CASES CHALLENGING WORKPLACE SMOKING RESTRICTIONS

CASES OF SPECIAL INTEREST

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INTRODUCTION

The cases in this section are divided according to the status of the employee challenging the restrictions -- non-union or union.

The case of *Kurtz v. City of North Miami*, in 1993, appeared to provide a significant boost to efforts challenging workplace smoking policies. A Florida appeals court struck down North Miami's regulation requiring applicants for positions with the city to sign an affidavit stating they had not smoked during the previous year. That ruling, however, was overturned by the Florida Supreme Court in 1995. The U.S. Supreme Court refused to review that ruling, allowing the North Miami regulation to stand.

In the union employee cases, unions typically have challenged an employer's unilateral imposition of a smoking ban as an unfair labor practice. In general, the unions have been successful in forcing employers to negotiate about smoking bans, although they may be less successful in the future as workplace smoking restrictions become more prevalent. It should be noted that requiring an employer to negotiate on a particular issue is not a requirement that the parties ultimately reach agreement or that the dispute must be resolved in a particular way.

NON-UNION EMPLOYEE CASES

DECISIONS IN FAVOR OF EMPLOYEES

[1] *Best Lock Corp. v. Review Board of the Indiana Dept. of Employment and Training Services*, 572 N.E.2d 520 (Ind. Ct. App. 1991). [11-12-93]

The employer, Best Lock Corporation, had a company rule that prohibited employees from using tobacco, alcohol and drugs at anytime -- whether at work or away from work (the TAD rule). Best Lock fired Daniel Winn for violating the TAD rule when Winn admitted he had been drinking on several occasions four years previously, shortly after Winn started working at Best Lock. Winn sought unemployment benefits, claiming that there was no just cause for his termination.

The court held that Winn was entitled to benefits because Best Lock had failed to establish a reasonable relationship between the TAD rule and Best Lock's business interest. The court reached this decision even though Winn had stated on his job application that he did not drink alcohol and that he would abide by the TAD rule. The court's holding affirmed the decisions of an unemployment claims deputy, an appeals referee and the state unemployment review board.

One of the findings made by the referee was that "no evidence was presented at the hearing that [the TAD] rule is reasonable or necessary for proper conduct or production at work. The claimant did not refuse to obey any instructions or rules that were work related."

The court distinguished *Grusendorf v. Oklahoma City* by stating that *Grusendorf* (i) started with a presumption that a rule prohibiting smoking by first-year firefighter trainees was valid and (ii) placed the burden on the employee to show that there was not a rational basis for the rule. In *Best Lock*, there was no presumption of validity and the employer had the burden of showing that the rule was reasonable. *Grusendorf* is summarized in the "Decisions in Favor of Employers" subsection.

Special circumstances which may have affected this decision: (i) Best Lock was represented at the administrative level by its personnel manager; (ii) Best Lock did not aggressively defend the rule prior to appeal; (iii) Best Lock failed to timely raise its arguments relating to the alleged costs of employee smoking; (iv) Best Lock inexplicably failed to follow a rule which required parties to attach copies of proposed additional documentary evidence to the application to admit same; and (v) Best Lock offered no work-related reasons for firing Winn.

[2] *Caron v. Silvia*, 588 N.E.2d 711 (Mass. App. Ct. 3/23/92). [11-12-93]

A Massachusetts appeals court denied summary judgment to the defendant employer, holding that a state worker has a constitutionally protected right to publicly denounce restrictions on smoking in state offices.

Ms. Caron, a former social worker for the Department of Public Welfare, is an advocate of smokers' rights who was fired after talking about workplace smoking on the news program "60 Minutes" and two Boston television programs. The appeals court unanimously found that because Ms. Caron's expression had addressed a "public issue," she was entitled to First Amendment protection.

Caron was a defendant in another ETS-related case, *Lee v. Caron and the State Department of Welfare*, in which a co-worker of Caron's sued for a smoke-free workplace. Caron asked to be joined as a defendant as she alleged her "addiction" to cigarettes would hamper her work performance if she was denied the right to smoke. Lee ultimately settled the case after the employer agreed to separate smokers and nonsmokers.

[3] *Daniels v. DCA, Inc.* (Minnesota Department of Human Rights) (decided 1988). [11-12-93]

The Minnesota Department of Human Rights invalidated a company's policy of refusing to consider smokers for employment. The complainant's encounter with DCA was just one instance where the company refused to consider smokers for employment, the Human Rights Department found. The policy was based on DCA's belief that smokers are "more likely to become disabled or subject to chronic illness," according to the department. Moreover, DCA apparently admitted that current employees would be terminated if they were found to have smoked during nonworking hours.

DCA's justification for its policy was unacceptable to the department, which found "probable cause" for a human rights violation and characterized the policy as an "intrusion into peoples' behavior away from the

work place and in matters unrelated to work." DCA failed to show that the policy was based upon a job necessity or that it was a bona fide occupational qualification, the department said.

The Minnesota Human Rights Act prohibits an employer from denying or terminating employment "solely because of a disability or perceived disability," the department said. "Although there is significant debate about whether smoke itself is a disability . . . the practice here constitutes disability discrimination either way as the exclusion of persons in this group (smokers), based on a presumption of increased risk for disability, falls within the Act's definition of disability discrimination."

[4] *Rossborough v. Plymouth* (Massachusetts Civil Service Commission) (decided August 1994). [12-17-95]

According to a press report, the Massachusetts Civil Service Commission reinstated a police officer fired in 1993 under a law that prohibits police officers hired after 1988 from smoking on or off the job. Although Officer Lynne Rossborough has been reinstated, she apparently was not awarded back pay. According to Rossborough's attorney, laws that prohibit officers from drinking alcohol while on duty are not enforced as strictly as the smoking ban was enforced against his client. Drinkers apparently are not dismissed outright. *See The Boston Globe*, August 12, 1994.

DECISIONS IN FAVOR OF EMPLOYERS

[1] *Drug Plastics & Glass Company, Inc.*, 1992 WL 394663 (N.L.R.B. 12/16/92). [11-12-93]

The Board reportedly affirmed the decision of an administrative law judge that the employer lawfully discharged an employee for violating its policy against smoking on the production floor while production was in progress. Although the Board rejected the employee's claim that he was discharged because of his union organizing activities, it did affirm a finding that the employer committed unfair labor practices in the context of the union's organizing campaign. *See* BNA *Daily Labor Report*, January 14, 1993.

[2] *In the Matter of Fortunoff Fine Jewelry & Silverware, Inc. v. New York State Division of Human Rights*, 1996 WL 279470 (Appellate Division, Second Department) (decided May 20, 1996). [12-2-96]

A New York appeals court ruled that a business did not illegally discriminate against a job applicant who was not hired after admitting she smoked cigarettes outside the workplace. The decision reversed a November 1994 ruling by the New York State Division of Human Rights in favor of the job applicant, who had been awarded $10,000 in compensatory damages. The decision of the Division of Human Rights was based on Executive Law § 296(1)(a), which prohibits an employer from discriminating against prospective employees who are "disabled."

The appeals court disagreed with the Division of Human Rights' finding that the job applicant was not disabled "within the meaning of Executive Law § 292(21), based upon her smoking outside the workplace. The defendant's status as a smoker outside of the workplace, without more, does not constitute a disability within the aforesaid section."

A press release by Action on Smoking and Health (ASH) has commented that the ruling "may help put an end to claims that there is some kind of right to smoke, whether the smoking occurs in public in a private office, or even in the home, or that there is some requirement that smokers be protected or accommodated." The group continued, "ASH helped to develop the legal principle under which nonsmokers who are susceptible to tobacco smoke are entitled to protection from secondhand tobacco smoke as 'disabled persons.' However, ASH notes, smokers are not addicted to smoking. Rather, some smokers are addicted to nicotine, but they can now satisfy that addiction without smoking." *See* ASH Press Release (undated), posted on the Internet.

[3] *Graff v. Thermal Control, Inc.*, No. 20,338 (New Mexico Supreme Court) (decided February 17, 1993). [11-12-93]

The New Mexico Supreme Court affirmed an entry of summary judgment against a smoker who was fired for smoking during her lunch break off her employer's premises. Ann Graff was fired before enactment of the New Mexico Employee Privacy Act; she had sued Thermal Control for breach of contract, wrongful termination, negligent misrepresentation and *prima facie* tort.

The court based its decision on the state's employment-at-will case law and specifically rejected Graff's claim that a discharge for smoking cigarettes violates a fundamental right to privacy.

