ARBITRATION DECISION NO.:
048

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Ohio Department of Health

DATE OF ARBITRATION:
February 26, 1987

DATE OF DECISION:
September 9, 1987

GRIEVANT:
Union

OCB GRIEVANCE NO.
None assigned

ARBITRATOR:
Hyman Cohen

FOR THE UNION:
Daniel S. Smith, Esq.

FOR THE EMPLOYER:
John Alexander, Esq.

KEY WORDS:
Smoking
Work Rule Change

ARTICLES:
Article 25 – Grievance Procedures
§25.01 – Process

Article 43 – Duration
§43.02 – Preservation of Benefits

FACTS:
The director of the Ohio Department of Health designated all Department of Health facilities to be non-smoking areas pursuant to the implementation of a policy to eliminate smoking in the work place at the Departments. The Chief of Personnel Services informed the Executive Director of OCSEA about the changes. OCSEA's Executive Director then informed the Department that these changes would significantly affect working conditions and could not be unilaterally imposed by

management. A meeting was held between the Union and Management, but there were no changes made and the policy was implemented as planned. This grievance challenging the no-smoking policy followed.

UNION'S POSITION:

The Union relies on ORC 4117.08(A) to contend that the no smoking policy is a mandatory subject of bargaining, and that by changing the smoking policy, the State violated Article 43 Section 43.02 of the Contract. Smoking is a benefit and can't be taken away by management. There is question as to whether the rule is reasonably related to a work objective or purpose. Furthermore, the Union believes the state failed to establish that the new ban on smoking is more effective than the former policy of having designated smoking areas in minimizing health risks. Reasonableness should be measured by looking at past practices. The employees under past practice chose whether smoking was to be allowed in the work area. Discipline can be imposed in violating the new policy, and other State agencies do not have the same policy. ODH employees thus suffer from disparate treatment.

MANAGEMENT'S POSITION:

It is a management right to ban smoking at the department. The work rule banning smoking is reasonable. The fact that employees were allowed to smoke in the past does not constitute a valid past practice.

ARBITRATOR'S OPINION:

The right to bargain is a statutory right and is outside the arbitrator's scope concerning contractual rights. The issue under ORC Section 4117 may be an unfair labor practice and should be addressed in a different forum i.e. Section 43.02 of the Contract was not violated as smoking is not a fringe benefit.

The new policy constitutes a reasonable work rule and is thus allowable under Section 43.03 of the Contract. The test for reasonableness is if the rule is reasonably related to a legitimate objective of protecting non-smokers from second hand smoke. Medical testimony and opinion of the Surgeon General establishes that passive smoking is harmful and the new no smoking policy reduces health risks more effectively than the old system. Addiction to tobacco does not outweigh the ill effects of a smoke filled work environment. Allowing the smokers to smoke in the breakroom was a trade-off for establishing the no smoking ban in the work area and the use of the break room is not mandatory for non-smokers. "Stop Smoking" classes were held, thus allowing smokers time to deal with a difficult transition. Because the Department of Health has an obligation to set and observe high health standards, the policy is reasonable for the agency and not discriminatory.

The past practice of allowing employee smoking in the work area is not a term or condition of employment for the employees. Allowing the employees to smoke in the past did not modify or amend the Collective Bargaining Agreement, and it is management's right to implement the new policy. The policy is reasonable and shall be allowed to stand.

AWARD:

Grievance is denied.

TEXT OF THE OPINION: * * *

_____X

In the Matter of the Arbitration

-between-

DEPARTMENT OF HEALTH, STATE OF OHIO ARBITRATOR'S OPINION

-and-

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
AFSCME-AFL-CIO

Grievance: Smoking Policy

_____X

FOR THE STATE:

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DATES OF THE HEARING:

February 26, 1987

PLACE OF THE HEARING:

Offices of OCSEA
Columbus, Ohio

ARBITRATOR:

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. 0. Address:
2565 Charney Road
University Heights, Ohio
44118

* * *

The hearing was held on February 26, 1987 at the offices of OCSEA, Local 11, Columbus, Ohio before HYMAN COHEN, Esq. the Impartial Arbitrator selected by the parties.

