fighter had served a total of 5 years as a state, county, or municipal fire fighter and a qualifying medical examination given prior to the time of his or her becoming a state, county, or municipal fire fighter showed no evidence of heart or respiratory impairment or disease, and where the disability or death is found to be caused by heart or respiratory impairment or disease, such finding shall be presumptive evidence that such impairment or disease was caused by such employment.

891.455 Presumption of employment-connected disease; cancer. (1) In this section, "state, county, or municipal fire fighter" means a fire fighter who is covered under s. 891.45 and any person under s. 61.66 whose duties as a fire fighter during the 10 year qualifying period specified in sub. (2) took up at least two-thirds of his or her working hours.

(2) In any proceeding involving an application by a state, county, or municipal fire fighter or his or her beneficiary for disability or death benefits under s. 40.65 (2) or any pension or retirement system applicable to fire fighters, where at the time of death or filing of application for disability benefits the deceased or disabled fire fighter had served a total of 10 years as a state, county, or municipal fire fighter and a qualifying medical examination given prior to the time of his or her becoming a state, county, or municipal fire fighter showed no evidence of cancer, and where the disability or death is found to be caused by cancer, such finding shall be presumptive evidence that the cancer was caused by such employment.

(3) The presumption under sub. (2) shall only apply to cancers affecting the skin, breasts, central nervous system or lymphatic, digestive, hematological, urinary, skeletal, oral or reproductive systems.

(4) The presumption under sub. (2) for cancers caused by smoking or tobacco product use shall not apply to any municipal fire fighter who smokes cigarettes, as defined in s. 139.30 (1m), or who uses a tobacco product, as defined in s. 139.75 (12), after January 1, 2001.

holds meeting and where Police Officers subject to the Police and Fire Commission's authority are employed, or in other public areas.

The settlement agreement in this case was intended to be a final and binding settlement of the Union's grievance and demand to bargain over the smoking ban. It was not intended to be subject to any action or ratification by the Police and Fire Commission. The Employer had the authority to enter into the June 10, 2010 settlement agreement without ratification by the Police and Fire Commission. The Union asks that the grievance be sustained and that the Employer be ordered to permit smoking outdoors in accordance with the historical status quo until the Employer reaches agreement with the Union on this issue. In the alternative, the Employer should be required to adhere to the terms of the June 10, 2010, settlement agreement.

Employer

Prior to filing the prohibited practice complaint, the Union had filed two grievances against the Employer related to the adoption of the smoking ban policy. The Employer has consistently maintained that the Union failed to follow the grievance procedure as it pertained to the processing of those two grievances. Therefore, the Employer contends that the Union has waived the issues which were alleged in the prior grievances. The Employer contends that prior to the facts in this case, smoking was only allowed in the designated areas within the fire station. Thus, when the state-wide indoor smoking ban took effect July 5, 2010, firefighters would essentially be prohibited from smoking while at work. The Employer gave notice that it was considering drafting a smoking ban for the Police and Fire Commission at meetings on January 12, 13, and 14, 2010, at which the Union President and other union officers were present. At no time from January 2010, to May 27, 2010, did the Union respond to, question, or challenge the adoption of the policy. The Union first raised the issue when it filed the verbal grievance May 27, 2010. This was processed to the written grievance stage on June 2, 2010. Therefore, the grievance was untimely and the right to grieve that issue is waived. The smoking policy which existed before the disputed policy was Fire Department Code of Conduct, Section 7.37, which was adopted in January, 2008. The Union never objected to the adoption of the policy.

The Union failed to follow the grievance procedure as to the grievance it filed June 2, 2010. The parties did reach a tentative settlement at Step 2 on June 10, but this was not ratified by the Police and Fire Commission. The settlement was contingent upon the approval of the Police and Fire Commission which did not approve it. The Chief timely provided a step 2 answer on June 18, 2010, but the Union did not file a timely request for arbitration. The Union never requested arbitration. Under the terms of the grievance procedure, the grievance is deemed waived. The only response the Union made was to file were complaints for injunctive relief in Circuit Court and the prohibited practice complaint in dispute. The parties have always required strict compliance with Step 2. Accordingly, the Union's grievance in this matter is untimely.