[4] *Grusendorf v. Oklahoma City*, 816 F.2d 539 (10th Cir. 1987). [11-12-93]

Although the court upheld a fire department's ban on off-duty smoking applicable to firefighter trainees, the court agreed with the plaintiff that the defendant's smoking ban infringed upon liberty and privacy rights, stating as follows:

> It can hardly be disputed that the Oklahoma City Fire Department's nonsmoking regulation infringes upon the liberty and privacy of firefighter trainees. The regulation reaches well beyond the work place and well beyond the hour for which they receive pay. It burdens them after their shift has ended, restricts them on weekends and vacations, in their automobiles and back yards and even, with the door closed and shades drawn, in the private sanctuary of their own homes.

816 F.2d at 541. The Court upheld the smoking ban based upon a finding that the ban bore a rational relationship to the promotion of the health and safety of the firefighter trainees. "The one peculiar aspect of the non-smoking regulation that [did] not appear entirely rational" to the Court was that it applied only to first year firefighter trainees and not to all firefighters in the department. The Court refused to consider whether the smoking ban was infirm on equal protection grounds, however, because that issue had not been raised by the parties. *Id.* at 543.

[5] *Hatfield v. Johnson Controls, Inc.*, 791 F.Supp. 1243 (E.D. Mich. 5/5/92). [11-12-93]

The court entered summary judgment in favor of defendant, extinguishing Donald Hatfield's claim that he was wrongfully discharged for smoking in a restricted area. Hatfield had been a supervisor for Johnson Controls, which manufactures batteries. He apparently was caught smoking in a restricted area on two occasions. The first time he was suspended; the next time he was fired.

Hatfield alleged that Johnson Controls selectively enforced the rule against smoking in the restricted area and that he was contractually entitled to intermediate discipline under the terms of the employee handbook. The court concluded, however, that Hatfield failed to raise a genuine issue of material fact to support either claim.

[6] *Hulme v. Reinbeck Foods, Inc.*, 480 N.W.2d 40 (Supreme Court, Iowa) (decided January 22, 1992). [11-12-93]

The court found that a plaintiff who alleged that she was fired in part because she complained about a no-smoking policy had failed to establish a prima facie case of retaliatory discharge.

In rejecting Diane Hulme's claim of retaliatory discharge, the court noted evidence that her negative attitude was a frequent source of friction at work and that other employees at the store were relieved by her discharge.

[7] *Kurtz v. City of North Miami, Florida*, No. 95-545 (U.S. Supreme Court) (petition for certiorari denied January 8, 1996). [1-17-96]

The U.S. Supreme Court, on January 8, 1996, declined to review a decision by the Florida Supreme Court that sustained a North Miami regulation requiring applicants for positions with the city to sign an affidavit swearing they had not used tobacco products during the previous year. Petitioner Arlene Kurtz framed the issue for review as follows: "Whether the City of North Miami's regulation requiring that any applicant for any City job execute, as a condition of applying for employment, an affidavit stating that he or she has not smoked or used tobacco products for the preceding twelve months violates the Due Process Clause of the Constitution of the United States where the regulation is conceded by the City to be unrelated to job functions or performance and where the City's only asserted justification for the regulation is the reduction of costs resulting from smoking-related illnesses."

Kurtz applied for the position of clerk-typist with the city in May 1990. Two months earlier, the city adopted Administrative Regulation 1-46, requiring job applicants to sign an affidavit that they had not used tobacco products during the previous year. Kurtz, a smoker for some 30 years, could not sign the affidavit and was no longer considered for the position.

A Florida trial court upheld the regulation as constitutional; however, a Florida appeals court ruled that the regulation violates the Florida Constitution's express privacy guarantee. The Florida Supreme Court overruled the appeals court on April 20, 1995.

The Florida Supreme Court ruled that the ordinance violated neither the state nor federal constitution. According to the court, the city had a rational basis for its action pursuant to its "legitimate interest in

attempting to reduce health insurance costs and to increase productivity." The city had shown that "each smoking employee costs the City as much as $ 4,611 per year in 1981 dollars over what it incurs for nonsmoking employees." The court also observed that "the City is using the least intrusive means in accomplishing this compelling interest because the regulation does not prevent current employees from smoking, it does not affect the present health care benefits of employees, and it gradually reduces the number of smokers through attrition."

Kurtz was represented in her petition to the U.S. Supreme Court by Pamela A. Chamberlin of Miami, with assistance from the American Civil Liberties Union of Florida.

[8] *Operation Badlaw, Inc. v. Licking County General Health District Board of Health*, 991 F.2d 796 (6th Cir. 4/13/93). [11-12-93]

The Sixth Circuit Court of Appeals dismissed the claims of a non-profit group that challenged the constitutionality of regulations limiting smoking in public places and places of employment.

Plaintiff Operation Badlaw, Inc., challenged the regulations on grounds of equal protection, due process, privacy, commerce clause, and impairment of contract. The court found that none of these rights had been violated and that the regulations had a rational relationship to "the legitimate state purpose of minimizing unwanted exposure to second-hand smoke."

[9] *Quinn, Gent, Buseck and Leemhuis, Inc. v. Unemployment Compensation Board of Review*, 606 A.2d 1300 (Pa. Commw. Ct. 4/8/92). [11-12-93]

The court held that an employee who resigned from her job after learning that her employer planned to implement a smoking ban was not eligible for unemployment compensation benefits.

The court stated that this case showed a mere dissatisfaction with the employer's new smoking ban and an attempt by Ms. Sinclair to elevate the cause of smokers within the workplace and to advocate on their behalf. Moreover, the court stated that it will not allow unemployment compensation benefits to an employee who quits employment because smoking is banned within the employer's workplace, at least until such time as the legislature enacts laws to protect the rights of smokers.

The dissenting opinion said that, based upon the specific facts of this case, the employer's smoking ban was not reasonable where it expected employees, especially the older ones, to venture outside in Erie, Pennsylvania, during severe winter weather in order to smoke. The dissent also said that the employer did not otherwise reasonably accommodate those employees who smoked.

[10] *Riddle v. Ampex Corporation*, 839 P.2d 489 (Colo. Ct. App. 3/19/92). [11-12-93]

Affirming a decision of the Colorado workers' compensation appeals board, the court denied an employee's claim that she was rendered totally and temporarily disabled by mental stress caused by the implementation of a no-smoking policy in the electronics manufacturing plant of her employer. "[C]laimant's stress was attributable to facts and circumstances which are common to all fields of employment," the board had said.

The appellate court found no evidence to support Sharon Riddle's assertions that total smoking bans are uncommon in all fields of employment, or that the employer had retaliated against her because of her opposition to the smoking ban.

[11] Federal Magistrate Upholds Smoking Bans. [9-2-94]

According to a press report, a U.S. magistrate upheld a ban on smoking in government buildings in Ohio against an equal protection and due process challenge. The suit, filed on behalf of Dayton and Montgomery County employees, reportedly alleged that the bans violated the constitutional rights of government employees who smoke. According to the magistrate, "For at least decades, governments accommodated the competing interests of their smoking and non-smoking employees by completely preferring the interests of the smokers. Now, in light of new evidence on the health risks of environmental tobacco smoke, governments have begun instead to prefer the interests of non-smokers." *See The Plain Dealer*, June 9, 1994.

SETTLEMENTS

[1] *Bone v. Ford Meter Box Co.*, Case No. 85C01-9101-CP-28 (Circuit Court of Huntington County, Indiana, filed 1/15/91). [11-12-93]

Janice Bone was terminated after a company drug test found nicotine in her urine. She claimed that her

termination was predicated solely by her smoking off the job; she alleged that she had, by choice, never smoked at the office during her employment with Ford Meter. Ms. Bone's complaint alleged invasion of privacy, intentional infliction of emotional distress, and wrongful termination.

On June 28, 1991, Ms. Bone's son, Sean, filed a separate suit against Ford Meter, alleging that he was terminated because he chewed tobacco off the job.

The cases were settled for an undisclosed sum.

[2] *Spain v. The Housing Authority of Conway* (Court of Common Pleas, Horry County, South Carolina) (filed April 15, 1992; apparently settled April 28, 1992). [11-12-93]

Just prior to a show cause hearing, the defendant housing authority apparently capitulated to the plaintiffs' demands to relax the housing authority's policy of prohibiting smoking indoors. The plaintiffs were four employees of the housing authority; they alleged that the South Carolina Clean Indoor Air Act of 1990 required their employer to permit smoking in enclosed private offices and designated areas of employee break areas. Defendant agreed to amend its smoking policy accordingly, and further agreed to pay plaintiffs' attorney's fees.