The hearing began at 10-20 a.m. and was concluded at 6:40 p.m. Post -hearing briefs were submitted on May 19, 1987. * * *

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO, the "Union", is the exclusive bargaining representative for over 35,000 persons employed by the State of Ohio. These employees are included in eight (6) occupationally based bargaining units established by the STATE EMPLOYMENT RELATIONS BOARD (SERB). Slightly more than three hundred (300) of these employees work for the DEPARTMENT OF HEALTH, STATE OF 0HI0, the "State" or "Department".

On July 1, 1906 the first Agreement between the State and the Union, which was negotiated under Chapter 4117 of the Ohio Revised Code (Ohio Public Employee Collective Bargaining Low) went into effect. The Agreement covers all of the employee in the eight (8) bargaining units.

FACTUAL BACKGROUND

On June 3, 1985, roughly one (1) year before the effective date of the current Agreement between the parties, the State put in to effect "a six month trial smoking policy" which provided for smoking and non-smoking areas. By memorandum dated January 3, 1986, the State informed the Department's employees that several policies begun on a trial basis and due to expire December 31, 1985, have been indefinitely extended". Among "the policies" that were indefinitely

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extended was the smoking policy that was effective, June 3, 1985.

Negotiations which culminated in the current Agreement began on February 11, 1986. During negotiations the Union proposed that the rights of smokers and non-smokers were to be determined in supplemental agreements. The position of the State was that it would not agree to supplemental agreements; and that all issues would be dealt with in the Master Agreement. Russell Murray, the Executive Director of the Union, indicated that negotiation, took place under a tight schedule. The state legislature had to approve those items in the Agreement that required appropriations. As a result the target date for resolving the issues that would be included in the Agreement was May 19 or 20, 1986.

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By letter dated September 16, 1986, Thomas J. Halpin, N.D., Director of the Ohio Department of Health, requested William G. Sykes, Director of Administrative Services to designate all Department of Health facilities to be non-smoking areas pursuant to the implementation of a policy to eliminate smoking in the work place at the Department. Dr. Halpin indicated that the Department wanted to implement this policy on January 2, 1967. He went on to state in his letter to Sykes that the policy was intended to be a one-year test to be evaluated beginning in October ***, 1987.". Dr. Halpin's request was approved on October 9, 1986.

On October 17, 19-06, Michael J. D'Arcy, Jr., Chief, Personal Services, notified Murray of the Department's intention to implement its no-smoking policy. D'Arcy also indicated that the

Deportment's employees would be notified of the no-smoking policy on October 24 by inserts which would accompany their payroll checks. In his letter, D'Arcy also set forth that between October 24, 1986 and January 2, 1987 the Department anticipated an informal information campaign as well as smoking cessation classes to assist employees in what "could be a difficult transition to a smoke-free lifestyle in the work place". He added that in addition to smoking cessation classes, other positive approaches were being developed to assist employees who wished to quit smoking. On November 10, 1986, Murray sent a letter to D'Arcy which in relevant part stated:

> "Your proposed change would significantly alter the working conditions of all the employees in the Department of Health. This policy cannot be unilaterally imposed by management. The subject of smoking in the Department facilities is one which can only be changed through the negotiations between the Employer and the Union."

Murray went on to indicate that he was prepared to put together a Union team to meet with management representatives on this **3**

matter. Furthermore, he requested to be contacted to set up the first meeting. A meeting was held on December 17, 1986 at which the Department stated its reasons behind the policy. The meeting concluded with no changes in the policy and that the policy would be implemented as planned.

On October 28, 1986, Lyndell Mills, Union Local President, filed the instant grievance challenging the implementation of the no-smoking policy.

DISCUSSION

1. Failure to Bargain

The Union contend that the State was required to bargain with the Union before it implemented its no-smoking policy. In support of its contention, the Union relies upon Chapter 4117 of the Ohio Revised Code, Ohio's Public Employee Bargaining Law. Section 4117.08 (A) in relevant part, provides that -all- matters pertaining to wages, hours or terms and other conditions of employment * * are subject to collective bargaining between the public employer and the exclusive representative * *."

