FMCS ARBITRATION CASE

81K - 26042

SOCIAL SECURITY ADMINISTRATION

HEADQUARTERS BUREAUS AND OFFICES

and

LOCAL 1923

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

AFL-CIO

SMOKING POLICY VIOLATION

THOMAS GOODMAN

DECISION OF THE ARBITRATOR

ARTHUR ELIOT BERKELEY

January 22, 1982

Appearances

For the Agency:

Dolores Walke
Labor Relations Specialist

For the Union:

Alvin Levy
4th Vice President

Encl

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INTRODUCTION:

This case arose between the Headquarters Bureaus and Offices of the Social Security Administration (hereinafter called the Agency) and Local 1923 of the American Federation of Government Employees, AFL-CIO (hereinafter called the Union). The parties selected the undersigned as the aribitrator through the procedures of the Federal Mediation and Conciliation Service.

Two hearings were held: November 3 and 6, 1981, at which time both parties were afforded a full and complete opportunity to present all relevant witnesses, exhibits and arguments. Both parties enjoyed competent, energetic representation and a verbatim transcript was recorded, references to which are noted as T:212. Both parties elected to file post-hearing briefs. This decision is thus based upon all the witnesses, exhibits and argumentation presented during the hearing as well as arguments contained in the post-hearing briefs.

QUESTION PRESENTED:

Did the Agency violate its policy on smoking in the situation of employee Thomas Goodman; if so, what shall the remedy be?

BACKGROUND:

In this dispute many background facts are not in

controversy and may be briefly summarized. Other facts are highly controverted and may not therefore be so summarized. Thus, this case entails question of policy interpretation as well as factual determination.

This case is unusual in that it does not ask the arbitrator to interpret a collectively negotiated agreement but rather seeks an interpretation of a unilaterally promulgated Agency policy. Then Secretary Califano issued a policy, as was his prerogative, and subsequently guidelines were created for the implementation of that policy, guidelines which created numerous parameters some of which appear vague, to say the least, and some which perhaps contradict others.

On January 11, 1978, Secretary of Health, Education and Welfare, Joseph A. Califano, issued a regulation (Joint Exhibit 5) which was explained in a letter of the same date directed to "ALL NEW EMPLOYEES" (Joint Exhibit 4). In his letter the Secretary said that the "new policy prohibits smoking in all Department conference rooms, classrooms, auditoriums, libraries, elevators, and shuttle vehicles. To the extent it is practical to do so, efforts will be made to assign smokers and non-smokers to separate and physically distinct work places. In common work areas, in which two or more people are assigned, supervisors will prohibit smoking if an employee objects in writing to tobacco smoke in the

immediate work area on the basis that it is having an adverse effect on his or her health. In recognition of the rights of smokers, supervisors will establish areas in which smoking is permitted. All cafeterias will have designated smoking and non-smoking areas".

These comments were echoed in the Secretary's Memorandum which introduced the policy and guidelines set forth in General Administrative Manual Chapter 1-60, revised, which were in Joint Exhibit 5, and which will be examined later.

For the clarity and consistency of the record it should be noted that the Department of Health, Education and Welfare was subsequently reorganized and a separate Department of Education created. Social Security Administration is now a part of the Department of Health and Human Services (HHS).

The broad parameters of the policy are fairly clear: non-smokers are to be provided with, in Secretary Califano's words, "working environments which are reasonably free of contaminants by smoke". (Joint Exhibit 4). As noted above, he then added in this January 11, 1978 letter to all HEW employees, "In recognition of the rights of smokers, supervisors will establish areas in which smoking is permitted". (Ibid) Thus, from the beginning of this policy, concern was expressed as to both the rights of smokers and non-smokers. As to guidance in how these rights were to be balanced, the Secretary

wrote, "To the extent that it is practical to do so, efforts will be made to assign smokers and non-smokers to separate and physically distinct work places. In common work areas, in which two or more people are assigned, supervisors will prohibit smoking if an employee objects in writing to tobacco smoke in the immediate area on the basis that it is having an adverse effect on his or her health". (Ibid)

The Secretary thus did not attempt any clear or specific definitions of such crucial issues as what is to be done if it is not practical(and in whose judgment) to assign "smokers and non-smokers to separate and physically distinct work places", or where smokers would be permitted to smoke or whether an employee protesting smoke as having an adverse effect on his or her health must be put to any proof on that contention.