[3] *Sherer v. Access Graphics Inc.*, No. 94CV-000134 (District Court, Boulder County, Colorado) (dismissed October 4, 1994)

On October 4, 1994, the court entered an order dismissing the action with prejudice after the parties reached a settlement in September. Details of the settlement were not made public. The case, scheduled for trial in March 1995, was apparently the only one of its kind in which a smoker attempted to enforce a state privacy statute to protect the right to smoke.

Plaintiff Paul Sherer claimed he was fired because he was seen smoking at a shopping mall during his lunch hour. He claimed that his former employer, Access Graphics Inc., violated a Colorado law prohibiting employment discrimination against those who engage in lawful activities during nonworking hours.

PENDING CASES/OUTCOME UNKNOWN

[1] *Butler v. Peterson* (Court of Common Pleas, Summit County, Ohio). [11-12-93]

This is a class action suit filed by the Ohio Legal Rights Service on behalf of resident patients of a state-owned psychiatric hospital in which smoking has been prohibited indoors and outdoors on the premises. The plaintiffs' complaint alleges that the ban was improperly promulgated, violates equal protection and due process rights, and has created a safety hazard in that illicit smoking has caused fires in the facility since the policy was implemented. Plaintiffs' motion for a preliminary injunction against the ban is pending.

[2] *Coles v. Rides for Bay Area Commuters* (Fair Employment and Housing Commission, San Francisco, California) (filed January 1992). [11-12-93]

Plaintiff reportedly alleges that she was fired in January 1992 after she notified her supervisor that she intended to protest the denial of a promotion. Her application for promotion was allegedly denied because of her "relationship with cigarettes."

[3] *Keeney v. Investors Savings Bank* (U.S. District Court, District of Columbia) (filed 1992). [11-12-93]

Plaintiff reportedly alleges she was fired for failure to implement or enforce a smoking ban at the savings and loan branch office she supervised. The savings and loan has been placed in receivership by the Resolution Trust Corporation, but plaintiff's claim reportedly has been preserved in the receivership process.

[4] *Lambert v. City of Manteca* (City Personnel Board, Manteca, California). [11-12-93]

According to unconfirmed reports, plaintiff Lambert, a policeman in Manteca, California, filed an administrative complaint before the city personnel board challenging a ban against hiring smokers. Plaintiff was threatened with disciplinary action for smoking off the job. He has alleged that he is physically unable to stop smoking. Following the personnel board hearing, the losing party reportedly would have the right to a *de novo* city counsel hearing, then judicial review.

[5] *Loth v. City of Tacoma* (W.D. Wash. 1990). [11-12-93]

The Tobacco Institute reported that Mr. Loth filed a discrimination suit as a handicapped employee because he is unable to maneuver his wheelchair to the smoking room in the limited time allowed for smoking breaks and received a reprimand for excessive break time.

[6] *White v. Metallics Inc.* (New Britain Superior Court, Connecticut) (filed January 30, 1995). [12-17-95]

According to a press report, a woman who was allegedly discharged from her job as a customer sales representative because she was a smoker has filed a wrongful discharge suit against her employer in a Connecticut court. Evidently, plaintiff Catherine White told her employer she was a smoker several months after she was hired. The company chairman allegedly began harassing her about her smoking and her hours were subsequently cut. White claims she was fired in December 1994 in retaliation for a smoking discrimination complaint she filed with the state labor department the preceding month.

A state labor investigator reportedly issued a notice in response to the complaint, requiring the employer to refrain from imposing as a condition of employment that employees not smoke or use tobacco products while off duty. Connecticut has a statute that prohibits discrimination in employment against smokers. According to a state labor department spokesperson, the agency has not previously handled a wrongful discharge case involving an employee's off-the-job use of tobacco. *See The Hartford Courant*, February 1, 1995.

COLLECTIVE BARGAINING CASES

DECISIONS IN FAVOR OF UNION EMPLOYEES

[1] Buffalo, New York, Public Employees Thwart Workplace Smoking Ban. [8-29-96]

A press report indicates that the New York Public Employment Relations Board overturned a workplace smoking ban unilaterally imposed on municipal employees 14 months ago by the Buffalo city government. The board ruled that the city was required to negotiate changes in workplace smoking policy with the unions that represent city workers. The smoking ban will reportedly remain in effect, however, until after the city's appeal of the decision has been resolved.

The smoking ban was apparently pushed through the city council by former council member Clifford Bell, described as "an antismoking advocate." Prior to the ban, the city adhered to a state law that allows workplace smoking as long as no one in an office objects. Since the ban took effect, many workers reportedly smoke outside or slip away to bathrooms or private offices. *See The Buffalo News*, June 5, 1996.

[2] *56th Combat Support Group v. National Federation of Federal Employees Local 153*, 1992 WL 102042, 44 FLRA No. 90 (Federal Labor Relations Authority) (decided May 1, 1992). [11-12-93]

The authority held that the Combat Support Group violated federal labor laws when it implemented a smoking ban without giving union employees an opportunity to negotiate about the ban's substance or impact. Nevertheless, the support group did not have to rescind the ban, because after the union filed an unfair labor practice charge, the parties commenced negotiations. In the negotiations, the union reportedly did not demand a return to the status quo of an indoor smoking room. The negotiations resulted in the establishment of an outdoor smoking area 75 yards from the building.

[3] *Electromation, Inc. v. National Labor Relations Board*, 1994 WL 502513 (U.S. Court of Appeals, Seventh Circuit) (decided September 15, 1994). [12-21-95]

The Seventh Circuit Court of Appeals ruled that an employer violated the National Labor Relations Act by forming and participating in employee committees to resolve contentious issues such as company smoking policy. Because the case clearly involved employer-dominated committees, the court declined to decide whether more contemporary "employee involvement" committees should be permitted under the NLRA.

The employer formed the committees to respond to employee dissatisfaction with changes in attendance and wage policies. The employer dictated which employees would serve on the committees and what the topics of discussion would be. In addition, committee meetings were held during working hours and were attended by the employer. These factors, among others, convinced the court that the committees had been formed for purposes of dealing with conditions of employment on a bilateral basis and were unlawfully dominated by the employer.

[4] *Hi-Tech Cable Corp. and International Brotherhood of Electrical Workers, Local Union No. 1510*, 1992 WL 296023 (N.L.R.B. 9/30/92). [11-12-93]

The National Labor Relations Board determined that an employer was required to submit a change in its workplace smoking policy to collective bargaining. On appeal, the Board specifically held that the language of the collective bargaining agreement between the parties did not constitute a waiver of the union's statutory right to bargain about the implementation of a work rule.

[5] *Hi-Tech Cable Corp*, 318 NLRB No. 24 (decided August 10, 1995). [12-21-95]

For the second time in three years, the National Labor Relations Board ruled that Hi-Tech Cable Corp. violated the National Labor Relations Act by unilaterally imposing a smoking ban at its Starkville, Mississippi plant, notwithstanding objections by the employees' bargaining representative, the International Brotherhood of Electrical Workers. The Board apparently rejected the company's claim that "health, cost, and production-related justifications" necessitated its position, finding instead that Hi-Tech failed to bargain in good faith concerning the smoking policy.

In 1991, Hi-Tech "banned all use of tobacco anytime and anywhere on company property." In response to a challenge by the Electrical Workers, the Board ordered the company to bargain with the union regarding the ban. During three days of negotiations, the company

categorically rejected the union's requests for a designated smoking area and for removal of "no tobacco" signs posted at the entrances to company parking lots. In its latest ruling, the Board apparently ordered Hi-Tech to bargain in good faith concerning "the usage of tobacco by unit employees," and to "embody any understanding reached in a signed agreement." *See BNA Labor Daily*, August 18, 1995.

[6] *Imperial Floral Distributors, Inc. and Amalgamated Industrial and Toy and Novelty Workers of America*, Local 223, 1995 WL 592490 (National Labor Relations Board) (decided September 29, 1995). [1-17-96]

The National Labor Relations Board ruled against the now-defunct Imperial Floral Distributors, finding that the firm engaged in a number of unfair labor practices including implementation of a facility wide smoking ban in retaliation for employees pursuing union activities. The employer's retaliatory activities began in November 1994 and lasted until its Glendale, New York, facility closed in December 1994. The employer failed to answer the charges filed by NLRB's general counsel.