The Union also requested bargaining with respect to the new procedure in the June 2 grievance. The Employer did bargain with the Union at Step 2 but the settlement was not approved. The Union did not declare impasse and did not seek interest arbitration. Therefore, the Employer's bargaining obligation is met.

The Union also failed to follow the grievance procedure for the grievance it filed on June 30, 2010. This grievance alleged that the Employer abandoned the settlement of June 10. This is the same argument raised in the prohibited practice complaint. The Employer makes the same argument raised as to the June 2 grievance.

Although the Employer asserts the issues raised by the Union in the prohibited practice complaint were waived, it addresses them nonetheless. The Smoking Ban Policy of 7.42 is a permissive subject of bargaining. The Smoking Policy Ban of 7.42 bans smoking by everyone and is a matter primarily related to the exercise of municipal powers. It is unquestionably an exercise of the Employer's responsibility to act for the government and good order of the City. Chief Hook explained a motivating factor behind the policy is the fact that Fire Fighters have a benefit that is funded by taxpayers, the heart and lung presumption that is not available to other employees. The Chief noted that another public policy interest concern, operational efficiency. Fire fighters who smoked outside were less available than those who smoked inside.

The management rights clause of the collective bargaining agreement gives the Employer the right to establish the smoking policy ban of 7.42. It includes the right to establish the rules and regulations of the department and the right to control the building and real estate. This waives the Employer's duty to bargain on those subjects during the term of the agreement. The management rights provision grants those rights to the Employer "except as expressly and specifically abridged, delegated, granted, modified or limited by this Agreement." The agreement does not specifically address smoking in any of its provisions.

The Union's position that the maintenance of standards clause requires the Employer to allow the fire fighters to smoke while on duty must fail because the management rights clause trumps the maintenance of standards clause. Other arbitrators have held that the right to smoke is always subject to regulation by an employer and is subject to change when there is a change in circumstances. Here the state-wide smoking ban is clearly a change in circumstances. In any event, the smoking ban is reasonable.

The Union waived by inaction any right it may have to bargain over the smoking ban policy prior to the Police and Fire Commission's adoption of the policy on May 20, 2010. In the event that the management's rights provision is not deemed a waiver of the obligation to bargain over smoking, a wavier occurred by the Union's failure to seek bargaining over the subject prior to the Police and Fire Commission's action. The testimony indicates that they understood the policy and intended to not object to it. The Union never objected to the adoption of the previous policy, Sec. 7.37.

In any event, the Employer satisfied any requirement it may have had to bargain. The Employer satisfied that duty when it met and discussed the matter on June 10, 2010. The Employer and Union both made proposals and actually made a tentative agreement. When it was not ratified by the Police and Fire Commission, the parties reached impasse after a good faith effort.

The parties did not reach a settlement agreement at the June 20, 2010 meeting. The Union knowingly waived its right to arbitrate the settlement agreement and it should not be allowed to argue it in the present case. In any event, the settlement was contingent on ratification and it was not ratified. Therefore, it was conditional and the condition has not been met for it to go into effect.

In summary, the Union should not be allowed to resurrect the duty to bargain and settlement agreement issues because they were waived by the terms of the grievance procedure. In any event, no settlement was reached. The Employer asks that the grievance be dismissed.

Union Reply

The Employer renounced technical objections when it agreed to defer to grievance arbitration. At page 16, et seq. of the transcript the Employer agreed to waive timeliness issues. The Union relied upon this agreement of the Employer and, therefore, the argument is waived by estoppel.

The Union reiterates its position that Sec. 7.47 is a mandatory subject of bargaining. The Employer ignores that smoking bans are not *per se* permissive. Similarly, the management's rights provision does not give the Employer the right to take this action. The maintenance of standards provision supersedes the management's rights provision. The agreement at Article XXVI, Section 1, broadly defines a grievance to include the right to grieve working conditions which are primarily related to wages, hours and working conditions which violate the terms of the agreement. Here fire chiefs have sanctioned smoking for years. This right has been modified over the years, but the fundamental right has been respected. In any event, the total ban on smoking while on duty is unreasonable. The Employer has failed to show that it is directly and proximately related to its legitimate needs. The Employer and the Union reached a settlement on June 10, 2010. The Chief never told the Union of any contingencies. The Chief acknowledged that he did not always take settlements to the Police and Fire Commission. In any event, the June 2 grievance is then appropriate for resolution under the provisions of the agreement.

