CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

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| In The Matter of Arbitration<br>Between: | * | |
| THE STATE OF OHIO<br>Department of Public Safety<br>State Highway Patrol | * | March 25, 1988<br>Arbitrator's No. I JD 3-88<br>Grievance Number 275<br>Greenwood<br>15-03-010188 |
| -and- | * | |
| THE FRATERNAL ORDER OF POLICE<br>Ohio Labor Council, Inc.<br>State Unit I | * | Decision Issued<br>August 11, 1988 |

APPEARANCES

FOR THE STATE

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| Jack Burgess | Chief of Arbitration Services |
| Captain J. M. Demaree | Personnel Officer |
| Lt. D. L. Anderson | Management Representative |
| Dr. John Picken | Witness |
| Michael D'Arcy | Chief, Personnel Services, Department of Health |

FOR THE FOP

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| Deborah Bukovan | Attorney for the OLC |
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ISSUE: Protest against unilateral smoking ban.

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SMOKING BAN GRIEVANCES -- BACKGROUND

Two grievances, one initiated by a Highway Patrol Dispatcher, the other by a State Trooper, protest implementation of the final phase of a graduated smoking policy. The grievances were combined into a single dispute on behalf of the entire Bargaining Unit. The focus of the Union's position is that the new regulations constitute unilateral changes in working conditions and abolishment of binding past practice. While the Union does not challenge the reasonableness of the policy, it urges that the State violated its legal and contractual obligation to negotiate before circumscribing employment rights.

On March 13, 1987, the Director of the Ohio Department of Highway Safety announced a two-stage smoking policy. The first stage, effective April 1, 1987, established limited areas where smoking was permitted only during breaks and meal periods. It was designed to wean smokers over nine months after which indoor smoking was to be prohibited altogether. The relevant features of the program were as follows:

> A. From the effective date until January 1, 1988, there will be designated smoking areas for use during lunch periods and breaks only. Smoking in restrooms is prohibited. After January 1, 1988, there will be a policy prohibiting smoking in all facilities and areas of the Department of Highway Safety. [Emphasis added.]

. . .

C. There will be space set aside in cafeterias and special dining rooms clearly designated as non-smoking.

D. ODHS will institute an educational program designed to assist employees in reducing and eventually eliminating smoking in the workplace and in maintaining compliance with departmental policy.

. . .

G. Smoking while driving state vehicles is prohibited. It is also prohibited when driving . . . private vehicles on state business, while accompanied by another employee.

H. Any employee violating this policy will be subject to appropriate disciplinary action.

The initial phase was accepted by the Unit. The relegation of smoking privileges to limited times and isolated areas was not grieved. There was one grievance over Item G of the policy forbidding smoking in state vehicles. Recognizing that Item G would be almost impossible to enforce and probably was unnecessary when all occupants of a vehicle were smokers, the Department partially granted the grievance by amending Item G as follows:

> When driving a state vehicle or private vehicle on state business, smoking is prohibited if there are non-smokers in the vehicle.

The Union did not pursue its grievance thereafter.

The first stage of the policy must have had significant impact on smoking employees of this Unit, especially Dispatchers. They were no longer permitted to indulge their habit at their work stations. At Highway Patrol posts, they were restricted to smoking in annexed garages and/or outbuildings. Dispatchers had, at most, three periods during which they could smoke, one lunch break and two scheduled work breaks. However, there was no guarantee that they would receive any or all of the breaks on every shift. Article 22, §22.01 of the Agreement conditions their meal breaks on available relief:

> The Highway Patrol will provide a lunch break for Dispatchers when possible. When there is an officer available, the shift supervisor will attempt to relieve the Dispatcher for a lunch break, not to exceed one-half (½) hour, at or near the halfway point through the shift. If this is not feasible due to the officer's work load, then a break will be provided when feasible. If during the break, a situation arises that it is necessary for the officer to return to his duties, the Dispatcher will return to dispatching duties.