[7] *In The Matter of Arbitration Between The Flexible Corporation and The United Steel Workers of America*, FMCS No. 90-17998, Grievance No. 8265-418-89 (Federal Mediation and Conciliation Service) (decided October 25, 1990). [11-12-93]

In response to a 1990 arbitration decision that The Flexible Corporation's no-smoking policy was unreasonable, the company amended its policy by allowing employees to smoke only in the "smoking area" of the break/lunchrooms. The smoking area was divided from the nonsmoking area by a partition which did not reach a high open ceiling. Two "smoke eaters" were suspended above the smoking area.

A second arbitrator held that the company's smoking policy still was unreasonable and that the partitioning of the lunchroom, the installation of smoke eaters, and the installation of separate vending machines for smokers and nonsmokers were "band aid cures" that did not "directly and proximately benefit the health of the employees."

The arbitrator stated as follows:

> As noted in the [1986] Surgeon General's Report, the only effective way to remove smoke from the air is to increase the exchange of indoor air with clean outdoor air. The report casts serious doubt on the effectiveness of cost effective filtration devices such as "smoker eaters" in removing smoke fumes from the air. No modifications have been made to the ventilation system and the exchange of indoor air for clean outdoor air has not increased. The partitioned smoking area still concentrates large numbers of smokers in a relatively small area, increasing the amount of passive smoke to which smokers are subjected. Evidence presented at the hearing also indicates that because of the open ceiling, tobacco smoke comes over the top of the partitions into the no smoking area, subjecting nonsmokers to concentrated passive smoke. The benefits gained by nonsmokers having their own vending machines is minimal.

In the prior 1990 arbitration decision, the arbitrator had found that when employees were permitted to smoke in the plant, the smoke dissipated before reaching fellow employees because of the high ceilings and the amount of distance between employees on the floor. The previous arbitrator "faulted the company for failing to determine the amount of exposure to smoke fumes in any area or to evaluate the effectiveness of the ventilation system, even though the resources and technology to do so were available."

[8] *In the Matter of Department of the Navy Trident Refit Facility, Bangor, Silverdale, Washington and Local Lodge 282, International Association of Machinists and Aerospace Workers, AFL-CIO*, 1994 WL 723813 (Federal Service Impasses Panel) (decided December 27, 1994). [12-21-95]

The Federal Service Impasses Panel resolved a dispute over smoking during breaks at a naval facility that repairs and refurbishes submarines by requiring two 15-minute paid breaks for the facility's employees. Employees will be permitted to smoke during these breaks. Prior to the ruling, no official break policy existed at the facility and employees were permitted to leave their work stations at will for any reason. However, after a workplace smoking ban was imposed, smokers apparently abused the privilege by taking extensive smoking breaks. The employer, attempting to quell complaints by nonsmokers, sought to ban smoking entirely by refusing to pay employees for any time on the job during which they smoked. The panel rejected the employer's recommendation to continue the ad hoc smoking ban, as well as the union's recommendation that the non-structured break policy be continued.

[9] *John Deere Co., Local 125, United Auto Workers*, 1993 WL 321785 (Office of General Counsel, National Labor Relations Board) (decided July 29, 1993). [2-11-94]

General Counsel of the National Labor Relations Board advised a union that it did not violate its duty of fair representation in refusing to file a grievance on behalf of employees who sought a workplace smoking ban. The employees sought the ban after allegedly experiencing difficulty breathing in spite of restrictions on smoking that had been placed in the warehouse in which they worked. The union and employer had bargained for the restrictions, which prohibited smoking where employees work near each other.

[10] *Klein Tools, Inc. and Local Lodge No. 1255 of the International Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers*, AFL-CIO, 1995 WL 686035 (National Labor Relations Board) (decided November 14, 1995). [1-17-96]

The National Labor Relations Board ruled that Klein Tools violated the National Labor Relations Act when the company unilaterally implemented a smoking ban at its plant in Skokie, Illinois. Smoking had previously been permitted throughout the unionized plant; however, in 1993, Klein prohibited indoor smoking at all seven of its plants. Klein and the union negotiated for 10 months, by which time the union tentatively agreed to restrict smoking to two outdoor smoking areas if the company would make the areas comfortable during inclement weather. However, the company balked at making the necessary improvements to the smoking areas, declared that negotiations had reached an impasse, and unilaterally implemented the smoking ban. The board found that negotiations were not at an impasse and required Klein to (i) rescind the smoking ban; (ii) reinstate and adequately compensate all employees negatively affected by the policy; and (iii) post a notice of the board's action at the plant and an admission by Klein that it violated the Act.

[11] *Local 1186 of Council No. 4, AFSCME v. State Board of Labor Relations*, 620 A.2d 766 (Conn. 2/23/93). [11-12-93]

The Connecticut Supreme Court determined that the New Britain Board of Education would be required to bargain about "discretionary" aspects of a 1987 smoking ban if implementation of the smoke-free policy had a substantial secondary impact on employee working conditions. The "discretionary" aspects apparently included prohibitions on smoking out of doors and when classes are not in session and student activities have ceased.

The court asserted that the implementation of a ban on smoking is a managerial prerogative and may not be a mandatory subject of bargaining, but that the board was nevertheless required to bargain over secondary effects. The Court suggested that the board may be required to bargain over its failure to provide a smoker's lounge for those teachers who smoke. The case was remanded to the State Board of Labor Relations. *See* BNA *Washington Insider*, March 8, 1993.

[12] *Luke Air Force Base, Arizona v. American Federation of Government Employees, Local 1547, AFL-CIO*, 1994 WL 58823 (Federal Labor Relations Authority) (decided February 24, 1994). [5-20-94]

The Federal Labor Relations Authority ordered the employer to rescind its unilaterally imposed nonsmoking policy and to permit smoking indoors. The ruling affirmed a decision of an administrative law judge. In May 1988, the employer implemented a base-wide nonsmoking policy without bargaining with the union over the substance, impact and implementation of the change. Smoking occurred in a number of buildings on the base until 1990, when the employer insisted that the policy be observed. Thereafter, the union filed an unfair labor practices complaint. Citing a number of cases in which employers were required to engage in bargaining over smoking policies, the judge rejected the employer's argument that bargaining may be dispensed with in light of "the widely accepted physical hazards of tobacco smoke."

[13] *Marine Corps Base Camp Lejeune, N.C. and American Federation of Government Employees Local 2065*, 1993 WL 514555 (Federal Labor Relations Authority) (decided December 7, 1993). [2-11-94]

The Federal Labor Relations Authority (FLRA) determined that the employer in this case was not required to give the union notice that it was implementing a change in the workplace smoking policy and was not required to bargain over the change. The employer had unilaterally decided to ban smoking in its clothing sales warehouse and to designate an outside loading dock as a smoking area. The union claimed that this was a substantive workplace change and that the employer was required to bargain over the change. Because the collective bargaining agreement

between the parties already gave the employer the authority to establish smoking and nonsmoking areas, the FLRA ruled against the union on the issue.

[14] *National Association of Government Employees v. U.S. Department Of Veterans Affairs*, 43 FLRA No. 42, 1991 WL 278931 (Federal Labor Relations Authority) (decided December 13, 1991). [11-12-93]

The union initiated this suit because the employer, among other things, refused to negotiate with the union over its proposal to require employees of a veterans hospital to receive hazardous pay or environmental differential pay (EDP) for exposure to tobacco smoke in the workplace.

The employer defended against the union proposal by arguing that its general schedule (GS) employees were not entitled to hazardous pay, because tobacco smoke exposure does not meet the statutorily defined requirements of "hazardous duty." The employer further argued that EDP for wage grade (WG) employees exposed to tobacco smoke was inconsistent with a statute providing that EDP is authorized only for "unusually severe hazards." The employer espoused that employees are exposed to tobacco smoke "in everyday life," and thus exposure at the workplace was not unusual.

Rejecting the employer's arguments, the authority concluded that the union's proposal was negotiable based on testimony that only certain patients in the hospital were permitted to smoke. Therefore, it appeared that exposure to tobacco smoke was only occasional. A wage differential may be paid for hazards that are "not usually involved" in the performance of the employee's duties, the authority said, adding that where a federal employer has discretion over a matter affecting conditions of employment, the employer is obligated under statute to exercise that discretion through bargaining, unless a law states that such exercise of discretion is non-negotiable.