The Union's claim is raised in the wrong forum- The Arbitrator is without power to require the State to bargain with the Union. Indeed, Article 2S, Section 25,01 of the Agreement, in relevant part, provides that "a grievance is defined as any difference, complaint or

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dispute between the Employer and the Union affecting terms and/or conditions of employment regarding the application, meaning, or interpretation of the Agreement. Whether the State is required to bargain over a no-smoking policy is not within the intent and meaning of the definition

of a grievance agreed to by the parties. It should be noted that under Section 4117.11 (A) (5) the failure of a public employer to bargain collectively with the exclusive representative of the employees constitutes an unfair labor practice. In any event the process of arbitration is concerned with contractual rights, rather than statutory rights. Clearly, the Union's claim that the State is required to bargain with it over the implementation of its no-smoking policy is to be addressed in another forum.

2. Article 43, Section 43-02

The Union asserts that by changing the smoking policy, the State violated Article 43, Section 43.02 which provides as follows:

> §43.02 Preservation of Benefits
>
> To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue **5**
>
> and be determined by those statutes, regulations, rules or directives."

The Union indicates that the smoking policy that was in effect on July 1, 1986 was an Appointing Authority directive which provided benefits to the employees. Thus, by changing the policy, the Union claims that the State has violated Article 43, Section 43.02 by failing to continue such benefits which are not addressed in the Agreement.

After carefully examining the evidence in the record, I have concluded that the State did not violate Article 43, Section 43.02 of the Agreement. The only evidence with regard to Section 43-02 was provided by N. Eugene Brundige, the State's principal spokesperson during negotiations which led to the current Agreement. He provided undisputed testimony on this aspect of the instant dispute between the parties. He stated that Section 43.02 was "presented and accepted" by the parties as "continuing financial and fringe benefits provided by the State which would not be interfered with". He added that there was "no intent to remove" such benefits conferred by the State. I cannot conclude that the smoking policy in existence before January 2, 1987 was a fringe benefit.

Furthermore, the smoking policy in effect on July 1, 1986 was not an Appointing Authority directive as contemplated within the meaning and intent of Section 43.02. Brundige indicated that an **6**

Appointing Authority directive is a "document that has a method of promulgation spelled out." He testified that "it is an order from the Director that has to follow a procedure--it has the force of an order from an Agency." Brundige said, f or example, that the order "has to be journalized". The testimony of Brundige was undisputed concerning the procedure to be followed in order to promulgate an Appointing Authority directive. No evidence was provided at the hearing that the

smoking policy that was in effect on July 1, 1906 followed the procedure set forth by Brundige; nor was there any evidence in the record to indicate that the policy as "journalized". Accordingly, I cannot conclude that the smoking policy in effect on July 1, 1986 constituted an Appointing Authority directive. 3- WORK RULE a- Reasonableness

Having established that the smoking policy in effect on July 1, 1966, was not an "Appointing Authority directive" within the meaning of Section 43.02, 1 turn to consider the no smoking policy which was implemented on January 2, 1(87. 1 have concluded that the policy constitutes a work rule. Thus, the central inquiry of the instant dispute is whether the no smoking policy is a "reasonable" work rule which is required under the terms of Section 43-03. After carefully examining the evidentiary record, I have concluded that the no

smoking policy or work rule is reasonable.

The test of reasonableness of a plant rule was provided in Robertshaw Controls Co., 55 LA 283, 286 (Block, 1970), where the Arbitrator stated: "The test is whether or not the rule is reasonably related to a legitimate objective of management; * *." In upholding a no-smoking rule the Arbitrator in *Snap-On-Tools Corp*., 87 LA 785, 789 (Berman, 1966) stated: "A rule is reasonable if it uses appropriate means to accomplish a legitimate objective".

Furthermore, the Arbitrator in *Schein Body & Equipment Co., Inc*., 69 LA 930, 936-937 (Roberts, 1977) indicated that the test of the reasonableness of a work, rule is whether or not the work rule is related to the legitimate business objectives of the Company * *. However, he added that: "To a certain extent, the determination of the reasonableness of a rule or regulation involves the balancing of interest with the Company's legitimate business requirements to be considered on one side of the scale and the employee's right to exercise personal freedoms free from unnecessary interference
(except by government) on the other side of the scale". It is in light of these considerations that the no smoking policy is to be assessed.

b. MEDICAL EVIDENCE

The Union raises the query as to whether the work rule is reasonably related to its object or purpose. At the outset of this

discussion it should be noted that the Department of Health does not have "business objectives" or "business requirements". It is a public agency, which is responsible for safeguarding the health and promoting positive health practices of Ohio citizens.

