UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: July 15, 1998

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL
COMMAND WRIGHT-PATTERSON AIR
FORCE BASE, OHIO

Respondent

and Case No. CH-CA-70577

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL F-88

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

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WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND WRIGHT-PATTERSON AIR FORCE BASE, OHIO Respondent	
and INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL F-88 Charging Party	Case No. CH-CA-70577

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 17, 1998**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

ELI NASH, JR.

Administrative Law Judge

Dated: July 15, 1998
Washington, DC

OALJ 98-33

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND WRIGHT-PATTERSON AIR FORCE BASE, OHIO Respondent	
and INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL F-88 Charging Party	Case No. CH-CA-70577

Warren A. Buckler, Jr., Esq.
Stacy Lewis Zaire
For the Respondent

Greg A. Weddle, Esq.
Susan L. Kane, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to an unfair labor practice charge filed on August 7, 1997, by the International Association of Fire Fighters, Local F-88 (herein called the Charging Party or Union) the Regional Director of the Chicago Region of the Federal Labor Relations Authority (herein called the Authority) issued a Complaint and Notice of Hearing, on February 25, 1998.

The complaint alleges that the U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio (herein called Respondent) violated section 7116(a)(1) and (5) of the Statute by unilaterally

terminating the practice of smoking inside the fire houses at its facility.

A hearing was held in Dayton, Ohio, at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. The parties filed timely post hearing briefs which have been carefully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The International Association of Fire Fighters (IAFF) is the certified exclusive representative of a nationwide unit
of employees appropriate for collective bargaining at Respondent's facility. The IAFF represents employees in the fire protection branch at Tinker, Robins, Wright-Patterson, Kelly, and McClellan Air Force Bases. The Union is the agent of IAFF for the purpose of representing the unit employee fire fighters assigned to Respondent's fire houses at the facility. Respondent has four fire houses at its facility.

Respondent and the Union are parties to a Command Labor Agreement (CLA) between the IAFF and the Air Force Materiel Command. The three-year agreement was approved and thus became effective on October 4, 1993, and is automatically renewable.[1] In addition to the CLA, the Union and Respondent are parties to a local supplemental agreement

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[1] Article 27, section 3 of the CLA concerning smoking policy reads, in pertinent part, as follows:

> "Therefore, smoking will be prohibited at all Fire Stations[,] those employees who must smoke may do so outside the Fire Station."

The CLA further says that, "policies/procedures to assist bargaining unit employees to quit smoking is a subject that is expressly authorized for local negotiations."

which was executed on September 14, 1994, or after the CLA.[2] The local supplemental agreement addresses only the smoking cessation program which is specifically authorized in the CLA for negotiations. The absence of mention of the smoking policy in the local agreement negotiated reasonably supports a belief that substantive negotiations on the smoking policy were left to the CLA. Furthermore, Union president James Johnson testified that, despite the signing of the CLA containing the smoking prohibition, smoking continued in the fire houses and "that part of the contract was never really adhered to."

The General Counsel offered testimony from the Union's former president Richard Pence and its present president Johnson, who both testified to the effect that there was an agreement between national vice president, Mike Crouse, and the Air Force Materiel Command labor relations officer, Dale Biddle, who was the chief negotiator for the Air Force Materiel Command, after the CLA was signed to "allow each local affiliate in the base to come up with their own policies on smoking . . . And then each local affiliate came up with their own policy regarding smoking." According to Pence, details about smoking in the fire house were allegedly left to him and Fire Chief Darrell Wilcoxon. Their agreement allegedly reached during the July 1995 reopener of the CLA is totally inconsistent with the CLA's ban on smoking in fire houses. Johnson also testified that Crouse and Biddle agreed to allow each local affiliate in the base to come up with their own policies on smoking.