The Agency thus sought to promulgate more specific guidelines for policy implementation through its Administrative Directives System (Joint Exhibit 7). This document states that "In recognition of the fact that smoking is dangerous to the health of smokers; that tobacco smoke in a confined area creates a health hazard to non-smokers suffering from heart disease, respiratory diseases or allergies related to tobacco smoke, and that smoke in a confined area may be irritating and annoying to non-smokers and violates their privilege of breathing air relatively free from tobacco smoke contamination,

every effort will be made to provide an environment reasonably free of such contaminants".

It must be noted that the guidelines do not envision an environment totally free of smoke and its contamination, but rather only one "reasonably free of such contaminants," yet as stated below, does provide for the prohibition of smoking.

Section E deals with guidelines for work areas and under the heading of "1. Separation of Smokers and Non-smokers" states:

In consideration of the rights of smokers and non-smokers in work areas, they will, within practical limits, be given the opportunity to be assigned to separate and physically distinct offices and work places (separate and physically distinct does not necessarily require private offices or the partitioning of non-smokers from smokers). In each situation, all factors such as air flow, proximity of office equipment, aisleways, etc. must be taken into account in deciding if smokers and non-smokers may be segregated, or if smoking must be totally prohibited. The following provisions will apply in making these determinations.

a. Efficiency of work units or administrative effectiveness shall not be impaired.

b. Excessive costs will not result from providing physical separation.

c. Additional space will not be required".

SSA. g. 110-5 then continues as follows:

2. Common Work Areas

In meeting the requirements of this section, it is not intended that a small work area be divided into smoking and non-smoking areas, but will be declared a non-smoking area if an employee objects in writing to tobacco smoke on the basis that it is having an adverse effect upon his or her health.

a. Common Work Areas as defined generally means: an individual work station as defined in the Federal Property Management Regulations plus adjacent work stations not separated by a wall. There is no established area based on square footage (as applicable to large "open space" work areas or as to what constitutes the immediate work environment). In determining what is a common work area, consideration should be given to all factors such as air flow, proximity of office equipment, aisleways, etc. in deciding if smoking must be totally prohibited. As a general rule, a minimum rate of 5 cubic feet per minute (cfm) of fresh air per person is recommended to remove smoke from a work area and provide an environment reasonably free of contaminants.

b. In common work areas, in which two or more employees are assigned, supervisors will prohibit smoking if an employee objects in writing to tobacco smoke in the immediate work environment on the basis that it is having an adverse effect

on his or her health.

3. Smoking Areas

a. Recognizing the rights of smokers who continue to smoke, supervisors will establish areas in which smoking is permitted. Such areas will be conspicuously posted.

b. When smoking is prohibited in a common work area because space and/or efficiency limitations make it impossible to establish separation of smokers and non-smokers, a smoking room or area must be provided for smokers. Separate areas established for smoking outside the normal work area are not to be considered work stations".

THE GRIEVANCE

Thomas Goodman, employed in the Office of Systems, Office of Systems Planning and Control at the Agency, was assigned to work on the fifth floor of the New Computer Center Building. This is a large, "open space" type of layout with no floor to ceiling walls. There are work stations with what amounts to partitions of perhaps five or six feet in height. The Grievant's contention is that he is bothered by smoke generated by co-workers at their work stations which are nearby and he therefore seeks to have smoking banned on the entire fifth floor, with smoking to be permitted only in the observation lounge and perimeter corridors. The Grievant's position is that the Agency is not in compliance with HHS

policy on smoking, and that the relief he seeks, if granted, will put the Agency in compliance while not contravening the guidelines quoted previously.