The grievances at issue in this dispute were submitted on January 1, 1988, the day that the designated smoking places were eliminated and indoor areas of all Highway Patrol posts became smoke-free environments. The Department denied the claims, contending that the policy was fully justified in view of the State's overriding moral, legal, and contractual responsibility to protect

and preserve a healthy working environment. In the Patrol's view, the ban did not impinge on any ossified working conditions nor did it rescind a "benefit" guaranteed by an immutable past practice. If there was a practice, according to the Employer, the conditions upon which it was founded disappeared in 1986, when the Surgeon General of the United States completed a study and issued findings confirming the extremely deleterious effects of side-stream and ambient smoke on nonsmokers.

APPEAL TO ARBITRATION;
THE PROCEDURAL DEFENSE

The grievances remained unresolved and the Unit appealed to arbitration. A hearing convened in Columbus, Ohio on March 25, 1988. At the outset, the Patrol challenged procedural arbitrability. Its position was premised on Article 20, §20.04 of the Agreement which provides that class grievances "shall be filed within fourteen (14) days of the date on which any of the like affected Grievants knew or reasonably should have had knowledge of the event giving rise to the class grievance." In the Patrol's judgment the Union missed the fourteen day deadline by a wide margin. All members of the Bargaining Unit had knowledge of the policy in March, 1987. Two weeks after it was announced, it went into effect, and the progressions of the regulation were known to all. Everyone understood that the first phase was to be followed by a second. On

January 1, 1988, the indoor smoking ban would become absolute. In the Employer's view the Union had a "window" within which to grieve, which expired no later than April 15, 1988. It did grieve, but only on the portion of the policy covering smoking in vehicles. The Employer concludes that the Union's nine months of silence concerning all other aspects of the policy waived its grievance rights and abolished its entitlement to an award on the merits of this controversy.

Despite the Patrol's objection to arbitrability, the hearing went forward on the merits. It was understood, however, that the Arbitrator would bifurcate the decision-making process. Arbitrability was to be addressed first and if the Employer prevailed the grievances were to be dismissed summarily without regard to their substantive validity. Within those boundaries, the parties agreed that the Arbitrator was authorized to issue a conclusive award. Arbitral jurisdiction is more specifically defined and limited by the following provisions of Article 20, §20.07:

> 5. Arbitration Decisions
>
> . . .
>
> The arbitrator's decision shall be final and binding upon the Employer, the Fraternal Order of Police, Ohio Labor Council, Inc. and the employee(s) involved, provided such decisions conform with the Law of Ohio and do not exceed the jurisdiction or authority of the arbitrator as set forth in this Article . . .
>
> 6. Arbitrator Limitations

> Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the language of this Agreement.

Following the hearing the parties obtained additional time to prepare and submit briefs.

ARBITRABILITY -- DISCUSSION AND DECISION

1. Guidelines. It is unnecessary to burden this decision with a pedantic analysis of the value of a viable grievance procedure to both the Bargaining Unit and Management. Safety forces in the State of Ohio are prohibited from using strikes or similar economic weapons to enforce demands or redress perceived wrongs. The grievance procedure is the only resource for employees who believe their contractual rights have been abridged by managerial excess or abuse. Therefore, it is important that the process be both flexible and usable. It should not be easily undermined because of inconsequential procedural omissions.

Nevertheless, this Arbitrator lacks authority to elevate his subjective concepts over what the Agreement requires. It is imma-

terial that he may believe the Agreement imposes unnecessary procedural trivialities which can unjustly defeat a grievance before it begins. The negotiators spoke clearly on the subject. They agreed to mandatory time limits and no arbitrator has the power to "improve" the contractual undertaking. As stated earlier, Article 20, §20.07 of the Agreement defines arbitral jurisdiction. It prohibits an arbitrator from imposing any limitation or obligation "not specifically required" by the language of this Agreement. The intent is clear. Arbitral authority is derived from and limited to the language agreed upon at the bargaining table. The language leaves absolutely no room for a decision, no matter how just and appropriate, which goes beyond "the four corners of the Contract."