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[2] The local supplemental agreement, Article 7, section 5, entitled smoking cessation program, reads as follows:

> The parties agree to work towards creating a social environment that supports abstinence and discourages the use of tobacco products, creating a healthy working environment and providing smokers with encouragement and professional assistance quitting. If available, the Employer agrees to provide a smoking cessation program for those employees desiring to attend. The Employer agrees to grant time with no charge to leave for an employee's first smoking cessation program while on duty. Bargaining Unit Employees will bear the personal cost associated with these smoking classes. Bargaining Unit Employees desiring to utilize the time to attend smoking cessation class will submit a written request to his her appropriate supervisor for approval.

"And then each local affiliate came up with their own policy regarding smoking." Johnson's testimony, however, only mirrors that of Pence and does not corroborate the testimony that there was an agreement between the national signatories of the CLA to change the smoking policy set out in Article 27 of the CLA.

Neither does Wilcoxon's testimonies confirm that there was permission from the national level to moderate Article 27. Other than his general statement that local management was aware of his negotiations with the Union, Wilcoxon was silent with respect to who authorized him to negotiate the matter. He also did not disclose during his testimony what the contents of those negotiations were. Although Wilcoxon testified that local management was generally aware of his "informal" approach to negotiations about fire house issues concerning quality of life issues, he did not indicate that he had any specific directive from local management on the smoking policy negotiations nor did he testify regarding what agreement was reached about the facility's smoking policy. Additionally, there is no testimony from Crouse and Biddle, who allegedly allowed negotiations at the local level although the CLA contained the smoking policy at Respondent's fire houses. Furthermore, Wilcoxon offered no testimony concerning whether he was aware or not aware that smoking was going on in the fire houses or even that the agreement that he had with Pence on the new smoking policy had been breached.

Unfortunately, neither the next Fire Chief nor Respondent's local labor relations staff was aware that there was a smoking policy other than the one contained in the CLA.

Although Pence says that he and Wilcoxon worked out an agreement to allow inside smoking during inclement weather, there is no record evidence that each had the authority, either expressed or implied to change the contents of the policy contained in the CLA. Even if there was a Wilcoxon-Pence agreement, it could not represent a modification of the CLA, in the opinion of the undersigned, since it would be necessary to show that there was some authorization from the national level for these two to negotiate a change in the CLA at the local level.

In any event, the evidence reveals that any Wilcoxon-Pence agreement or any other agreement was ever followed as employees continued, as they had in the past, smoking in the firehouses. Based on Johnson's testimony, it appears that employees never followed either the CLA or the Wilcoxon-Pence prohibitions against smoking in the fire house.

Furthermore, the record does not show that anyone, even in local manage-ment, was aware that smoking was taking place inside the fire house, despite the prohibition of the CLA. Thus, not even Pence and Johnson say that any local management was aware that smoking was going on in the stations despite the prohibitions of the CLA. Wilcoxon, who testified, certainly did not say that he was aware that the locally negotiated policy was not being followed.

The CLA is silent as to impact and implementation negotiations over the smoking policy itself, but expressly authorizes local supplemental agreements over the policies and procedures to assist bargaining unit members to quit smoking. Indeed the parties addressed this very smoking cessation matter in the local agreement approximately one year later. The local agreement, however, makes no mention of local negotiations which would allow any modification of the smoking policy negotiated in the CLA.

From November 1990 to April 1997[3] or during Wilcoxon's tenure as the Fire Chief, negotiations between the Union and Respondent over changes in conditions of employment were normally conducted verbally and informally. Wilcoxon testified that he was aware of the contract provision controlling bargaining with the Union. In his opinion, the informal and oral bargaining that he engaged in with the Union on almost a daily basis, he considered "in the spirit of the contract." Also, Wilcoxon stated with respect to the quality of life issues, that he bargained "per the advice that I receive [from] command." Thus, Wilcoxon stated that even on "trivial matters" he kept Respondent's labor relations staff informed. Wilcoxon did not say, however, that he received any directions or instructions to negotiate the smoking issue from anyone in management at either the local or Command level. Respondent's witnesses testified, however, that they were unaware of any revision in the negotiated smoking policy contained in the CLA. Furthermore, McKay testified that he discovered that there was an agreement on smoking, but "after hours and during inclement weather and that it would cease if anyone complained." Furthermore, Wilcoxon's successor as Fire Chief, Jimmy McKay, continues this practice, verbally negotiating with the Union daily. None of this explains, however, why the smoking cessation program which was expressly authorized for local supplemental negotiations appears therein and the most important issue, the smoking policy, was not reduced to writing by the parties.