In questioning whether the work rule is reasonably related to its object or purpose, the Union claims that the State has not established that the ban on smoking minimizes health risks more effectively than the old smoking policy which designated smoking areas. This brings me to the testimony of Dr. John J. Picken, Medical Director, Pulmonary Services, Riverside Methodist Hospital, in Columbus, Ohio. He indicated that in 1980, studies established an incidence of lung

cancer for non-smokers who lived with smokers and for non-smokers who worked in smoke filled work environments. Dr. Picken stated that the causal relationship of lung cancer in the work place is accepted by practitioners in the field. He said that cigarette smoking produces such toxic substances as carbon monoxide gas, hydrogen cyanide, nitrogen dioxide, tar and nicotine. He said that the nicotine in tobacco is a potent stimulant and is addictive. Dr. Picken went on to state that there is “no level that is safe” concerning the adverse effects of smoking. He stated that the non-smoker is exposed to a variety of carcinogens and poisons which cannot be remedied by most filtration systems in office buildings. He testified that **9**

Separating non-smokers from smokers in a room has no effect. The gaseous phases emitted by the smoker are minute and are diffused everywhere throughout a building. Dr. Picken stated that if a
non-smoker has bronchial ashtma, he is immediately affected by smoking within the some room. Dr. Picken indicated that on-going research has shown a link between respiratory infections, high blood
pressure and heart attacks by non-smokers and breathing cigarette smoke.

Dr. Picken then referred to the 1986 Surgeon General's Report: The Health Consequences of Involuntary Smoking, in which, in his introduction to the Report, Dr. E. Everett Koop, Surgeon General stated:

> "As both a physician and a public health official, it is my judgment that the time for delay is past; measures to protect the public health are required now. The scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke.
>
> The data contained in this Report on the rapid diffusion of tobacco smoke throughout an enclosed environment
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>
> suggest that separation of smokers and nonsmokers in the same room or in different rooms that share the some ventilation system may reduce ETS exposure but will not eliminate exposure. The responsibility to protect the safety of the indoor environment is shared by all who occupy or control that environment.
>
> Cigarette smoking is an addictive behavior, and the individual smoker must decide whether or not to continue that behavior, however, it is evident from the data presented in this volume that the choice to smoke cannot interfere with the nonSmokers’ right to breathe air free of tobacco smoke. <u>The right of smokers to smoke ends where their behavior affects the health and well-being of others;</u> furthermore, it is the smokers’ responsibility to ensure that they do not expose nonsmokers to the potential harmful effects of tobacco smoke.

[Emphasis added.]

I have concluded that the State established that the inhalation of tobacco-smoke polluted indoor air by a non-smoker (“passive smoking”, or “side-stream smoke”), is a health hazard. In *United Telephone Co. of Florida*, 78 LA 865, 870 (Clarke, 1982), both

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the agreement between the parties and the Occupational Safety and Health Act of 1970 required the Company to provide a healthy and safe working place for employees. The failure to do so subjected the Company to liability under the agreement. In *United Telephone*, the Arbitrator stated the following about the number of studies regarding the effects of passive smoking which were produced by the Company:

> “Apparently reasonably well controlled studies have found increased risks of cancer, negative cardiovascular effects, and negative respiratory effects in persons chronically exposed to passive smoking. Correlation does not necessarily imply causation. In other words, the effects noted in the studies summarized in Company Exhibit No. 3 may have been caused not by passive smoking but by other factors. The possibility that other factors have produced the effect does not prohibit the employer from logically concluding that smoking may be a causative factor in producing the effects noted and attempting to reduce its potential liability from involuntary passive smoking”. At page 870

