January 7, 1986

MEMORANDUM

Re: Union Bargaining Rights Under GSA Smoking Restriction Rule

I. INTRODUCTION

On December 8, 1986, the General Services Administration ("GSA") issued a final rule (the "Rule") regarding smoking in GSA-controlled buildings and facilities. 51 F.R. 44258, 41 CFR Part 101-20. Section 2(g) of the Rule provides:

> Prior to implementation of this regulation, where there is an exclusive representative for the employees, the agency shall meet its obligations under 5 U.S.C. Chap. 71. In all other cases, agencies should consult directly with employees.

An earlier version of section 2(g) referred to 5 U.S.C. 7117 instead of 5 U.S.C. Chap. 71. This Memorandum discusses the significance to federal employee unions of the current formulation of section 2(g) of the Rule.

The earlier reference to 5 U.S.C. 7117 suggests that GSA originally viewed the final smoking rule in its entirety as "Government-wide" in scope. Federal employee unions are entitled, at most, to consultation rights under 5 U.S.C. 7117 with respect to "Government-wide" rules. GSA's subsequent decision to refer to 5 U.S.C. Chap. 71 in the Rule rather than to 5 U.S.C. 7117 apparently reflects GSA's belated recognition that the Rule is not, in all respects, "Government-wide," and that federal employee unions accordingly have the statutory right under 5 U.S.C. Chap. 71 to bargain over at least some

aspects of the Rule. As explained below, we conclude that collective bargaining agreements already in place -- particularly those containing provisions dealing expressly with workplace smoking -- must be honored during the term of such agreements.

We believe, in addition, that federal employee unions can reasonably take the position that important aspects of the Rule -- relating primarily to general office space -- cannot be implemented by any agency without according full bargaining rights to the union or unions rperesenting agency employees.

II. ANALYSIS

A. Union Consultation and Bargaining Rights Regarding Workplace Smoking

5 U.S.C. Chap. 71 grants federal employee unions various rights with respect to "conditions of employment." Conditions of employment are defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . .." 5 U.S.C. 7103(a)(14). The Federal Labor Relations Authority ("FLRA") has recognized workplace smoking as a condition of employment under 5 U.S.C. Chap. 71. See Social Security Administration, 19 F.L.R.A. No. 47 (1985). This is consistent with court and administrative decisions defining "conditions of employment" under statutes creating collective bargaining rights for non-federal employees. See Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 529 n.4 (9th Cir. 1968) ("company rules concerning coffee breaks, lunch periods, smoking, employee

discipline, and dress are mandatory bargaining subjects") (citations omitted); Chemtronics, Inc., 236 N.L.R.B. 178 (1978) (unlawful to deny employees smoking privileges because of union activities); Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 459 A.2d 452, 455 (Pa. Commw. 1983).

Because smoking is a condition of employment, rules governing it may not be imposed or changed by an agency without according federal employee unions their statutory rights to be consulted, or to bargain collectively, over the change. If the change results from a "Government-wide" rule, consultation rights are triggered; otherwise, full collective bargaining rights are triggered. The difference between these rights is substantial.

The consultation rights granted by 5 U.S.C. 7117(d) for "Government-wide" rules are quite limited. They include being informed of a proposed change in working conditions, having a reasonable time to present views and recommendations regarding it and having those views or recommendations considered by the agency. Section 7117(d) also requires the agency or agencies involved to provide the union a written statement of the reasons for any final action. Only unions that represent at least 3,500 employees have consultation rights regarding "Government-wide" rules under section 7117(d). See 5 C.F.R. 2426.11.

In contrast to the limited consultation rights that federal employee unions have with respect to "Government-wide" rules, such unions have rather extensive rights over matters subject to mandatory bargaining. Agencies must negotiate in good faith with union representatives concerning any changes in working conditions subject to mandatory bargaining. In the absence of agreement, negotiations must continue until impasse has been reached, at which point a mediator may be called in or the parties may adopt other methods to assist in the negotiations. If the impasse remains unresolved following mediation or other voluntary arrangements of the parties, the issue on which impasse has been reached can be referred by either party to the Federal Service Impasses Panel, an entity within the FLRA. 5 U.S.C. 7119.