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Unless otherwise noted, all dates hereafter are 1997.

On June 18, a letter was sent by Respondent's Labor Relations Officer Brian Normile to then Union President Pence, in which Normile informed Pence that the practice of smoking inside fire houses at the facility would be terminated effective July 7. Normile explained that Respondent's termination of the smoking practice was pursuant to the parties' collective bargaining agreement's prohibition of smoking.

Pence was stepping down as Union president effective July 1, so he gave the June 18 letter to the newly elected Union President Johnson. Johnson was the Union's vice-president up until July 1. Within a day or two of receiving Normile's letter from Pence, Johnson telephoned Normile to express the Union's disagreement with the decision to terminate indoor smoking. Johnson informed Normile that any changes in the practice of indoor smoking needed to be negotiated. Johnson proposed that the indoor smoking practice could continue during periods of inclement weather.

Normile told Johnson that the only agreement Respondent was willing to recognize was the CLA and its restrictions on indoor smoking. Nonetheless, Normile told Johnson that if Johnson and Chief McKay could come to an agreement regarding smoking, Normile would not have a problem with that. That same day, Johnson met with Chief McKay, who replaced Chief Wilcoxon as Fire Chief in March. Johnson explained to McKay the practice of smoking in the fire houses and stated that Normile had said if the two of them could come to an agreement that would be fine with Normile. McKay replied that the contract prohibited smoking and he was not willing to discuss the issue.

McKay testified that he became aware of smoking taking place at the fire house almost immediately after taking the Fire Chief position. McKay says that he looked into the reason for the smoking, in an empty stall, in the fire house. McKay further testified that the collective bargaining agreement said that there would be no smoking "within the facilities." McKay said that he looked for anything in writing governing smoking and "couldn't find anything." He also stated that he was "told they had a side bar agreement or written agreement." McKay says that he found nothing to substantiate the written agreement. The local supplement contains a clause concerning the smoking cessation program, but does nothing to change the mandate of the CLA prohibiting smoking at the Fire House.

According to McKay, he did find an old SOP signed by Wilcoxon that said smoking would be "outside the facility." He later found, however, that there was a verbal agreement

with Wilcoxon, but his understanding of this agreement was that the verbal agreement ended if there were any complaints and he had complaints about inside smoking.

Later that same week, Johnson again spoke with Normile about the termination of smoking. This time, it was during a meeting arranged by Johnson and held in Normile's office. Johnson again expressed his dissatisfaction with the termination of indoor smoking; asked if there were any specific problems; and asked if there were specific locations of smoking Respondent wanted to change. Johnson told Normile he was willing to negotiate those matters. Normile stated that Respondent would not deviate from the contractual prohibition of smoking.

On July 7, Johnson again met with McKay. According to Johnson, he told McKay that it was not appropriate for him to terminate smoking without negotiations. McKay responded that he and Normile had reviewed the situation and the two of them felt the contract needed to be followed since there was no other written agreement. McKay further stated that they were not going to discuss the issue.

On July 7, Respondent terminated indoor smoking at the fire houses.

Around July 15, Johnson notified Normile of the Union's intention to file an unfair labor practice charge alleging a unilateral termination of the smoking practice. Normile responded on July 31, claiming that Respondent's termination of the smoking practice was not an unfair labor practice because "(the Union) did not provide bargaining proposals regarding the impact and implementation of this decision prior to the effective date of the change which was July 7, 1997."