Based upon the evidentiary record, the State has established

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that the ban on smoking minimizes health risks more effectively than the old smoking policy which establishes designated smoking areas. As stated in not prohibit the employer from logically concluding that smoking may be a causative factor in producing the effects noted * * from involuntary passive smoking." Indeed, Dr. Picken indicated that “the causal relationship of lung cancer in the work place is accepted by practitioners in the field. As I have already stated, Dr. Picken testified that “no level" of exposure is safe for non-smokers breathing in the minute gaseous phases from tobacco smoke. His testimony was fortified by detailed explanation, and studies (1986 Surgeon General's Report and the National Academy of Sciences Study). I find his testimony along with these studies to be of considerable probative weight. Given the overall purpose of the Department of Health, I cannot conclude that the no smoking policy, effective January 2, 1987, is unreasonable.

c. Effects on Smokers and Non-Smokers

Gracie James, Health Planning Administrator for the Department, testified that she suffered ill effects due to persons, smoking under the old policy. She stated that the immediate effect that she experienced included sore throats, headaches, watering of eyes, coughing and sneezing. Darlene P. Kreiser, Program Consultant,

Ohio Education Program on Smoking and Health, Division of Chronic Diseases, Department of Health quit smoking about twelve (12) years ago. Under the old policy she said that she experienced “headaches, prolonged sinus congestion and/or nausea * * when she transferred from a private non-smoking office to a partitioned work area.

The testimony of James and Kreiser is to be contrasted with the testimony of Frieda B. Ivery and Mary K. Thompson, who were bargaining unit members, and, who were also smokers. Ivery said that the ban on smoking has caused her to have a lack of concentration; she has suffered weight loss, and is irritable. She went on to say that it has affected her work in a negative manner. Ivery added that while at work she concentrates on wanting a cigarette; and not being able to smoke burns up a lot of energy. Thompson indicated that she was nervous under the new policy. She does not concentrate on her work and finds herself agitated with other employees. Thompson has gained weight since the implementation of the ban on smoking and has experienced physical discomfort.

Dr. Picken testified that the deprivation of smoking of smokers causes temporary adverse physiological and psychological reactions. But there are also immediate adverse physiological effects to non-smokers from side-steam smoke. . It Should be pointed out that where smoking is permitted in the work place, non-smokers are **14**

required to undergo involuntary exposure to tobacco smoke- For the most part, smokers do so involuntarily because of the very addictiveness of smoking. Neither interest can be dismissed as frivolous. However, in weighing and balancing the interests, I cannot conclude that addiction to smoking tobacco outweighs the ill effects of a smoke filled work environment, given the testimony of Dr. Picken and the 1986 Surgeon General's Report.

Nancy Issari; a bargaining unit member, and a non-smoker “ perferred to work under the old policy”. She acknowledged that other non-smokers had problems with smokers Linder the old policy. She referred to an employee who suffered from art allergy. Under the old policy, Issari said, the allergic employee relocated several times.

It should be pointed out that under the old policy an open work facility could be declared a non-smoking area, at the request of a non-smoker. Thus it was the non-smoker, rather than the State, who took the initiative in seeking to prohibit smoking in his or her are.). In light of the addictive nature of smoking and the immediate adverse effects of abstaining, it was left to the non-smoking bargaining unit rnember to declare part of an open work facility a non-smoking area.

Furthermore, D'Arcy testified on the unfairness of the old smoking policy. The “officials” of the Department who had private **15**

offices could smoke, but if an official leaves his his office to see his secretary, the official is prohibited from smoking. This was because supervisors under the old policy could smoke in their closed private offices while the majority of bargaining unit members were in open office facilities which.. as I have already indicated, could be declared a no smoking area at the request of a

non-smoker. On balance, the factors in favor of the ban on smoking outweighs the factors in support of the old smoking policy. The mission of the Department and the benefits to the non-smoker weigh heavily in favor of the ban.

d. Break Room

Evidence at the hearing indicated that under the new policy non-smokers complain about the "break areas" where they are able to purchase “snacks and drinks”. These areas were said to be . saturated with smoke" and Mills testified that non-smokers try to avoid the area. Under the old policy, the break, areas were not as concentrated with smoke. Furthermore, before January 2, 1987 the break room was divided into smoking and non-smoking areas. Issari, who is a non-smoker, confirmed that the third floor break room is "thick with smoke” under the new policy. She ridded that "several non-smokers have problems” with the third floor break room. Issari said that she does not remain downstairs in the break room or in the third floor break-room. When she gets a beverage she brings it **16**

Upstairs. Using facilities outside of the building takes up too much time according to Issari. Dr. Picken testified that the higher concentration of smoke in the break room is more dangerous to the non-smoker than the smoke that the non-smoker was exposed to at work, under the old policy.