The Federal Service Impasses Panel is empowered to "promptly investigate" the impasse, hold hearings, take sworn testimony and "take whatever action is necessary and not inconsistent with [5 U.S.C. Chap. 71] to resolve the impasse." 5 U.S.C. 7119(c)(5)(B). Any such action by the Impasses Panel is "binding on [the] parties during the term of the agreement." 5 U.S.C. 7119(C)(5)(c). This provision has been interpreted to authorize the Panel to impose settlement terms on the parties. See, e.g., Council of Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984). Thus, the statute provides a mechanism whereby the position advocated by either party may be imposed on the other. (Indeed, the parties might

find themselves bound to provisions that neither party proposed.)

B. Union Bargaining Rights Under the GSA Smoking Rule

In many agencies where employees are represented by unions, some aspects of workplace smoking are determined in collective bargaining agreements. To the extent that any workplace smoking issue has been so resolved in a collective bargaining agreement, that agreement will continue to govern the matter throughout its term, even if it conflicts with the GSA's final smoking rule.1/

A collective bargaining agreement need not be in writing, in whole or in part.2/ Accordingly, it is possible that in some agencies, workplace smoking matters have been determined as part of collective bargaining negotiations between the agency and a union, but that the agreement of the parties has not been embodied in a document. The absence of a

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1/ 5 U.S.C. 7116(a)(7) provides in pertinent part that it is an unfair labor practice for an agency "to enforce any rule or regulation [with an exception not pertinent here] which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed." As explained in the Conference Report on the Civil Service Reform Act, 5 U.S.C. 7116(a)(7) "generally prohibits [a] governmentwide rule or regulation from nullifying the effect of an existing collective bargining agreement." H. R. Rep. No. 1717, 95th Cong., 2nd Sess. 155 (1978).

2/ 5 U.S.C. 7103(a)(12) defines "collective bargaining" to include "execut[ing], if requested by either party, a written document incorporating any collective bargaining agreement reached."

written memorialization of a collective bargaining agreement should not diminish the union's right under 5 U.S.C. 7116(a)(7) to rely on the agreement as precluding enforcement of the Rule to the extent the Rule conflicts with the agreement.

To the extent workplace smoking issues have not been addressed in a collective bargaining agreement (whether or not in writing), the Rule will obviously not be in conflict with the agreement. In such a situation, or where there is no collective bargaining agreement, a union's right to bargain over implementation of the Rule will depend on the extent to which the pertinent provisions of the Rule can be said to be "Government-wide" in scope.

5 U.S.C. Chap. 71 does not define the phrase "Government-wide" rule, nor is the legislative history clear on the point. But the FLRA has addressed the question. In National Treasury Employees Union, 3 F.L.R.A. 748 (1980), the FLRA held that a GSA rule regarding parking spaces, applicable to "vehicle parking facilities in and around existing government-owned properties under the custody and control of GSA," is a Government-wide rule for purposes of section 7117(a)(1). In view of its decision in the Treasury Employees case, it is highly unlikely that the FLRA could be convinced to hold that -- because GSA's final smoking rule does not

apply to all federal employees -- no provision of the Rule qualifies as "Government-wide."[3/]

But although some aspects of the Rule probably would be held to be "Government-wide,"[4/] the Rule leaves the ultimate decision on some matters -- most prominently the regulation of smoking in general office space and corridors, lobbies and restrooms -- to each agency. Agency action on such matters would not constitute "Government-wide" rules. As a consequence, federal employee unions should be entitled to full bargaining rights before any agency seeks to change the extent to which smoking is permitted in general office space, corridors, lobbies and restrooms.

Significantly, the Rule also leaves to each agency the development of enforcement guidelines. In addition, the Rule permits, but does not require, each agency to adopt more stringent requirements than those established by the Rule. Any agency proposal concerning enforcement or to impose more

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3/ In reaching its conclusion in Treasury Employees, the FLRA rejected a literal reading of "Government-wide," because "it does not appear that there is any regulation which literally affects every civilian employee of the Federal Government." Id. The FLRA held that Government-wide rules include rules "generally applicable throughout the Federal Government, i.e. [that] apply to the Federal civilian work-force as a whole, though not, of course, to every Federal employee." Id.

4/ The Rule unconditionally proscribes smoking in all GSA building auditoriums, classrooms, conference rooms, elevators, medical care facilities, libraries and hazardous areas.

stringent restrictions on smoking then required by the Rule would not be a "Government-wide" rule, and would therefore be fully bargainable.

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