The pivotal question is whether or not these grievances met the contractually expressed time limitations. If they did not and the Agreement so requires, the grievances will be dismissed regardless of their validity. The Arbitrator can follow acknowledged precedent by interpreting ambiguities and uncertainties so as to favor survival of grievance rights. In the final analysis, however, the negotiated intent will have to prevail.

2. Arguments. The Employer's position concerning timeliness centers on the remedy demanded. The Union's sole contention is that the Employer was obliged to negotiate before it could implement the alleged alteration of working conditions. The Employer calls attention to the fact that the right to demand negotiations, if it existed, was a Union prerogative. It argues:

> The right to negotiate an agreement or its amendments is a right belonging to the Union, as an entity, rather than individual employees. When the Union and its officers . . . became aware of the intent of management March 13, 1987, they could have requested or demanded bargaining under their theory that such was required. [Brief, 5]

The Patrol concludes that the time limit for a policy grievance requesting negotiations began to run when the policy being challenged was announced or placed into effect, and ended fourteen days later:

> Clearly, if the Union had a right to grieve a failure to bargain over this policy, the window to that right opened in March of 1987 and closed in April of 1987. [Brief, 6]

The Union maintains that the timing of these grievances was intentional, not a procedural oversight or omission. The basic policy of April 1, 1987 was deliberately not protested (except with regard to smoking in vehicles) because the Union, as an organization, did not quarrel with it. Although restricting smoking to particular times and locations inconvenienced some employees, Phase 1 was generally approved and desired by the Bargaining Unit as a whole. There was no reason to grieve. It was not until Phase 2 was implemented that the Union felt it necessary to lodge a challenge. The

Union argues that there was no delay whatsoever; the grievances were initiated on the day that Phase 2 materialized.

The Union regards the Patrol's arguments concerning when a policy grievance must be initiated as specious. Article 20, §20.02 defines a grievance as a complaint over "an alleged violation, misinterpretation or misapplication" of the Agreement. This definition, it is argued, pertains to both individual and class grievances. The distinction between the two is that one seeks remedy for a single individual, the other seeks a resolution benefiting all members of the Bargaining Unit. Additionally, class grievances and individual grievances are processed differently. Class grievances begin at Step 3.

Article 20, §20.04 states that class grievances are commenced within fourteen days "of the date on which any of the like affected grievants knew or reasonably should have had knowledge of the event giving rise to the class grievance." [Emphasis added] The "event" upon which these grievances were premised, according to the Union, was not the announcement of a future policy revision. It was the revision itself -- the elimination of all indoor smoking at Highway Patrol posts. The Union urges that the grievances fulfilled all contractual prerequisites and are entitled to receive a decision on their merits.

3. Decision on Timeliness. The grievances are procedurally correct and the Employer's request for summary dismissal will be denied. In arriving at this conclusion, the Arbitrator has been influenced most by the following provisions of the Agreement:

ARTICLE 21 - WORK RULES

§21.01 Copies of Work Rules

. . .

To the extent possible, new work rules and directives shall be provided to the Ohio Labor Council two (2) weeks in advance of their implementation. In the event that the Labor Council wishes to present the views of the bargaining unit regarding a new work rule or directive, a time will be set aside at the regularly scheduled Labor/Management Committee meeting. The issuance of work rules and directives is not grievable. The application of such rules and directives is subject to the grievance procedure.

§21.02 Application

All work rules and directives must be applied and interpreted uniformly as to all members. Work rules or directives cannot violate this Agreement. In the event that a conflict exists or arises between a work rule and the provisions of this Agreement, the provisions of this Agreement shall prevail.

The Arbitrator must assume that §21.01 means what it says, that announcements of work rules are not grievable in and of themselves. It is only when rules are applied that grievance rights materialize. No matter how the smoking policy is characterized, it was a rule. Its last stage, prohibited all indoor smoking. Phase 2 could not have triggered a grievance in March, 1987 because it had not yet been applied. Any grievance before it was applied would have been premature.