It should be underscored that the critical inquiry in this case is over the reasonableness of the policy which was effective on January 21, 1987. The ban on smoking by the State created a trade off, with the smoker being able to smoke in the break room. The non-smoker benefited from the lack of smoke in the work area but was subjected to smoke in the break room. The "cost” to the non-smoker for a smoke free work place is a smoke filled break room if the non-smoker wishes to utilize the break room> Issari, a non-smoker, indicated, she does not remain in the downstairs breakroom or the third floor breakroom. She purchases her beverage and brings it back to the office. The point to emphasize is that the non-smoker can easily avoid the break room or the non-smoker can enter the break room solely for the purchase of a snack and beverage, without remaining in the room. It should be emphasized that the non-smoker's use of the break room is discretionary. In light of the mission of the Department and the medical and scientific evidence produced at the hearing, the benefits from the ban on smoking at its **17**

work facilities outweigh the detriment caused to nonsmokers who at their discretion take their break in the break room where smoking is permitted. Furthermore, in light of the difficulties faced by smokers who are required to abstain from smoking in the work place, it is reasonable to permit them to do so during limited daily segments in the- break rooms. In addition, smokers are given other opportunities to smoke during their meal periods, provided that they do so away from the work facilities.

d. PAST PRACTICE

The Union claims that “Arbitrators also measure reasonableness by looking at past practice.” The past practice alluded to by the Union involves employees who “chose whether smoking was allowed in the work area”. The question of "past practice” involving a ban on smoking in locker rooms, rest rooms and hallway's and restricting smoking to the lunch room during rest and lunch

periods
was addressed in *Sherwood Medical Industries*, 72 LA 258 (Yarowsky, 1977). The Arbitrator in relevant part, stated

> "A basic question is whether smoking in the previously accepted areas is a past-practice or whether it is an extra contractual consideration which has no binding force regardless of how well established it may be.
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"Although smoking in the previously permitted areas is a privilege enjoyed by the employees over a considerable period of time, the Arbitrator has found that the revision in the plant room is a reserved management decision because it is of a discretionary nature and tile motivation for making the revision is nondiscriminatory It is not aimed solely at employees who smoke who had taken time away from their work to smoke at unauthorized times. It has application to all employees wishing to smoke on their breaks and lunch periods and restricts the permissible area for smoking to the cafeteria." At page 260.

Referring to the nature of the smoking "benefit", and impacts on terms and conditions of employment, the Arbitrator went on to state:

> "in this particular case, the arbitrator has found that the Company was not guilty of bad faith or intent on being unreasonable in promulgating the new rule for the reason that the privilege of smoking in the previously permitted areas is not identical with the employment relationship as such.
>
> In other words, it is not a term a condition of employment and the work of the employees does not depend upon the continuance of the smoking privilege in the long-standing previously existing smoking areas. This is the essential difference between the unilateral revision of this plant rule and the plant rules cited in the Union's brief. Sharpening knives and paid lunch periods are not peripheral to the employment relationship. Smoking privileges in designated areas in the plant are not of the same nature, especially in view of the accepted plant rule relating to smoking.
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> Although the employer has acquiesced in the practice for a number of years, it is not of that quality of employee benefit that has the effect of modifying or amending management's rights in the Agreement itself." At pages 260-261. (72 LA 260-261)

Thus, as applied to the facts of the instant case, the privilege of smoking under the old policy -is not a term or condition of employment and the work of the employees does not depend upon the continuance of the smoking privilege in the long standing previously existing smoking areas." Furthermore, the privilege of smoking "is **20**

not of that quality of employee benefit that has the effect of modifying or amending the management rights in the Agreement itself."

f. Discipline Under the New Policy

The Union states that a smoker can be disciplined for violating the new policy. Thus, according to the Union, "ultimately a long time employee who is unable to quit smoking may be put in jeopardy of losing his or her livelihood ".