[15] *National Institute For Occupational Safety And Health, Appalachian Laboratory v. American Federation Of Government Employees, Local 3430*, 40 FLRA No. 29, 1991 WL 104211 (Federal Labor Relations Authority) (decided April 19, 1991). [11-12-93]

In this opinion, the Authority denied a motion to reconsider its decision that the Public Health Service violated the Federal Service Labor-Management Relations Statute by (i) disapproving a contractual provision negotiated by the union and NIOSH, and (ii) directing the Centers for Disease Control to discontinue designated smoking areas at NIOSH's Appalachian Laboratory. The Authority directed NIOSH to reinstate and reestablish the designated smoking areas in the facility.

The authority rejected argumented by the Public Health Service (PHS) that the position of its Assistant Secretary is "a highly visible one in which he must often provide the leadership necessary to get the American people to engage in actions which will promote good health." PHS had further asserted that to "indicate publicly that [the Assistant Secretary] will take action to facilitate . . . the practice of smoking. . . ." would be inconsistent with that position.

[16] *Newark Valley Central School District v. Public Employment Relations Board*, 596 N.Y.S.2d 216 (N.Y. App. Div. 4/15/93). [11-12-93]

The division ruled that prohibiting smoking by bus drivers on school buses even while students are not present was a matter for collective bargaining.

[17] *Matter of Newark Valley Central School District v. Public Employment Relations Board, et al.*, 610 N.Y.S.2d 134, (N.Y. 3/24/94). [5-20-94]

The New York Court of Appeals ruled that a school district's unilateral implementation of a smoking ban on school buses when no students are on board should have been collectively bargained as a term or condition of employment. In so ruling, the court rejected the district's argument that collective bargaining on the issue was preempted by statute or policy. The court refused to reach the issue of whether "smoking drivers do or do not present a health hazard to students who later board the bus," as the issue was not presented during initial stages of the case.

[18] *Pennsylvania v. Pennsylvania Labor Relations Board*, 459 A.2d 452 (1983). [11-12-93]

The court held that rules governing workplace smoking are terms and conditions of employment and, therefore, are subject to mandatory collective bargaining. "The subject of whether employees may smoke at their workplaces appears to be at the center of those subjects

properly described as 'conditions of employment'," the court said.

[19] *City of Seattle v. Public Employment Relations Commission*, 809 P.2d 1377 (Supreme Court, Washington) (decided May 16, 1991). [11-12-93]

The Seattle Police Dispatchers Guild and other affected unions alleged that a unilateral workplace smoking ban implemented by the City of Seattle required mandatory collective bargaining. The supreme court held that the city's attempt to appeal an adverse ruling from an administrative agency had not been timely filed and thereby kept in place the agency's order requiring the city to bargain on both the ban and the effects of the ban's implementation.

[20] *United Paperworkers International Union, Local 1279 v. Wisconsin Tissue Mills, Inc.*, 1993 WL 315614 (E.D.Pa 8/17/93). [11-12-93]

A trial judge ruled that a grievance filed over a unilateral workplace smoking policy must be submitted to arbitration.

[21] *U.S. Department of Veterans Affairs Medical Center Northport, New York and National Federation of Federal Employees Local 387*, 1994 WL 99970 (Federal Labor Relations Authority) (decided March 24, 1994). [5-20-94]

The Federal Labor Relations Authority (FLRA) determined that the VA did not build adequate outdoor smoking shelters under its collective bargaining agreement with the union representing its employees. An arbitrator had ordered the VA to comply with the agreement, which also required the establishment of smoking cessation classes, and the VA filed exceptions to the award, claiming that it would violate government-wide policy by directing the medical center to return to a policy of allowing smoking indoors.

In affirming the arbitrator's award, the FLRA noted that the arbitrator's award did not require that the VA permit smoking indoors at the medical center. The arbitrator merely required the VA to establish a committee to address the adequacy and accessibility of the shelters, after finding that the shelters did not properly protect smoking employees from local weather conditions and were located near trash containers.

[22] *U.S. Department of Health and Human Services, Indian Health Service, Oklahoma City v. Federal Labor Relations Authority*, 885 F.2d 911 (D.C. Cir. 1989). [11-12-93]

The Indian Health Service in Oklahoma City, an agency of the Department of Health and Human Services (IHS), decided to establish an area-wide ban on smoking. The service later implemented that policy at its five Oklahoma City facilities.

A union representing about 1,000 employees at the five facilities filed an unfair labor practice charge against IHS after IHS refused to negotiate on alternatives to the total smoking ban. The Federal Labor Relations Authority concluded (i) that IHS had not shown that a total ban was the only means to achieve the objective of promoting American Indian health; (ii) that less drastic alternatives proposed by the union would not have interfered with that purpose; and (iii) that IHS had engaged in an unfair labor practice by refusing to negotiate about alternatives to the ban. The District of Columbia Circuit upheld the agency determination and denied IHS petition for review.

[23] *U.S. Department of Health and Human Services v. Federal Labor Relations Authority*, 920 F.2d 45 (D.C. Cir. 1990). [11-12-93]

The Department of Health and Human Services (HHS) unilaterally banned smoking in all of its facilities. The Federal Labor Relations Authority (FLRA) determined that HHS was obligated to negotiate with the union about the smoking ban. The HHS argued that a complete smoking ban was essential to the performance of its mission to educate the public about the dangers of smoking.

The FLRA and the Sixth Circuit both rejected HHS' argument. "It is hard to see how it can be argued . . . that HHS's concern for its employees can be qualitatively different from that of other government agencies," the circuit court opinion concluded.

[24] *U.S. Department of Health & Human Services v. Federal Labor Relations Authority*, 952 F.2d 398 (4th Cir. 12/26/91). [11-12-93]

Affirming the Federal Labor Relations Authority, the court held that a division of the U.S. Department of Health and Human Services committed an unfair labor practice when it unilaterally implemented a smoking ban.

[25] *U.S. Department of Health and Human Services Region V v. National Treasury Employees Union Chapter 230*, 1992 WL 183663 (Federal Labor Relations Authority) (July 24, 1992). [11-12-93]

The Federal Labor Relations Authority (FLRA) affirmed an arbitrator's decision that the U.S. Department of Health and Human Services (HHS) violated a collective bargaining agreement by unilaterally imposing a smoking ban. Under the FLRA order, HHS was required to bargain with the union over the smoking ban, restore a former smoking policy at one location, and create designated smoking areas at another location where the bargaining unit employees work.

[26] *U.S. Department of Health and Human Services, SSA, Office of Hearings and Appeals, Syracuse, N.Y. and American Federation of Government Employees Local 1760*, No. 93 FSIP 164 (Federal Service Impasses Panel) (decided November 18, 1993). [2-11-94]

According to a press report, a Federal Service Impasses Panel ordered the adoption of a management proposal to restrict smoking to outdoor areas and to lunch and scheduled break time only. The union, representing some 19 employees, had sought additional smoking breaks, but the panel rejected the proposal, saying management's plan "provides sufficient accommodation for smokers now required to go outside to smoke to foster a healthy workplace while minimizing disruptions of service to the public." *See Government Employee Relations Report*, December 27, 1993.

[27] *U.S. Department of Veterans Affairs Medical Center Danville Veterans Hospital and American Federation of Government Employees Local 1963*, 1993 WL 514579 (Federal Labor Relations Authority) (decided December 8, 1993). [2-11-94]

The Federal Labor Relations Authority (FLRA) upheld an arbitrator's determination requiring that an employer reopen indoor designated smoking areas until such time as the employer provides adequate and accessible outdoor smoking shelters. A Federal Service Impasses Panel order had required that such shelters be built for smoking employees. Claiming that the shelters established by the employer were inadequate, the union filed a grievance concerning the implementation of a workplace smoking ban. The arbitrator agreed with the union that the outdoor facilities were inadequate and the FLRA determined that the arbitrator's award, which ordered the reopening of indoor smoking areas pending alterations to the outdoor shelters, was not deficient.

[28] *U.S. Dept. of Veterans Affairs Medical Center Kerrville v. American Federation of Government Employees Local 2281*, 1992 WL 308860 (Federal Labor Relations Authority) (decided October 16, 1992). [11-12-93]

The Federal Labor Relations Authority affirmed an arbitrator's decision compelling the VA to designate an indoor smoking area at its Medical Center in Kerrville, Texas, until such time as two additional outdoor smoking shelters were enclosed and provided with heating and ventilation equipment.

[29] *U.S. Dept. of the Navy Naval Station Mayport, Fla. and American Federation of Government Employees Local 2010*, 1992 WL 379053 (Federal Labor Relations Authority) (decided September 25, 1992). [11-12-93]

The Federal Labor Relations Authority adopted the order of a law judge who ruled that the employer was required to bargain over its decision to install glass windows in the doors of the rooms it had set aside for smoking at the U.S. Naval Station in Mayport, Florida.