The Agency in turn argues that it is in compliance with both HHS policy and its own guidelines concerning non-smokers' rights. They argue they have sought to accommodate the Grievant previously in numerous ways in this matter and that the relief sought may not be granted because it would contravene the guidelines. In its cogent argumentation the Agency raises numerous arguments which will be examined seriatim, with the Union's position juxtaposed for clarity of positions.

1. <u>The Grievant has already been sufficiently accommodated</u>

The Agency presented unrefuted testimony that in establishing the layout of the work area, the Grievant's supervisors sought to place Mr. Goodman in as smoke free an area as possible. The Grievant was given a work place which was surrounded by an area of approximately 50 feet square in which smoking was prohibited. This 50 feet by 50 feet area represents about one-fourth of Mr. Goodman's Division's area. (T: 270, 273), and the Agency contends this is sufficient accommodation.

The Grievant contends that the buffered non-smoking space was smaller, and it is not at all sufficient and that,

in fact, he is still seriously bothered and his health is adversely affected by the smoke that wafts through the air from smokers' work stations and the carrying of lighted tobacco products through and around his work area by smokers.

2. The guidelines do not envision a totally smoke-free environment.

The Agency argues that the guidelines do not envision a totally smoke-free environment, but only one reasonably free of such contaminants .

3. The air quality tests indicated that the Grievant's work environment was "reasonably free of such contaminants".

The Agency argues the air was monitored at the Grievant's work place and the tests results clearly demonstrate the environment is "reasonably free of such contaminants" and thus, the Agency has not only sought to accommodate the Grievant but in fact has successfully resolved the problem.

The Grievant argues first, that the tests were not truly representative of the day-to-day air quality at his work place, and second, even if the test results were accurate, he is not satisfied with the level of smoke contaminants in the air in his immediate work environment and his health is still being placed in jeopardy by the current situation in which smoking is permitted.

4. The test results show the suggested air quality level is being met and the grievance should be dismissed.

The Agency argues that if the air quality standard set out in the guidelines of 5 cfm is being met, there does not need to be any further accommodation of the individualized, personal proclivities of one disgruntled employee, and the matter should be closed. If a reasonable person would be satisfied, the Grievant should be. The Agency, by meeting the 5 cfm standard is clearly in compliance with the HHS policy and its own guidelines.

The Union contends that the appropriate standard is not the objective number in the guidelines but the personal experience of the individual. They cite an internal memo which corroborates this position issued by Lawrence E. Hendricks, Administrative Assistant to an Associate Commissioner at the Agency. (Joint Exhibit 8), dated "Nov. 03, 1978".

5. The Grievant's testimony is not credible and smoke does not have a proven ill effect on his health.

The Agency contends that the Grievant, while perhaps not strictly speaking required to present documented proof of his medical problems caused by smoke, presented weak and unconvincing material from his doctor. In addition, the Agency argues it is unclear whether the Grievant ever presented these documents to the appropriate supervisor. All of which goes to

undermine the Grievant's credibility and makes suspect his allegation that smoke has an adverse impact upon his health.

The Union denies medical documentation is even required and argues that his documentation is valid and was presented to his then-supervisor. All that is required, the Union argues, is that the Grievant, pursuant to regulations "must object in writing to tobacco smoke in his or her environment on the basis that it is having an adverse effect upon his or her health", and this the record clearly demonstrates the Grievant in fact did. The Union concludes that the Grievant's credibility is not an issue here and, once the regulation quoted directly above has been complied with, it is the Agency's duty to meet its obligation of a smoke-free work environment for the Grievant.

6. Smoking is already prohibited in the Grievant's work area.

The Agency argues that its definition of the Grievant's work area is correct, that is, his work station plus those adjacent work stations not separated by a wall. To consider the entire fifth floor of the New Computer Center to be his work area is incorrect and unrealistic, and contrary to the purposes of the regulations - and common sense. Therefore, since smoking is prohibited in the Grievant's work area, the grievance must be denied.