Employer Reply

The Union requested at hearing a different remedy than it stated in its brief. The Union now seeks a remedy of allowing fire fighters to smoke outside the station In order to grant that remedy, the arbitrator would have to ignore departmental policy 7.37 which prohibits fire

fighters from smoking "in public view." Moreover, the Union is seeking to gain something that it could not get during the negotiation process and exceeds the arbitrator's authority. The Union incorrectly states in its brief that: "Chief Hook goes on to contend that because the May 31, 1990 Department Order is silent on outdoor smoking, outdoor smoking has not been allowed since 1990." This is not what Chief Hook contended. Instead, he stated that, "The only indentified designated areas are the garage areas on the order in 1990, department order" at page 95 of the transcript. When he made this statement he was discussing the prior order, policy 7.37 which prohibited smoking in public view, thus effectively prohibiting smoking outside. When policy 7.37 was adopted, there can be no argument that smoking outdoors was prohibited. Since there was an indoor place to smoke and, in light of the benefits that are available to fire fighters pursuant to the statutory presumption, the Employer did not want to have fire fighters smoking outdoors where the public could see them. The testimony about fire fighters smoking outdoors after policy 7.37 only shows that fire fighters were not properly supervised and not a "past practice." The Employer did not violate any contractual duty of good faith or any provision of the contract. The Union simply did not have a contractual right to smoke. There has been an on-going interest to prevent on-duty fire fighters from smoking in public view and to maintain an efficient work environment. Fire fighters were avoiding smoking in public view even before the adoption of 7.37. In addressing the mandatory/permissive analysis the Union ignores the significance of the agreement's management rights clause. The Employer reiterates its argument in its main brief. Alternatively, the Employer does not simply assert the Policy 7.42 is a *per se* permissive subject of bargaining. The Employer cited several compelling public policy goals, in addition its interests in its facilities, to establish that Policy 7.42 would be determined to be a permissive subject of bargaining. Because it is permissive, it is not subject to the maintenance of standards provision.

The evidence in this case does not show a final settlement at the June 10 2010, meeting. The Union seems to believe that the Chief's history in not seeking to obtain the Police and Fire Commission's approval of past policy changes was inconsistent with the Employer's notice to the Union that the proposed modifications were contingent on Police and Fire Commission's approval. There is no inconsistency in the two positions. When the Chief agrees to tentative settlements they are always agreements subject to the approval of the Police and Fire Commission. The Union is incorrect when it states that the Employer representatives at the June 10 meeting had the authority to settle without the Police and Fire Commission approval. There are two separate settlement issues in this case. The first is with respect to the grievance. The second is the demand to bargain the modification of the collective bargaining agreement. The Chief that he has the right to settle grievances at step 2 but nothing precludes him from taking issues to the Police and Fire Commission before making a settlement final. He gave the Union a notice that he would do so in reaching the grievance settlement. The Chief never had authority to agree to negotiate a change to a term of the collective bargaining agreement. The Chief told the Union in the June 10 meeting that any change to Policy 7.42 would require a change to the collective bargaining agreement and approval by the Police and Fire Commission. In any event, any change would have had to be approved by the Police and Fire Commission.

DISCUSSION

1. Binding Settlement

The purpose of Article XXVI, Grievance Procedure, is to achieve those resolutions of grievances which are possible in an expeditious manner at the lowest possible level and, where no settlement is reached, to quickly process them to resolution in arbitration. Grievance procedures are a method by which parties further their collective bargaining responsibilities under Section 111.70(3)(a)4 as defined in Sec. 111.70(1)(a), Stats.

The essential nature of the settlement process is that it be entirely voluntary. The settlement process as to this issue was very emotional and protracted. It is not the role of the arbitrator to create settlements where none was actually finally agreed-upon. Any attempt by an arbitrator to impose a settlement where none was actually finally agreed necessarily reduces the chances that the settlement process will be effective in the future.