Analysis and Conclusions

The smoking policy at issue was negotiated at the national level in a CLA in 1993. Since the parties entered into a CLA, any local supplements would therefore have to be consistent with the CLA and authorized by both sides at the national level because the bargaining obligation is at that level. It is noted in this regard, that Article 27 expressly authorized bargaining at the local level over the smoking cessation program. There is no such written authorization concerning any other aspects of the smoking program, however. Absent such a written authorization, one could reasonably believe that allowing the local affiliates to come up with "their own policies on smoking" did not mean that they could each come up with a new and different

policy, but simply that each should work out the impact and implementation of their smoking policy. Furthermore, I am not persuaded that the 1995 statement that each local affiliate would be allowed to come up with "their own policies on smoking . . . " meant that each local element could establish smoking policies that were not consistent with the CLA. It is reasonable to conclude that such a statement would mean scrapping the language of the CLA and starting all over again. There is not one iota of evidence that negotiators at the Command level meant for that to happen. As noted, Pence testified that there was authorization, but his testimony is uncorroborated on the record. There is simply not enough record evidence to support such a finding.

The General Counsel maintains, in essence, that Respondent's Fire Chief orally agreed to allow smoking inside Respondent's fire houses under certain conditions and that out of that agreement, bargaining unit employees established a past practice of smoking inside the fire house, at all times. The General Counsel now claims that this smoking inside the fire house, despite a prohibition on such smoking in the CLA, ripened into a condition of employment that could not be unilaterally changed by terminating the work place smoking without bargaining.

Any analysis of this case must consider whether or not a past practice was established by employees smoking inside the fire houses at Respondent's facility even though there was a contractual prohibition of such smoking. The record clearly shows that employees continued to smoke in the fire house after the parties at the Command level negotiated a prohibi-tion against smoking inside fire houses in 1993. In fact, based on Johnson's testimony, they never stopped smoking in the fire houses. Thus, the smoking practice which the General Counsel contends began in 1995 during Wilcoxon's tenure as Chief was always in existence. It was, in fact, the very policy that the CLA sought to prohibit. Furthermore, it was the practice terminated by substantive negotiations at the Command level.

Smoking is a substantively negotiable condition of employment. *Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 52 FLRA 225, 242 (1996); *Luke Air Force Base, Arizona,* 49 FLRA 137 (1994).
Furthermore, there are numerous cases holding that a past practice may be established where it is consistently exercised over an extended period of time with the knowledge and express or implied consent of "responsible management" within the agency. *See Defense Distribution Region West,*

Tracy, California, 43 FLRA 1539 (1992); *U.S. Department of Labor, Washington*, D.C., 38 FLRA 899 (1990); *See also Norfolk Naval Shipyard*, 25 FLRA 277 (1987). Furthermore, a past practice may be established under certain circumstances although it may be inconsistent with the terms of the parties' agreement. *See Defense Distribution Region West, Lathrop, California*, 47 FLRA 1131 (1993); *U.S. Department of the Navy, Naval Avionics Center, Indianapolis, Indiana*, 36 FLRA 567 (1990). In order to ripen into a condition of employment, however, it must have been exercised over a significant period of time and followed by both parties or followed by one party and not challenged by the other. *U.S. Department of Labor, Washington, D.C.*, 38 FLRA 899 (1990). There was absolutely no showing in this case, that any one at a higher level acquiesced in the practice of inside smoking in the fire houses at Respondent's facility.

Clearly the CLA provision which prohibited smoking was negotiated at the Command level. Consequently, deviations from that policy must obviously be authorized at that level.