By not challenging the policy before April 15, 1987, the Union implicitly acceded to an event. But the event was not something destined to occur nine months later, it had already occurred -- partial limitations on the smoking privilege. The second phase of the policy became an event on January 1, 1988, when something which the Union regarded as a privilege of employment was abolished. The second phase was not applied and did not become an event until indoor smoking was totally eliminated. It was then that the right to grieve vested, not before. It follows that the grievances are timely.

THE MERITS; EXAMINATION OF ARGUMENTS AND OPINIONS OF THE ARBITRATOR

1. Past Practices Under Articles 2 and 3. It is broadly acknowledged that a collective-bargaining relationship is the sum of several parts. While the governing management-labor contract is predominant, it is not the entire undertaking. Contracts are clarified and amended from time to time by written side agreements, grievance settlements, and the like. The relationship may also be refined through practices, or what some have called, "the silent agreement."

Practices are simply mutually recognized ways of doing things. Usually, they evolve over a prolonged period of time in which con-

sistent responses to given circumstances become ingrained in the day-to-day interaction between an employer and a bargaining unit. The responses, if they are indeed mutually recognized (rather than secret) and do not contradict language in the written contract, become binding on employers and employees alike. Thereafter, they are included in an amorphous, unwritten code known as "the common law of the shop."

Archibald Cox once pointed out that practices are essential facets of bargaining relationships because it is impossible for negotiators to foresee every problem, twist, or disagreement that might occur during a contractual term. The parties need a broader framework than provided by the formal written agreement in order to obtain direction in their day-to-day interactions. Cox commented:

> There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. . . . Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.1

It is not unusual for arbitrators, finding no specific contractual support for a grievance, to turn to past practice as the source for an award. Such decision making is appropriate if one

views the "common law of the shop" as controlling, subordinate only to the written law of the shop. However, there is justification for suspecting that past practice alone cannot be the basis for a valid award in a dispute between these parties. Article 20, §20.07 of the Agreement between the State of Ohio and the Ohio Labor Council restrictively defines arbitral jurisdiction as covering "Only disputes involving the interpretation, application, or alleged violation of a provision of this Agreement." If the word, "Agreement" is intended to comprehend only the written document, it is arguable that arbitrators are forbidden to draw their decisions from any other source.

A provocative counter-argument might be that "Agreement" is intended to have broader scope, but fortunately neither of those arguments needs to be addressed. The written document itself incorporates past practice. Article 2 provides:

> **ARTICLE 2 - EFFECT OF AGREEMENT -**
>
> **PAST PRACTICE**
>
> This Agreement is a final and complete agreement of all negotiated items that are in effect throughout the term of the Agreement. No verbal statements shall supersede any provisions of this Agreement.
>
> Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement and which are not specifically provided for or abridged by this Agreement will continue in effect under conditions upon which they had previously been granted throughout the life of this Agreement unless altered by mutual consent of the Employer and the Labor Council.

The Union faces a critical barrier to its argument that smoking indoors was a "right" protected by Article 2. The contractual provision suggests that its intendend scope was limited to a significant degree. The negotiators did not refer to "practices" in the body of the Article, the word appears only in the heading. Moreover, the first sentence of the second paragraph defines the benefits preserved as those "granted by the Ohio Revised Code which were in effect on the effective date of this Agreement."

The Patrol interprets Article 2 narrowly. It maintains that the only past-practice rights which the Union can legitimately claim are those granted by law. When the Agreement became effective, there was no law granting smoking rights. But a law did exist authorizing state agencies to ban smoking. Ohio Revised Code §3791.03, enacted November 15, 1981 (four and one-half years before the contractual relationship), requires the establishment of no-smoking areas in all state buildings and provides that such area may include an entire building. In its post-hearing brief, the Employer stressed the argument that smoking was not a privilege which Article 2 perpetuated. Because the General Assembly enacted a law confirming the Employer's prerogative to prohibit indoor smoking, it is absurd, in the Patrol's judgment, to find that indoor smoking is a right guaranteed by Article 2.