I conclude that the parties did reach a tentative settlement of the disputed issues on June 10, 2010, but that the settlement was conditional in that in order for it be effective it had to be ratified by the Police and Fire Commission.

The Union's position herein was that it was not directly told that the settlement was subject to ratification and, in essence, it questioned if the Chief intended it be subject to ratification. It is undisputed that Chief Hook told the Union representatives at the end of the June 10 meeting that he would submit the matter to the Police and Fire Commission. In essence, the Union's position is that it did not understand that the statement meant that the settlement was actually conditioned upon a ratification vote of the Police and Fire Commission, but rather the fact that Chief Hook would merely inform the Police and Fire Commission.

Chief Hook testified that during the June 10 meeting he told the Union numerous times that any settlement was subject to ratification by the Police and Fire Commission. He specifically disputed the Union's assertion that they were only told he would inform the Police and Fire Commission and not told that it be presented for a ratification vote[3]. He also stated that after he received the Union's letter confirming its view of the tentative settlement, he again told the Union that he would present the letter to the Police and Fire Commission as part of the ratification process. [4] I find the foregoing testimony credible.

It is irrelevant that the Chief had not submitted changes in smoking policy to the Police and Fire Commission before because he did state that he was submitting it this time. His statement at the end of the meeting was sufficient notice that he was exercising that authority in this specific situation.

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[3] Tr. pp. 103-4

[4] Tr. p. 98

The Chief also essentially met his responsibility to present the matter to the Police and Fire Commission as a proposed settlement. The Chief's letter of June 14 to the Police and Fire Commission demonstrates that he did submit it to them for ratification along with the agreed-upon changes. He requested that they approve it.

It is a fair statement that neither party expected the Police and Fire Commission to fail to ratify the settlement. The expectations of both parties were necessarily high as they reached conceptual agreement. Once this occurs it is obviously frustrating to have a settlement not be completed. Nonetheless, the Police and Fire Commission has independent authority over rules it previously approved. Neither party could reasonably expect that its actions would be solely perfunctory. Accordingly, I conclude that the condition of ratification was not met and that no final settlement occurred.

I note here that the Union cannot be prejudiced by the failure to have the settlement ratified. The Union withdrew the grievance in reliance upon the settlement which it expected would be ratified without question. Thus, the original grievance remained effective. The timeliness issue is addressed below.

2. Timeliness and Waiver of Duty to Bargain

The Employer made a number of arguments concerning timeliness. This case was originally filed as a complaint of prohibited practice. The Employer responded to that complaint seeking to defer the issues raised by the Union to arbitration. The WERC's policy as to deferral of cases arising under Sec. 111.70(3)(a)4, Stats, is that it will require a party seeking deferral to agree to waive technical defenses before the WERC will defer. SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94). However, the WERC's policy of deferral is different in cases alleging a violation of collective bargaining agreement under Sec. 111.70(3)(a)5, Stats. In MONONA GROVE SCHOOL DISTRICT, DEC. NO. 22414 (WERC, 3/85) the WERC restated its long-standing policy as follows:

> However, where the labor organization has bargained an agreement with the employer which contains a procedure for final impartial resolution, of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over breach of contract claims because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. MAHNKE V. WERC, 66 Wis.2D 524, 529-30 (1974); UNITED STATES MOTORS CORP ., DEC. NO. 2067-A (WERB, 5/49); HARNISCHFEGER CORP., DEC. NO. 3899-B (WERB, 5/55); MELROSE-MINDORO, *supra*; CITY OF MENASHA, DEC. NO. 13283-A (WERC, 2/77).