The General Counsel did not offer any evidence from either management or the Union concerning any authorized modification to the smoking prohibition contained in the CLA. Furthermore, no evidence was proffered to show that any responsible management officials other than Wilcoxon was aware that smoking was going on, despite its prohibition. In fact, Respondent has refuted this claim from the very beginning, asserting that it was not aware of such a negotiated policy at the local level and insisting that it needed to follow the CLA. Thus, it is clear that the practice agreed to by Wilcoxon and the Union specifically conflicted with the CLA and could not ripen into a past practice about which Respondent would have an obligation to bargain. This could occur only if it was clearly shown that Respondent was aware of authorization from the Command level to change the agreement or that at the local level it was aware that smoking was taking place in the fire houses despite the CLA. *See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO*, 17 FLRA 1011 (1985); *National Association of Government Employees, Local R14-77 and U.S. Department of Veterans Affairs Medical Center, Grand Junction, Colorado*, 40 FLRA 342 (1991); *Compare U.S. Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, Region II*, 38 FLRA 193 (1990)(past practice created in part by higher level manager's acquiescence in the action of a local manager). Here there is no evidence showing that the lifting of the prohibition on smoking inside Respondent's fire houses was

known to anyone in management at any level other than Wilcoxon. Clearly local management did not acquiesce in the alleged past practice for upon finding that smoking was taking place in the fire houses it terminated the practice.

The cases cited by the General Counsel to support its position that "an agency may not change unilaterally a condition of employment established through past practice even if the condition established by practice differs from the express terms of the parties collective bargaining agreements" are distinguishable. *U.S. Patent and Trademark Office*, 39 FLRA 1477 (1991); *U.S. Department of the Navy, Naval Avionics Center, Indianapolis, Indiana*, 36 FLRA 567 (1990). In those cases there was no contention that the practice established at the local level was inconsistent with the provisions of a national agreement, or that the local practice was unknown to management at the national level of exclusive recognition. Nor do those cases stand for the notion that local management had a duty to bargain before unilaterally changing a past practice that had ripened into a condition of employment. Absent some specific or express delegation to the parties' local representatives, the obligation remains at the level of exclusive recognition which in this case is national. In my view, the combined testimony of Pence, Johnson and Wilcoxon does not establish that there was such a delegation.

While the undersigned is not unaware of Pence's and Johnson's testimony that there was authorization to negotiate with Wilcoxon over a smoking policy in the fire houses, their testimony is not supported by the record. As already stated, Pence's uncorroborated testimony does not establish a past practice in this case. In fact, Johnson's testimony seemed to show that there was no smoking policy in the fire houses from 1993 to 1995 and there was apparently no effort on the Fire Chief's part to enforce the policy of the CLA. Nor does it appear that Wilcoxon sought to enforce the alleged local negotiated agreement. In these circumstances, what was allegedly negotiated between Wilcoxon and Pence could not have been a new policy, but simply an accommodation for those who continued to smoke. In any event, not even that policy was enforced, raising the further question as to whether or not there was any smoking policy at the fire houses during Wilcoxon's tenure as chief.

In short, it appears that the CLA contained the existing smoking policy of the parties. Thus, it is found that Respondent's effort to require bargaining unit employees to adhere to the negotiated policy did not require bargaining. In this regard, it must be noted that the past practice alleged herein was a practice that was not

consistent with that provided for in the CLA and that there is no showing that this inconsistency was either known to or acquiesced in by signatories to the CLA. Consequently, the bargaining unit employees could not establish a policy that was not authorized at the Command level by simply failing and refusing to adhere to the negotiated policy even though the Fire Chief, in this instance, overlooked smoking in spite of the CLA's prohibition against it.4

Based on the foregoing, it is found and concluded that Respondent did not violate section 7116(a)(1) and (5) of the Statute by unilaterally terminating the practice of smoking inside the fire houses at its facility. Accordingly, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. CH-CA-70577 should be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., July 15, 1998

ELI NASH,
JR. Administrative Law Judge

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4 Based on the above findings, that Respondent did not refuse to bargain the substance of the smoking policy herein, it is unnecessary to address Respondent's claim that the Union did not follow the procedures set forth in Article 12, section 5, subsection e for changes initiated at the Activity level. In addition, a finding as to whether further requests to bargain would have been futile is also not necessary.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. CH-CA-70577, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: July 15, 1998
Washington, DC