The very addictiveness of the smoker strengthens. The justification for the State's policy which was effective January 2, 1987. Such addition keeps people smoking despite cogent reasons for stopping. The weight of medical and scientific evidence produced at the hearing suggests that continued exposure to tobacco smoke poses a serious health threat. The addiction to cigarettes by smokers strengthens the justification for the State's prohibition to do so rather than leaving it to fellow non-smoker employees to choose whether smoking should be allowed in the work area. In any event, based upon the evidence in the record, given the Department's purpose rind the benefits to be derived by non-smokers from banning smoking in the work area outweighs the compelling need of smokers who by their habit cause harmful effects in the work, place.

4. Promulgation and Implementation of the

New Policy, Effective January 2, 1987

It is well established that an employer may establish and enforce plant rules to insure the health and safety of employee. *United Telephone Co. of Florida* 78 LA 665, 869-870. (Clarke; 1982). The Ohio Department of Health is the public agency responsible for safeguarding health and promoting the positive health practices of the citizens of the State of Ohio. The Department of Health's promulgation and implementation of the policy in question is consistent with its mandate.

It has been emphasized that "sound industrial relations policy dictates that abrupt changes in rules should be accompanied by a gradual educational process." Co., 6 LA 430, 434 (Healy, 1946). Between October 24, 1986 and January 2, 1967, the effective dote of the policy, the State conducted on internal information campaign. Smoking cessation classes were conducted to assist employees in overcoming the "difficult transition to a smoke-free lifestyle in the work place". Ivery indicated that she was "aware of the program to stop smoking". Under the circumstances, the State was reasonable in the manner in which it sought to accommodate smokers to the ban on smoking.

5. Application of Ban on Smoking to the Department of Health

The Union points out that the "Agreement between the parties

covers all state employees in eight (6) occupational bargaining units, and not only those employees in the Department of Health. Other Departments of the State do not have policies which ban smoking. According to the Union the prohibition on smoking discriminates not only between employees covered by the some Agreement, but between State employees who work on different floors in the same building. It should be underscored that the mission of the Department is a factor of great weight in this decision. As the Department, in relevant part, stated for its purpose in promulgating its no-smoking policy:

> The Surgeon General has indicated that cigarette smoking is the single most important preventable cause of death rind illness in America. The personal health hazards of smoking have been well documented. Many nonsmokers experience irritation from sidestream smoke that could affect their ability to work efficiently or their ability to have a positive attitude about the workplace. Sufficient evidence is now available to document the acute and long-term hazards of sidestream smoke.
>
> The labor contracts with District 1199 and OCSEA mandate that the

> Agency/Employer provide a safe and healthful work environment. Executive Order 83-62 also addresses this issue. The Ohio Department of Health takes these obligations seriously.
>
> As the public health agency responsible for safeguarding health and promoting positive health practices of Ohio citizens, the Ohio Department of Health has an obligation to set and observe high standards of health practice.

In light of the Department's purpose, there is sufficient justification for no-smoking policy as opposed to the policy in other departments of the State.

6- § 3791.031

As a final consideration, I turn to Ohio Revised Code §3791.031 which is entitled “non-smoking areas in places of public assembly”. The statutory provision recognizes that the Department may include, but does not require that an entire office complex constitute a “no-smoking area”. Thus, § 3791.031 is a factor, albeit not a weighty factor in arriving at the conclusion that the non-smoking policy is reasonable.

CONCLUSION

The no smoking policy effective January 2, 1967 is reasonably

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related to a legitimate objective of the Department, namely, safeguarding the health and promoting health practices of Ohio citizens. The example it sets by implementing the ban on smoking in it's own Department is consistent with its public duties. Moreover, the Department's no smoking policy was an appropriate means to accomplish its objective. Finally, in the weighing and balancing of interests, the mission of the Department and the benefits from a smoke-free work environment outweighs the smokers compelling need to smoke.

THE AWARD

In light of the aforementioned considerations, the ban on smoking, effective January 2, 1987 is reasonable.

Dated: September 9, 1987
Cuyahoga County
Cleveland, Ohio

_____
HYMAN COHEN, Esq.
Impartial/Arbitrator
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