The law judge agreed with the union that the impact of the window installation was not de minimis in that it exposed smoking employees to a "fish bowl" atmosphere. The law judge ordered the windows to be covered or removed pending good faith bargaining over the matter.

[30] *W-I Forest Products Company, LP v. Lumber And Sawmill Workers Local 2841*, 1991 WL 187491 (N.L.R.B. 8/30/91). [11-12-93]

The National Labor Relations Board agreed with the union's allegations in this case that a lumber mill employer violated the collective bargaining agreement between the parties by implementing a smoking ban at the mill without union consent. Nevertheless, the Board ultimately agreed with the ALJ that the union's complaint should be dismissed because the union had by its conduct waived its right to bargain over the smoking ban.

Testimony indicated that the employer decided to implement the ban to avoid workers' compensation lawsuits in which employers were held liable for "tobacco-induced illnesses" because smoking at the

workplace was permitted. The employer was "troubled" because it did not wish to be in a position where it could be accused of promoting the idea of smoking, the employer's chief negotiator testified. The employer was also concerned with the impact of smoking on the cost of health care, according to the negotiator.

[31] *Williams Air Force Base, Ariz., and American Federation of Government Employees Local 1776*, Case No. SA-CA-20302 (Federal Labor Relations Authority) (decided April 30, 1993). [11-12-93]

An administrative law judge ruled that Williams Air Force Base violated Title VII of the Civil Service Reform Act of 1978 by unilaterally closing a hallway smoking area without offering the union an opportunity to negotiate the issue. According to the judge, closure of the smoking area forced smokers to use a gazebo that was exposed to 116 degree heat and "hordes of white flies." The employer argued that the smoking area was closed because it was not properly ventilated, and the cost of upgrading the ventilation was not justified due to the planned closure of the facility some time in 1993. The judge rejected the employer's arguments and ordered the restoration of the hallway smoking area until the obligation to bargain was observed.

[32] *Woolsey v. City of Marion* (Superior Court, Marion County Indiana) (decided August 5, 1991). [11-12-93]

Plaintiff, a pipe-smoking Marion, Indiana, police officer, filed suit to enjoin enforcement of a ban on pipes and cigars in police department facilities and vehicles. On August 5, 1991, the Superior Court entered an agreed injunction which found that a unilaterally imposed smoking ban is a breach of the union contract.

DECISIONS IN FAVOR OF UNION EMPLOYERS

[1] *Allied-Signal, Inc., Kansas City Division*, 1992 WL 122628 (N.L.R.B. 5/29/92). [11-12-93]

The National Labor Relations Board (NLRB), in a split decision, upheld the ruling of an administrative law judge that an employer was not required to bargain with its union machinists prior to banning smoking at its south Kansas City, Missouri, plant in 1989. Because the union had failed to object to smoking restrictions imposed during the previous 19 years, the NLRB found the union had waived its right to bargain over the issue. *See Kansas City Star*, June 9, 1992; BNA *Washington Insider*, June 5, 1992.

[2] *Civil Service Employees Ass'n, Inc., Local 1000, AFSCME, AFL-CIO v. Public Employment Relations Board*, 599 N.Y.S.2d 671 (N.Y. App. Div. 6/24/93). [11-12-93]

A New York trial court upheld a smoking ban instituted by the Department of Health in its Roswell Park Memorial Institute facility in Erie County, New York. The court determined that on the basis of the union contract and subsequently approved smoking guidelines, the union had waived its right to negotiate smoking policies.

[3] *Department of the Air Force, Eielson Air Force Base, Alaska, and Local 1836, American Federation of Government Employees, AFL-CIO*, 1995 WL 576797 (Federal Service Impasses Panel) (decided September 27, 1995). [1-15-96]

Citing the EPA Risk Assessment on ETS, a Federal Service Impasses Panel imposed an indoor smoking ban at Eielson Air Force Base, Alaska, notwithstanding a union's concern that outdoor smoking could lead to "frostbite, hypothermia, and other hazards" associated with extreme cold. The union, which represents approximately 300 employees, sought to preserve existing indoor smoking areas, while agreeing that designated smoking areas in new buildings would meet all pertinent ventilation standards. The panel's order requires the parties to submit to grievance arbitration should they fail to agree on the design characteristics of outdoor smoking shelters.

[4] *Department of the Army, Army Reserve Personnel Center, St. Louis, Missouri and Local 900, American Federation of Government Employees, AFL-CIO*, 1993 WL 317674 (Federal Service Impasses Panel) (decided August 19, 1993). [11-12-93]

A federal arbitration panel agreed with an employer that smoking will be banned in three of its buildings following the completion of construction and renovation activities. The union and employer had reached a negotiating impasse over the smoking policy, with the union proposing that limited areas in the buildings remain designated smoking areas or, in the alternative, that the employer be required to build an outdoor structure to protect smokers from the elements.

The union also requested that smoking breaks in addition to regular breaks be permitted.

Stating that "the health hazards associated with the passive inhalation of second-hand smoke" have been conclusively established by an "overwhelming body of scientific evidence," the panel designated several indoor smoking areas until completion of construction and determined that the outdoor accommodations already offered by the employer were sufficient to protect smokers once the buildings had been declared smoke free. These accommodations consist of an overhang at the entrance to the building and a tent-like structure with plastic walls which could be rolled up or down according to weather conditions. The panel refused to order additional smoking breaks.

[5] *Department of the Army, Fort Drum, New York and Local R2-61, National Association of Government Employees, SEIU, AFL-CIO*, 1995 WL 576783 (Federal Service Impasses Panel) (decided September 27, 1995). [1-17-96]

A Federal Service Impasses Panel resolved a smoking policy dispute between the U.S. Army at Fort Drum, New York, and three employees' unions by adopting a policy prohibiting indoor smoking in all buildings except soldiers' clubs, two snack bars, the bowling center and living quarters. The policy is similar to one the panel previously adopted for Malmstrom Air Force Base. The panel rejected the unions' proposed modification to that policy that would have allowed indoor smoking when temperatures drop below 35 degrees Fahrenheit, a common occurrence in Watertown, New York, where Fort Drum is located. The unions also argued that Fort Drum, unlike Malmstrom, is an "open" facility, which increases the potential for "injury or foul play" by persons from outside the base when smokers are forced outside late at night.

[6] *Department of the Navy, Naval Computer Telecommunications Station, East Machias, Maine and Local 2635, American Federation of Government Employees, AFL-CIO*, 1993 WL 310383 (Federal Service Impasses Panel) (decided August 12, 1993). [11-12-93]

A federal arbitration panel agreed with an employer's proposal that smoking be restricted indoors at a remote facility on the Atlantic coast of Maine. Pursuant to this proposal, smoking will be permitted only in family housing units, bachelor enlisted quarters and a recreation area. The employer cited the EPA Risk Assessment on ETS to support its position. The panel stated, in this regard, "we favor prohibiting indoor smoking, given the overwhelming body of scientific evidence cited by the Employer conclusively establishing the health hazards associated with the passive inhalation of second-hand smoke." The employer will, however, be required to provide outdoor smoking areas that provide a measure of protection from the elements.

[7] *Department of the Treasury, Internal Revenue Service, Fresno, California and Chapter 97, National Treasury Employees Union*, 1995 WL 618900 (Federal Service Impasses Panel) (decided October 12, 1995). [1-17-96]

A Federal Service Impasses Panel resolved a workplace smoking impasse between the Internal Revenue service's Fresno Service center and an employees' union by adopting the employer's proposal to prohibit indoor smoking. The union had proposed maintaining existing designated indoor smoking areas. The union represents approximately 6,000 IRS employees at the Fresno center.

The panel found that the IRS would need to spend more than $1 million to modify existing smoking areas to comply with ventilation standards for federal buildings. The IRS had already covered several outdoor atriums designated as smoking areas prior to unsuccessful mediation in September 1995. The panel cited the EPA Risk Assessment on ETS in concluding that "the dangers associated with exposure to second-hand smoke have been well documented."