When the parties agreed to submit the entire complaint to arbitration, the Employer waived its procedural objections to having the complaint heard in its entirety on the merits.[5] However,

[5] Tr. p. 20-1

there is some ambiguity in the Employer's wavier which may relate to the difference between the two deferral policies. I, therefore, address the salient procedural objection made by the Employer -- that the Union failed to make a request for arbitration following the Chief's answer to the June 2, 2010, grievance.[6]

I restate the facts as to that issue. The parties met at Step 2 on that grievance on June 10, 2010. They reached a tentative settlement of the grievance. They were in disagreement as to whether it was subject to ratification by the Police and Fire Commission, but both parties were aware that it would be submitted to the Police and Fire Commission. The Union withdrew the grievance by letter on June 11, based upon its legitimate, but incorrect, belief that the parties had reached a final settlement. The grievance procedure required that the Chief provide his second step answer within 10 days. The Police and Fire Commission met and rejected the settlement on June 17, 2010. Chief Hook essentially answered the grievance by letter dated June 18. The grievance procedure required that the Union provide notice of its appeal to arbitration within 15 calendar days of the Chief's answer or the matter was considered settled. The Union filed the instant complaint with the WERC on July 10 and also contemporaneously sought an injunction in Circuit Court by complaint filed July 7.

As of the date of the Chief's answer the parties had a legitimate disagreement as to whether a settlement was in effect. The longstanding policy of the WERC is that grievance settlements are collective bargaining agreements. See, *Thomsen v. WERC*, 234 Wis.2d 494 (Ct. App., 2000). Settlement agreements may be in the form of a separate collective bargaining agreement, amendment to an existing collective bargaining agreement, or a resolution of a grievance. Until the issue of whether there was, in fact, a settlement agreement and, if so, whether it was subject to enforcement in the grievance procedure was resolved, the grievance procedure could not move forward. While normally, those issues are for the courts supervising an arbitration provision, the parties did submit those issues to this arbitration. Accordingly, the grievance procedure was tolled (suspended) from June 11, 2010, until that issue was resolved herein and I determined that the original grievance remained in effect.[7]

3. Violation of Maintenance of Standards Provision

a. Interpretation of Maintenance of Standards

The employment relationship is a dynamic relationship. No collective bargaining agreement can anticipate all of the circumstances which might arise between the Employer and the Union or the Employer and various employees. The purpose of Article XXIX,

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[6] The objection on the basis of failure to request bargaining with respect to the adoption of Rule 7.42 is clearly waived by the agreement on the record at hearing herein.

[7] See, GRANITE ROCK V. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, 130 S.Ct. 2847 (2010)

Maintenance of Standards is to provide standards for the resolution of disputes which involve those unplanned situations. They are commonly interpreted by looking at the provisions of the agreement which are directly related, the general regulatory scheme of the agreement, the past practice of the parties, and, to some extent, the customs and practices of the fire service.[8] The parties have placed some restrictions on the interpretation of this otherwise very broad provision. They are:

1. It must be a "condition of employment" which is "primarily related to wages, hours and working conditions"

2. Continuous

3. Known and sanctioned by the Fire Chief

4. Not specifically provided for elsewhere in the agreement

5. Not substantially modified as a result of negotiation

The arguments of the parties have raised a number of questions about the meaning of the maintenance of standards provision. The first issue is the relationship between Article III, Section 1's provision that rights are reserved to the Employer except as expressly and specifically abridged, delegated, granted, modified or limited by this Agreement. . . ." Because the Maintenance of Standards provision is, by its nature, a "general" provision, the two provisions appear to be contradictory. The Employer's approach treats the Maintenance of Standards provision too narrowly. The Maintenance of Standards provision is focused on employee interests in their wages, hours and working condition. Once a practice which qualifies under the provision is defined, the provision is a "specific" provision so that it supersedes the provisions of the management rights provision in situations in which it applies.

b. Application to This Dispute

The Employer, like all public employers everywhere, has legitimate concerns about its employees who smoke. Two of those concerns which were highly emphasized at hearing herein are Sec. 891.45, which presumes that heart or lung disease in fire fighters is work related and Sec. 891.455, which presumes that cancer is an employment connected disease. As correctly emphasized by Chief Hook in his testimony, these specific provisions impose potential liability upon public employers for the consequences of fire fighters' smoking.

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[8] The concept of "past practice" is defined and its application discussed in NAA, *The Common Law of the Workplace: The Views of the Arbitrators* Sec. 2.20 (BNA, 2d. Ed); see, also, Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements" 1961 Proceedings of the National Academy of Arbitrators, page 31 (BNA, 1961). In essence, a "past practice" is a pattern consistently undertaken in recurring situations so as to evolve into an understanding of the parties.