The Patrol notes that the Union did not even refer to Article 2 in its grievances. The obvious reason, according to the Employer,

was that the Article validated the smoking ban and worked against the Union's claim. The argument is stated as follows:

> On the surface it might appear that the Union in this case has made a clerical error and meant to cite Article 2 . . . But there was no indication of that at the hearing or in any discussions with the Employer. More importantly, the Union certainly exhausted its use of Article 2 when it first grieved the smoking policy in April of 1987 and failed to pursue the grievance beyond Step 3. Finally, as regards "past practice" the fact is, as pointed out in the Step 3 answer, Article 2 continues benefits "under conditions upon which they had previously been granted," which, in this case would only be the conditions in 3791.03 which allows the Director of [the Department of Administrative Services] to establish smoke-free areas. Perhaps that's why the Union didn't cite Article 2. It clearly works for the Employer's case.
>
> For the above reasons, it is the Employer's view that the Arbitrator can not find a duty to bargain arising under the contract in this case, and that none should be implied. [Brief, 9-10.]

The Arbitrator interprets Article 2 more broadly than the Employer. While the contractual phrase, "granted by the Ohio Revised Code" does seem to imply that the only rights incorporated in Article 2 are those actually bestowed by the General Assembly, the implication flies in the face of what appears to have been the bargaining-table intent. The title to Article 2, "EFFECT OF AGREEMENT - PAST PRACTICE" signifies that the negotiators meant to preserve practices as well as legislated benefits. This interpretation fits the language of the Article if one reads the verb, "granted,"

as comprehending allowance or permission for any existing practice not specifically prohibited by law. While interpreting the language in this manner may place tortured emphasis upon a single word, the alternative would conflict with what was most probably the negotiated purpose. It would rob the term, "past practice" in the title of the Article of all meaning; because a search of the Ohio Revised Code for legislated "practices" would be futile. It is concluded, therefore, that Article 2 perpetuates and carries forward binding past practices which are not in conflict with the law as it existed when the Contract was ratified and adopted.

The Patrol's assertion that the Union did not cite Article 2 in either of its grievances is accurate. However, the Union did claim that the Phase 2 smoking ban violated Article 3. Article 3 consists of four paragraphs. The first three deal with the possibility that a provision of the Contract might be nullified by a "tribunal of competent jurisdiction." In such instance, the remainder of the Agreement is to survive and the parties are to negotiate for modifications of the invalidated language.

The last paragraph of Article 3 states:

> Amendments and modifications of this Agreement may be made by mutual written agreement of the parties to this Agreement, subject to ratification by the Labor Council and the General Assembly.

In the Arbitrator's judgment, that paragraph stands alone. It

requires the parties to negotiate for in-term modifications of their Agreement, whether or not the desired changes are pursuant to judicial invalidation of a contractual provision. The word, "Agreement" must be regarded as encompassing the entire contractual relationship. Otherwise the practices preserved by Article 2 might be discontinued unilaterally, in clear disregard of what was intended.

There is no question but that indoor smoking was a practice. If it was binding, Article 3 required modifications to be negotiated. But it may not have been binding. Practices which are not binding are always open to abolishment by unilateral action. Therefore, the outcome of this dispute will depend on a determination of this issue.

2. Was the Smoking Practice Binding?

A. Elements of Binding Practices. Almost every arbitrator has had occasion to comment upon and define past practice. Many follow rigid guidelines in determining whether a binding practice exists. Most commonly, they state that a practice must be clear, consistently followed as a repeated response to given circumstances, long lived, and mutually accepted. Some arbitrators have held that a practice is not binding if it pertains to a relatively trivial condition of employment. As will be observed, application of this standard has frequently resulted in decisions upholding no-smoking policies. The theory followed has been that the right to smoke is not truly a condition of employment, immutable to unilateral change.

All arbitrators who have addressed the subject acknowledge that past practices do not bind a party if they conflict with written language of the controlling contract. This makes sense when one recognizes that the role of the "common law of the shop" is to define ambiguities in a written contract and create supplemental benefits upon which the contract is silent. It does not and is not meant to replace or repeal the written agreement.

In examining the standards, the Arbitrator finds that not all of them can be realistically termed either definitions or indispensable requirements of binding practice. Clarity for example is most difficult to achieve since practices, by their nature, are unwritten. If they are written and mutually adopted, they are side agreements, not practices. The fact that a practice is not unequivocally clear does not prevent it from being interpreted and applied by an arbitrator.