[8] *EEOC v. Local 2667, American Federation of Government Employees*, AFL-CIO, 1994 WL 257022 (Federal Service Impasses Panel) (decided June 8, 1994). [9-2-94]

A Federal Service Impasses Panel resolved a negotiating impasse between the Equal Employment Opportunity Commission (EEOC) and its employees by permitting the EEOC to immediately implement a ban on smoking indoors at its headquarters building. The union representing the employees had sought a delay in implementation of the ban or construction of separately ventilated smoking rooms in the building and the designation of several outdoor smoking areas. The union had also sought recognition that smokers should be accorded "the same protection as those individuals who qualify under the Americans with Disabilities Act,"

In rejecting the union's position, the panel noted that the EPA Risk Assessment on ETS has "prompted the Panel regularly to order parties to adopt provisions which prohibit indoor smoking." The panel further stated, with regard to the ADA, "if a cause of action should arise under that law, appropriate action may be taken independent of the parties' agreement on smoking." Under the panel's order, the EEOC will be required to designate one outdoor smoking area and to provide smoking cessation classes to interested employees.

[9] *In the matter of Department of the Army, Army Armor Center and Fort Knox, Fort Knox, Kentucky and Local 2302, American Federation of Government Employees, AFL-CIO*, 1994 WL 677632 (Federal Service Impasses Panel) (decided December 2, 1994). [12-21-95]

The Federal Service Impasses Panel resolved an impasse over a workplace smoking policy by (i) banning all indoor smoking; (ii) requiring the employer to designate reasonably accessible outdoor smoking areas that provide a measure of protection from the elements; and (iii) requiring the employer to provide a smoking cessation course to interested employees at no cost. In so ruling, the panel rejected the union's request for designated indoor smoking areas or the establishment of adequate outdoor smoking facilities prior to requiring smokers to smoke outside. The panel cited the EPA Risk Assessment on ETS to support its assertion that ETS has "scientifically-proven adverse effects" on the health of employees.

[10] *In the Matter of Department of the Army Corps of Engineers, Huntington District, Huntington, West Virginia and Local 3729, American Federation of Government Employees, AFL-CIO*, 1995 WL 351148 (Federal Service Impasses Panel) (decided June 6, 1995). [12-21-95]

A Federal Service Impasses Panel resolved a workplace smoking dispute in favor of the employer. The employer originally sought to prohibit smoking in five separate buildings, but agreed during negotiations on a new collective bargaining agreement to permit smoking in a designated smoking room shared by other federal employees in one of the buildings, the Christie Building. The union agreed to the smoking ban in three buildings, but argued that an additional smoking lounge in the Federal Building should be kept open because the Christie Building had become inaccessible due to the closing of an access tunnel for security reasons.

The Impasses Panel found that the union presented "no evidence to support the view that the current available ventilation in the indoor smoking area [in the Federal Building] has eliminated the scientifically-proven adverse effects of second-hand smoke on the health of employees." As the basis for its conclusion that ETS represents a serious threat to employees, the Impasses Panel cited the EPA Risk Assessment on ETS.

[11] *In the Matter of Department of the Navy, Great Lakes Naval Base, Great Lakes, Illinois and Local 2326, American Federation of Government Employee, AFL-CIO*, 1994 WL 657121 (Federal Service Impasses Panel) (decided November 18, 1994). [12-21-95]

The Federal Service Impasses Panel resolved a workplace smoking impasse by adopting a military smoking ban in effect since January 1, 1994, but ignored by many employees. The panel rejected the union's argument that it would be more cost effective for the employer to permit indoor smoking in designated areas than to require the employer to build outdoor shelters. In so ruling, the panel stated, "there is no evidence in the record that the ventilation in those areas would adequately protect nonsmokers from dangerous passive smoke." The panel cited the EPA Risk Assessment on ETS to support the "extensively documented health hazards associated with exposure to second-hand smoke."

[12] *In the Matter of Department of the Navy, Naval Aviation Depot, Norfolk, Virginia and Local 39, International Association of Machinists and Aerospace Workers, AFL--CIO*, 1995 WL 450272 (Federal Service Impasses Panel) (decided July 28, 1995). [12-21-95]

The Federal Service Impasses Panel resolved a contract dispute between the Naval Aviation Depot and several labor unions by ordering the unions to accept the Depot's proposed smoking policy with only minor modification. As adopted, the policy (i) prohibits all indoor smoking at the Depot; (ii) permits smoking outdoors during lunch and regularly scheduled breaks; (iii) designates "protected" outdoor smoking areas reasonably accessible to employees; and (iv) provides a no-cost, smoking cessation course for interested employees. The Impasses Panel claimed that the Depot's smoking policy protects "nonsmokers from the extensively documented health hazards associated with exposure to second-hand smoke," citing the EPA Risk Assessment on ETS and two Surgeon General reports.

[13] *International Union v. Auto Glass Employees Federal Credit Union*, 1994 WL 324031 (M.D. Tenn. 6/22/94) (not in F. Supp.). [9-2-94]

A U.S. district court determined that alleged changes to conditions of employment, including the establishment of a smoke-free office environment, did not constitute a violation of the National Labor Relations Act (NLRA). The court found that the Federal Credit Union Act, which permits unilateral repudiation of collective bargaining agreements by the National Credit Union Association Board to rehabilitate a failing federal credit union, took precedence over the NLRA.

[14] *I.R.S., Los Angeles District v. Federal Labor Relations Authority*, 902 F.2d 998 (D.C. Cir. 1990). [11-12-93]

In the course of contract negotiations the union representing employees of the IRS presented a proposal which would have allowed individual employees to designate their own private offices, individual desks, and/or work stations as smoking areas. The IRS argued that the proposal was not bargainable because it conflicted with the GSA's regulation governing smoking in all GSA-controlled buildings nationwide. The regulation placed the authority and obligation to designate smoking areas upon the Agency heads as opposed to on individual employees. The District of Columbia Circuit agreed with the IRS that the agency was not required to bargain with the union regarding that issue.

[15] *In re: Livingston Education Association*, 1991 WL 326504 (N.J. Super. Ct. App. Div. 12/31/91). [11-12-93]

The court sustained a unanimous ruling by the Public Employment Relations Committee (PERC), which permitted the school board to unilaterally ban smoking by school employees on all school premises without their consent. The appellate court agreed with the PERC's finding that the school board "had a sufficient governmental policy interest in prohibiting employees from smoking within view of students to outweigh the policy's effect upon the work and welfare of the employees."

[16] *Matter of Department of the Navy, Philadelphia Naval Shipyard, and Local F-61, International Association of Firefighters, AFL-CIO*, 1994 WL 52762 (Federal Service Impasses Panel) (decided February 7, 1994). [5-20-94]

A Federal Service Impasses Panel resolved a smoking policy dispute between the Navy and a union representing firefighters and fire inspectors at the Philadelphia Naval Shipyard by banning smoking indoors and by ordering the employer to provide a reasonably accessible and sheltered outdoor smoking area for smoking employees, along with free smoking cessation classes. The union had sought a policy that would have permitted smoking in a vestibule to the building, while the employer proposed that the designated smoking area be located in another building. The panel rejected both proposals, saying they ignored "the overwhelming scientific evidence regarding the hazards connected with exposure to environmental tobacco smoke."

[17] *Matter of NLRB and NLRB Professional Ass'n and Washington Local, NLRB Union*, 1993 WL 456696 (Federal Service Impasses Panel) (decided November 5, 1993). [2-11-94]

A Federal Service Impasses Panel ordered the National Labor Relations Board (NLRB) to adopt the more restrictive smoking policy sought by the unions representing NLRB attorneys and clerical workers. The parties had reached a negotiations impasse and submitted their dispute to the panel for resolution. The NLRB suggested that smokers be permitted to smoke in smoking lounges with "state of the art" ventilation systems. The unions wished to establish a smoke-free workplace, with smoking permitted only in outdoor areas and in a garage-level designated smoking area. The panel, in endorsing the union positions, also ordered the NLRB to establish smoking cessation courses for smoking employees.

[18] *Mitchellace, Inc. and Chicago & Central States Joint Board, Amalgamated Clothing & Textile Workers Union, AFL--CIO--CLC*, 1996 WL 264504 (National Labor Relations Board) (decided May 16, 1996) [8-29-96]

The National Labor Relations Board (NLRB) decided that a manufacturer's suspension of two employees for violating the company's smoking policy was not motivated by anti-union sentiment and thus did not violate the National Labor Relations Act. The 300 employees of Mitchellace, an Ohio company, voted in favor of union representation in September 1993. NLRB general counsel charged Mitchellace with several labor act violations following the vote, including more stringent enforcement of the company's smoking policy, which permitted smoking only in the employee lunchroom and breakroom. The suspended

employees, both union supporters, admitted smoking outside the designated smoking areas. While the NLRB ruled that the employees' three-day suspensions did not violate the Act, the board found several other violations by Mitchellace.