However, all public employers have endured medical and time off costs related to smoking. Thus, this is not the only potential cost imposed. Section 111.32, Stats, 111.321 and 111.322, except as provided in Sec. 111.35, Stats, protect existing firefighters from discrimination based upon the use of, inter alia, tobacco products in their off-duty time -- off of the Employer's premises. However, Sec. 111.325(4), which was added effective with the adoption of Sec. 891.455, allows public employers to make it a condition of hiring new fire fighters that they be tobacco free. The Employer adopted a rule pursuant to Sec. 111.32(4), Stats. requiring that fire fighters hired after January 1, 1996, remain tobacco free. The Legislature could have, but did not, adopt a provision with respect to the above statutes which permitted a fire department to require its existing employees to be tobacco free at all times. What developed then and remained true until the facts of this case is that the Employer, including the Fire Chief at the time, recognized a right of existing employees who were tobacco users to maintain their habit by smoking at work at breaks and in non-working hours. At the same time, the Union has consistently recognized the right of the Employer to reasonably regulate the use of those products during the work day and while in uniform.

The testimony is sharply divided as to whether fire fighters were allowed to smoke outdoors during break times after the adoption of Sec. 7.37. I conclude that they were. It is undisputed that Fire fighters have always been free to go outdoors to exercise or take breaks, as long as it does not interfere with their duties. It is undisputed that prior to the adoption of 7.37, they were free to do so. The rule restricting smoking to essentially apparatus floors was adopted in response to the creation of Sec. 101.123, and the City of West Allis's response thereto. That rule was expressly limited to City-owned buildings. It allowed smoking outdoors. The evidence that Rule 7.37 was intended to change outdoor smoking is contradictory. See, tr. p. 89-91, 97. The concept that Rule 7.37 banned all smoking is based on Chief Hook's very broad view of Rule 7.37's ban on smoking "while" in public view. That interpretation effectively interprets "in public view" to mean where there is any remote possibility that a member of the public might see a fire fighter smoking. That construction could not have been intended by the drafters because it would have left the rest of the rule with little or no meaning.

In this regard, the testimony of Union witnesses that smoking continued to occur outside is credible. Mr. Volk's testimony that he personally smoked outside is strong evidence that it did occur. If this was a habit of employees, it is likely that the Employer's witnesses would not have found it unusual and, therefore, would not recall it. I, therefore, conclude that the Employer knowingly allowed those employees who were hired before January 1, 1996, who used tobacco products to maintain their habit by smoking at work during breaks and off-duty times. They were allowed to do so outside near the stations and in the designated areas prior to the adoption of 7.42. The testimony includes the fact that the former Fire Chief also smoked outdoors on occasion and, thus, he recognized the right of employees to do so. The rights to use tobacco for these employees and to maintain that habit at work have been reluctantly recognized by the Employer and meet the conditions of the Maintenance of Standards Clause 2-5.

The next question is whether the rule is "primarily related to wages, hours of work, and general working conditions" within the meaning of the Maintenance of Standards Clause. The parties agree that this phrasing is meant to reflect the long standing balancing test of the Wisconsin Employment Relations Commission (herein "WERC") and courts to determine which subjects employers and unions are required to bargain upon and which they are not.[9] The WERC has addressed smoking bans in two cases cited by the parties, *Brown County*, Dec. No. 27477 (WERC, 1992) and *Middleton Joint School District No. 3,* Dec. No. 14780-A (WERC, 1976). In *Brown County*, the County adopted a clean indoor air ordinance prohibiting everyone (public, employees and all others) from smoking indoors at any county-owned building, except in certain designated areas in a few buildings. Part of the purpose of the ordinance was to reduce the impact of indoor smoking on the health insurance costs of the Employer. However, another public purpose was to protect the non-smoking public from the health effects of smoking by others. Employees were permitted to smoke outdoors. The WERC unanimously concluded that smoking in buildings where it was totally banned was not a mandatory subject of bargaining, but that smoking in buildings where there were exceptions was a mandatory subject of bargaining. In that decision, the WERC concluded that a smoking ban was not a "per se" non-mandatory subject of bargaining.