The length of time that a practice has existed is only evidence of mutuality. Mutual acceptance occurs in an instant. It is not something that needs to be proven by decades of repetition. In some instances, the fact that an alleged practice has existed for a long time may indicate that an employer found it convenient to follow but never evinced a relinquishment of the power to make changes.

The Arbitrator agrees that consistency is an essential evidentiary element of a practice, but casual departures or inconsistencies do not necessarily mean that an alleged practice does not

exist. In essence, a practice is an informal agreement which comes into being through implicit or explicit recognition and consent. Any such practice which does not violate written contractual provisions is binding, so long as it defines a substantive condition of employment.

B. The Department of Health Decision and Its Precedence. On September 9, 1987, Arbitrator Hyman Cohen issued an award upholding a smoking ban at all facilities of the Ohio Department of Health. The arbitral decision gave scant emphasis to the Union's (Ohio Civil Service Employees Association, Local 11) argument that the ban violated past practice. Cohen concentrated on the finding that the policy reflected a reasonable exercise of the State's prerogative to control the workplace and remove hazards to the well-being of its employees. His conclusion that the smoking privilege was not a binding past practice was partially based on private sector arbitral opinions in which the practice argument was either ignored or discounted on the rationale that smoking was not a significant enough benefit. Arbitrator Cohen held:

> 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 not of that quality of employee benefit that has the effect of modifying or amending the management rights in the Agreement itself." [p. 20-21]

Cohen's ruling was in harmony with a body of private sector decisions. In Lennox Industries, 89 LA 1065 (R. Gibson, 1987), Arbitrator Robert L. Gibson noted that the union had previously failed to protest partial smoking bans in hazardous areas. He adopted the Company's argument that a practice without a specific work rule is nothing more than a "present manner of doing things which the Company can change" at will. His reasoning overcame the Union's past practice argument with the conclusion that smoking is not a benefit of employment. He stated:

> Even though the Union has argued that these prior limitations were reasonable because smoking was prohibited only in hazardous areas of the plant, this Arbitrator is not persuaded that the right to smoke is a condition of employment which must be negotiated. [89 LA 1065, at 1068-9]

In a similar case, Arbitrator Herbert M. Berman held that the union waived its right to demand retention of a long-standing practice permitting smoking by failing to grieve other rules which banned eating and drinking in the workplace. Berman's conclusion that smoking was not a condition of employment subject to change only through negotiations, was footnoted with the following explanation:

> The distinction between practices regarding "employee benefits," which cannot be altered uni-

> laterally, and practices regarding "basic management functions," which can be altered unilaterally, alluded to by Elkouri and Elkouri (4th edition, at pages 444-6), is not helpful here. Although smoking on the job might be considered an "employee benefit" and thus not subject to unilateral change change, the fact that smoking and similar activities have been unilaterally restricted in the past makes it unnecessary to move to a second-level analysis in order to determine whether smoking is a benefit that may not be unilaterally altered. [Snap-on Tools Corp., 87 LA 785; 86-2 ARB ¶8409, fn 7 (H. Berman, 1986)]

The Cohen decision placed substantial reliance on the opinion in Sherwood Medical Industries, 75 LA 258 (S. Yarowski, 1977). Arbitrator Yarowski gave short shrift to arguments that a unilateral smoking ban altered a condition of employment and violated a past practice. He stated simply that the practice did not confer a benefit and, therefore, was open to unilateral amendment:

> Although the employer as 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.
>
> . . .
>
> [C]ontinued expectation that the privilege would remain unchanged is difficult to argue. This is so when the smoking privilege is compared to substantive working benefits such as job classifications, seniority, vacations, paid lunch periods, job bidding, job tenure, and reasonably anticipated work opportunities. The difference lies in the impact of the unilateral action upon bargaining unit employees . . . [72 LA 258, 260-1, & 261-2]

The Arbitrator is not persuaded by these decisions. He especially rejects Arbitrator Berman's rationale as circular and contrary to broadly recognized principles of what practices are and how they fit into labor-management relations. Practices stand on their own, as do conditions of employment they foster. The fact that a unit of employees fails to respond to unilateral abolishment of one practice does not mean that the right to grieve other unilateral intrusions on working conditions has been abandoned. A union's implicit consent to rules abolishing candy bars and soda pop at work stations does not preclude a subsequent grievance over a smoking ban.