[19] *National Association of Government Employees Local R7-23, SEIU, AFL-CIO v. Department of the Air Force 375th Mission Support Squadron Scott Air Force Base, Illinois*, 51 F.L.R.A. No. 72, 1996 WL 81842 (Federal Labor Relations Authority) (decided February 21, 1996). [8-29-96]

The Federal Labor Relations Authority dismissed a union's unfair labor charge that a designated smoking area was eliminated without following the provisions of the parties' negotiated agreements. The complaint was brought by the National Association of Government Employees Local R7-23 against the Department of the Air Force 375th Mission Support Squadron Scott Air Force Base, Illinois. The Air Force eliminated the negotiated smoking area without prior negotiations with the union based on language in the agreement allowing it to implement changes to smoking practices because of "health of an ill employee."

According to the opinion, the Air Force's stated reason for making the change was that Patricia Bassler, an employee in the building in which the smoking area was eliminated, "can not be exposed to second-hand smoke because of health reasons." In determining that Bassler was an "ill employee," the Air Force relied on two notes provided by Bassler: one from her gynecologist stating, "Since it has been identified that even second-hand smoke is hazardous to her health, I would prefer that my patient, Patricia R. Bassler, not be subjected to this type of environment"; and one from her chiropractor stating, "Due to the unknown hazards of secondary cigarette smoke and the long-term respiratory problems it causes, I feel it is in my patient's best health not to be in a smokey environment." Bassler admitted that the was not "ill" during the time in question and that she did not have any medical condition that would be aggravated by exposure to ETS.

The union argued that, based on discussions during negotiation of the agreement, Bassler did not meet the definition of an "ill employee." The authority held that the Air Force could reasonably have found that the employee was an "ill employee," and that its action did not constitute a "clear and patent breach" of the terms of the agreement.

[20] *Transport Workers Union Local 2013 v. Southeastern Pennsylvania Transportation Authority*, 1991 WL 133510 (E.D. Pa. 7/17/91). [11-12-93]

The union filed suit to enjoin the employer from implementing a policy barring employee smoking in all indoor facilities in the workplace. The union asserted that the employer had allowed employers to smoke on shop floors in the past and that such practice had developed into an implied permission to smoke. The union further asserted that the policy was not authorized by the existing collective bargaining agreement.

The court denied the injunction, stating that the controlling statute, the Railway Labor Act (RLA), limited injunctions to major disputes and that minor disputes are to be resolved through compulsory arbitration.

The judge further stated as follows:

> [I]t is important to remember . . . [that] we are not deciding whether cigarette smoke inhaled directly, or passively by a third party, is deleterious to one's health. Nor are we deciding whether to put a stamp of approval on what the union might characterize as SEPTA's quasi-Orwellian decision as to how its employees might comport themselves . . . [r]ather, we must keep an eye on the technical, statutory, legal question of contractual construction in the context of the RLA, and leave those policy decisions for resolution by the parties themselves at another time.

[21] *In the Matter of Tyndall Air Force Base, Florida, and Local 3240, American Federal of Government Employees, AFL-CIO*, 1993 WL 184118 (Federal Service Impasses Panel) (decided May 25, 1993). [11-12-93]

A federal arbitration panel determined that an employer may impose a smoking ban at its Main Exchange facilities as long as it offers smoking cessation classes to its employees, designates an outdoor smoking area that is reasonably accessible to employees, and provides a degree of protection from the elements. The union had asked for employee polling and designated indoor smoking areas.

The panel approved a modified version of the employer's proposal on the basis of "the overwhelming scientific evidence concerning the adverse impact of

exposure to second-hand smoke." The panel further asserted, "a ban on indoor smoking is necessary to enhance the health of all individuals at the Main Exchange."

[22] *United Paperworkers Int'l Union -- Local 286 v. H.S. Crocker Co., Inc.*, 815 F.Supp. 302 (E.D.Wis. 3/13/93). [1-17-96]

A District Court judge determined that a union, seeking to compel arbitration over the implementation of a workplace smoking ban, did not timely file a suit to compel arbitration after the employer informed the union that it would not submit the issue to arbitration.

[23] *In re: U.S. Department of Health and Human Services/SSA and Local 3172, American Federation of Government Employees, AFL-CIO*, 1993 WL 106970 (Federal Service Impasses Panel) (decided April 7, 1993). [11-12-93]

Union workers filed a request for assistance with the Federal Service Impasses Panel when their employer refused to increase the ventilation in a new office location from 5 to 10 cubic feet per minute (CFM) of outside air per person. The panel refused to grant the union's request for relief in spite of evidence that ASHRAE now recommends a rate of 20 CFM for office space. "In our view," the panel stated, "[the union] has failed to demonstrate a need to change the current ventilation rate of 5 CFM." Because there was a nonsmoking policy in the office, the employer was complying with the "minimum Federal rate," and no one had yet complained about the air quality, the panel did not believe it was necessary for the employer to spend $12,500 to raise the ventilation rate.

[24] *U.S. Department of Housing and Urban Development, Region V and American Federation of Government Employees Local 3701*, Case No. 92 FSIP 205 (Federal Service Impasses Panel) (decided February 11, 1993). [11-12-93]

A Federal Service Impasses Panel ordered that smoking no longer be permitted in private offices in the HUD office in Cleveland, Ohio. The order followed union complaints that employees in work stations adjacent to the private offices were being exposed to ETS due to the inadequacy of the ventilation system to completely clear the air. Citing the EPA Risk Assessment on ETS as part of "the overwhelming body of scientific evidence that has conclusively established the health hazards associated with the passive inhalation of second-hand or environmental tobacco smoke," the panel also, sua sponte, banned smoking from designated sections in lunch and break rooms. According to the panel, employees who smoke will only be permitted to do so in reasonably accessible outdoor areas that provide a measure of protection from the elements.

[25] *YHA, Inc. v. National Labor Relations Board*, 2 F.3d 168 (6th Cir. 8/11/93). [11-12-93]

The Sixth Circuit Court of Appeals determined that union employees waived their right to bargain over the implementation of a nonsmoking policy in the workplace. The employees waited more than three months, until the day before the policy was to take effect, to demand bargaining on the issue.

[26] *Matter of Department of Veterans Affairs Regional Office, St. Petersburg, Florida and Local 1594, American Federation of Government Employees, AFL-CIO*, 1994 WL 66831 (Federal Service Impasses Panel) (decided March 2, 1994). [1-17-96]

A Federal Service Impasses Panel ordered that smoking be prohibited indoors at a VA office in St. Petersburg, Florida. The ruling adopted the employer's recommended resolution of a bargaining impasse, and further imposed the obligation upon the employer to provide a reasonably accessible, sheltered outdoor area for smokers and smoking cessation classes at no cost to employees. The employer, in making its recommendation, cited the EPA Risk Assessment on ETS to support its claim that "sidestream and second-hand smoke are health hazards."

The union had sought the establishment of a designated smoking room in an existing lounge that had a window and could provide direct exhaust to the outside. The union also proposed repairing a portable smoke filtration system and keeping doors to the smoking area closed. In this regard, the panel stated, "The improvements [the union] proposes do not, in our view, go far enough to separate employees from smoke-laden air in light of scientific evidence that links the passive inhalation of second-hand smoke to disease processes."

SETTLEMENTS

[1] *Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO v. Ohio Department of Transportation*, 1995 WL 326265 (Franklin County Court of Appeals, Ohio) (decided June 1, 1995). [12-21-95]

An Ohio appeals court dismissed as moot a smoking-policy dispute between a union and a government employer. In its original complaint to the State Employment Relations Board (SERB), the union claimed the unilateral imposition of a workplace smoking policy by the employer represented an unfair labor practice. However, SERB ruled that the smoking policy was not a mandatory subject of collective bargaining, a decision later affirmed by a lower court. While the union's appeal of the lower court's decision progressed, the governor of Ohio issued an executive order prohibiting smoking in most state facilities, including those operated by the defendant. The appeals court dismissed the union's claim as moot following publication of the executive order.

PENDING CASES/OUTCOME UNKNOWN

[1] *"Government Unions File Unfair Labor Practices Claim"* [2-11-94]

According to a press report, unions representing Bucks County employees filed a complaint with the Pennsylvania Labor Relations Board after county officials unilaterally instituted a smoking ban in all county facilities on March 1, 1993. The previous smoking policy, which permitted smoking in designated areas, was apparently negotiated during contract talks in late 1990. According to union officials, the change in policy represents a working condition that is subject to negotiation. *See Philadelphia Inquirer*, November 11, 1993.