The next issue is analyzing the evidence concerning the purpose of the change to rule 7.42. The employee interests which are clear in this record is the right under Article III to discipline either directly or constructively only for just cause and not on the account of personal habits or characteristics, and the rights guaranteed to be able to maintain the smoking personal habit in their off-duty time pursuant to Article XXV. It is common knowledge that smoking is a habit which for some is hard to break. For those believing themselves compelled to maintain this habit, they must smoke regularly with some frequency during every twenty-four hour period. It is clear that because of the unique twenty-four hour nature of most shifts, the new rule 7.42 essentially makes it very difficult for people to maintain the habit. It is also common knowledge that many people perceive themselves as having difficulty with "withdrawal symptoms" if they fail to regularly maintain the habit.

The Employer has substantial interests in the smoking habit of its employees. It is also common knowledge that smoking has serious health consequences including impacting physical lung capacity and increasing the risk of heart disease, cancer and other lung ailments. Every public and private employer who provides health insurance suffers serious costs related to the medical effects of the habit of smoking. The Employer has substantial interests in the physical

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[9] This is stated in DODGELAND EDUCATION ASSOCIATION V. WERC, 250 Wis.2D 357, 366 (2002) as follows:

> If the employee's legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the school system or the formulation of public policy predominates , the matter is not a mandatory subject of bargaining.

fitness of professional fire fighters. Professional fire fighting requires that employees maintain physical fitness and agility.

The WERC has held that the uniform regulation of a public employer's property may be, but may not always necessarily be, a matter which is not "primarily related." Chief Hook provided the testimony as to the Employer's reasons for its policy. He testified repeatedly that the purpose of this policy was related to Sec. 891.45, Stats. and, to a lesser extent, Sec. 891.455, Stats. While he testified in terms of the public perception relating to those benefits, the better view is that the sole purpose of the Employer in adopting rule 7.42 was to reduce its potential liability thereunder by making it a practical impossibility for those fire fighters who choose to smoke to be able to maintain their smoking habit at all.[10]

As noted above, the WERC has frequently, but not uniformly, held that rules regulating the general public's use of public property which are uniformly applied to the public, employees in question and all others who use that property are functions not "primarily related" to wages, hours, and working conditions. The Employer has made this rule applicable to all who are on Fire Department property. Chief Hook did not articulate any public purpose for extending this rule to the public and did relate his view that the reason it was extended to the pubic was simply for consistency in making it applicable to employees.[11] In this context, the fact that it was so extended is essentially a pretext to effectuate the employee-related purpose specified above. Accordingly, I conclude that the adoption of the total smoking ban of Rule 7.42 specified above violates Article XXIX of the agreement because its sole purpose is to prevent fire fighters from being able to maintain a smoking habit.

4. Remedy

It is appropriate to order the Employer to continue to allow those fire fighters who are permitted to use tobacco products to smoke outdoors at reasonable locations during breaks or off duty time. The practice of the parties is that the Employer has had substantial interests in regulating when and where smoking by fire fighters otherwise allowed to use tobacco products will occur outdoors. The testimony indicates that the discussions on that subject were complex. I, therefore, conclude that it appropriate to require the Employer to provide those employees who are allowed to use tobacco products a reasonable place and time to smoke and to remand to the parties for a specific determination of how this order should be implemented. The parties will be required to report back within thirty (30) days of the date of this award as to whether further proceedings are necessary to specify the remedy.

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[10] See, Tr. pp. 121-4. He also testified at page 137, 141 that smoking outdoors reduced fire fighters' ability to be available for a fire call, but the evidence indicates that this is no different than other outdoor break activities.

[11] Tr. 113-4

INTERIM AWARD

The Employer violated Article XXIX of the agreement by adopting rule 7.42 for the purpose of preventing employees who are allowed to smoke from maintaining their smoking habit. The Employer is ordered to allow fire fighters to have a reasonable designated smoking area outside their fire station and reasonable break times to do so.

Dated at Madison, Wisconsin, this 21st day of June, 2011.

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

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