Another line of decisions, which the Arbitrator finds to be better reasoned, concedes that an employer is ill served by smoking permissiveness, and should be able to ban the indulgence. However, when the smoking privilege has become a condition of employment supported by binding past practice, the decisions hold that the employer cannot prevail in a grievance challenging unilateral discontinuance. Practices cannot be altered unilaterally during a contractual term. If they are to cease, the cessation must derive from negotations.[2]

The Arbitrator holds that the privilege to smoke in limited areas of Highway Patrol posts was a term of employment confirmed by past practice. If the practice was binding, the Employer was not at liberty to abolish it unilaterally during the term of the Agree-

ment. It was contractually bound to negotiate change with the Union. The single question remaining is whether or not the practice was binding.

C. Conclusion -- Medical Background. Cigarette smoke consists of a combination of interactive chemical substances. Most are health hazards, some which are carcinogens. The Employer presented a volume of medical evidence, including the Surgeon General's 1986 study, to document its contention that side-stream and ambient smoke is hazardous to nonsmokers. Moreover, substances from burning tobacco remain airborne for long periods of time; doorways and walls are not adequate barriers. The deleterious products of smoking circulate through air-exchange systems and infiltrate even smoke-free environments to the extent that the isolated smoking areas within a building do not relieve nonsmokers of the dangers. It is unnecessary to examine the Patrol's evidence exhaustively, because the Union readily admits that smoking in and adjacent to the work area is hazardous to the health of nonsmokers. The Union does not argue that a smoking ban is unreasonable, it claims only the right to negotiate.

The Union's request will be sustained if, and only if, the privilege to smoke in isolated, Phase 1 areas was a binding practice. As stated earlier, no practice is binding if it conflicts with written language of the Collective Bargaining Agreement. The Employer urges that there is a conflict. It points to Article 16,

the Health and Safety Clause which commits the parties to cooperative efforts to assure that work areas are safe. Pertinent portions of Article 16 are as follows:

> §16.01 Mutual Concern
>
> Occupational safety and health is the mutual concern of the Employer, the Labor Council, and employees. The Labor Council will cooperate with the Employer in encouraging employees to observe applicable safety rules and regulations.
>
> §16.02 Compliance
>
> The Employer and employees shall comply with applicable federal, state and local safety laws, rules and regulations and departmental safety rules and regulations.
>
> §16.06 Safety Rules
>
> The Employer retains the right to establish work safety and health rules. When such rules are established, the Labor Council will be notified.

In the Employer's judgment, ambient and side-stream smoke products are so dangerous that any practice permitting them to exist violates the spirit and intent of Article 16.

The Arbitrator does not disagree in principle with the argument. He is compelled to observe however that the absolute ban imposed by the Department of Highway Safety is far more stringent than measures taken by the United States Government as a consequence of the Surgeon General's report. On December 6, 1986, the General

Services Administration issued a regulation requiring supervisors to "strive to maintain an equitable balance between the rights of smokers and nonsmokers." The rule does not ban smoking entirely.[3] Despite the spate of Surgeon General reports on smoking since the early 1970s, the Occupational Safety and Health Administration (OSHA) has yet to establish standards for tobacco smoke in the work place.[4]

It is virtually impossible for an employer to create a totally risk-free environment through rule making. Some hazards must be accepted, and the Arbitrator finds that the parties accepted the hazards of ambient smoke when they formulated their past practice. The concept that the 1986 Surgeon General's report identified the hazards of ambient smoke for the first time is an absolute fallacy. Reports on the subject, containing virtually the same conclusions, were made public as early as 1972.[5] The parties must have been aware of at least some of the dangers when they negotiated their 1986 Contract. Yet the subject never came up at the bargaining table. The Employer waited until the middle of the contractual term to abolish the practice. In the Arbitrator's opinion, the practice by then had become binding and was not amenable to unilateral discontinuance.

An entrenched condition of employment may be immune to non-negotiated extinguishment even when safety hangs in the balance. This principle was unqualifiedly affirmed in a 1980 decision of the

United States Court of Appeals for the Fifth Circuit. The case concerned a smoking ban in an asbestos plant. Even though it had been established through studies by the Surgeon General that workers exposed to asbestos who smoked were ninety-two times more likely to die from cancer than nonsmoking workers, the Court ruled that smoking was a condition of employment which the Company could not unilaterally destroy.6

SCOPE OF AWARD

The grievance will be sustained. The Arbitrator finds that the smoking privilege, as modified by Phase 1 of the Department's policy, continued as a condition of employment insulated by binding practice. When the Employer ruled it out of existence without negotiating, it violated its contractual responsibility.

The award that follows will demand a process, not a result. The Arbitrator fundamentally agrees that indoor smoking should be discontinued entirely. It is a demonstrated hazard which needs to be abolished. The Department's rule-making approach was designed to accomplish a desirable and necessary end with utmost efficiency. However, neither efficiency, reasonableness, justice, nor necessity license a contractual violation. The Employer is required to negotiate before it acts against a binding past practice.

The Arbitrator observes that there are two avenues for negotiation. The first and most obvious is a bargaining-table meeting

between the parties on the subject of smoking. Article 16 offers another alternative. §§16.07 and 16.08 provide for the establishment of a Joint Safety Committee consisting of three Employer and three Union designees. The Committee's responsibilities are outlined in §16.08, which states in part:

> The committee's general responsibility will be to provide recommendations for a safe and healthful workplace, by recognizing hazards, recommending abatement of these hazards, and recommending education programs. The committee shall:
>
> a. Meet on a definitely established schedule, but in no case less frequently than once a quarter;
>
> b. Make periodic inspections to detect, evaluate, and offer recommendations for control of potential health and safety hazards to the appropriate administrator;
>
> c. Promote health and safety education;

The Arbitrator observes that the Committee's mission is to be carried out jointly by Management and Union representatives acting as a unit. If the Employer's evidence were to hold up under the Committee's scrutiny, the Union would be hard-pressed to justify rejecting an absolute smoking prohibition.

AWARD

The grievance is sustained. The Department of Highway Safety is directed to set aside Phase 2 of the smoking policy and return to Phase 1 which permitted indoor smoking at limited times and in isolated locations.

If the Department wishes to pursue the creation of an entirely smoke-free environment it may do so by negotiating with the Union.

Decision Issued:
August 11, 1988

Jonathan Dworkin, Arbitrator

FOOTNOTES

1 Cox, Reflections Upon Labor Arbitration, 72 Harvard L. Rev. 1498 (1959), as quoted by Reardon & Leahy, Does Past Practice Protect Unions and Their Workers?, 37 Labor L.J. 646, 648 (1986)

2 See e.g., Parker Pen USA, 90 LA 489 (G. Fleischli, 1988); H-N Advertising & Display Co., 88 LA 329 (W. Heekin, 1986); Dental Command, 83 LA 529 (A. Allen, Jr., 1984); United Sanitary District, 82-2 ARB ¶8420 (A. Koven, 1982).

3 Crocker, Controlling Smoking in the Workplace, 38 Labor L.J. 739, 743-4 (1987); See also, Schein, Should Employers Restrict Smoking in the Workplace?, 38 Labor L.J. 173, (1987); Growth on Restrictions on Smoking in Workplace, 126 Analysis 61 (LRR, 1987).

4 Crocker, Supra 740-1.

5 See Crocker, Supra 739, which cites The Health Consequences of Smoking; A Report of the Surgeon General, US Department of Health and Human Services (1972).

6 Johns-Manville Sales Corp. vs IAM, 621 F.2d 756 (5th Cir. 1980).