The Union disagrees, claiming that since there is no wall in an "open space" building, the entire floor must be considered as the Grievant's work area. They note that there are no barriers to ambient smoke movement in such construction and thus the Grievant can be-and in fact is- thus exposed to ambient smoke in violation of both the letter and spirit of the regulations.

7. To declare the entire fifth floor a non-smoking area would result in increased operational cost and decreased efficiency.

The Agency argues that if smokers could not smoke at their work places, if smoking were banned on the entire floor, the employees who smoke would have to take unproductive smoke breaks which would increase operational costs while decreasing the efficiency of operations, both of which results violate SSA. g.: 110-5 VI E. 1. a. and b., previously quoted from Joint Exhibit 7.

The Union counters that operational efficiency is decreased when the Grievant (and other non-smokers) cannot work due to health problems caused by smoke. And if there were to be only a concern with operational efficiency, smoking would never be banned anywhere because the Agency would argue that making a smoker leave his or her immediate work area to have a smoke would inevitably increase costs and decrease efficiency. The Union concludes this is a self-

serving argument and one, if accepted, would conceivably permit the Agency to consistently circumvent the policy, clearly an anomalous result.

8. To architecturally install walls on the fifth floor of the New Computer Center would be prohibitively expensive.

The Agency argues that there is no feasible alternative architecturally to either continuing current practice, which it deems in compliance with the policy regulations, or prohibiting smoking entirely on the fifth floor, which it opposes for reasons cited above. The architectural style of "open space" means that no walls may be inserted from floor to ceiling which could conceivably solve the Grievant's problem by physically segregating smokers from non-smoking co-workers. Even if such floor to ceiling walls were architecturally possible, the Agency contends the cost would be prohibitive, and in violation of the proscription against excessive costs for providing physical separation.

The Union maintains that this argument is spurious at best because it is not requesting the construction of floor to ceiling walls. By the inexpensive expedient of simply prohibiting smoking on the fifth floor, the Grievant's needs are met and no architectural restructuring is required. And finally, there is a sizeable observation lounge which could be

denominated a smoking lounge area. This requires no new construction and could be easily and quickly reached by employees wishing to take a brief "smoke break".

9. The observation lounge on the fifth floor is not suitable for smokers only nor was it so designed.

In addition to arguing that any time away from one's work place to smoke is lost work time and is therefore operationally inefficient, the Agency argues that the lounge was designed for observation, not smoking.

The Union, while contending it is not their role to determine where smokers may smoke, does argue that this lounge would be, by location and physical lay-out, suitable for use by smokers.

10. The net effect of the Union's proposals would be to discriminate against smokers, something prohibited by the policy.

To make smokers leave their work stations to smoke infringes upon their rights since they have not had to do this before. In addition, a broad ban would restrict movement by smokers who could only smoke in a few designated places.

The Union argues that smokers have rights and those rights must be exercised subject to certain guidelines. The Agency has no difficulty or reluctance in prohibiting smoking where it interferes with sensitive data processing equipment

and here the interference caused by smoking is with human life, something far more precious.

11. Administratively enforcing a floor-wide prohibition on smoking would present great problems and entail increased costs.

The Agency argues that given the presence of contractors working on the still uncompleted facility, enforcement of a smoking prohibition would be difficult since contractors, sub-contractors and their employees are not, strictly speaking, under Agency direct supervision. While the Agency could perhaps request these outsiders not to smoke, the Agency has neither the right nor the supervisory staff to enforce such a ban. Even with Agency employees, to have supervisors enforce such a ban would, of necessity, entail time and expense better expended on operational matters.

The Union counters by noting that the Agency does not report any difficulty in enforcement of its no-smoking policy in areas where there is sensitive equipment, and therefore apparently it has the capability of so doing when it deems it appropriate; if there were a ban on smoking on the fifth floor of the New Computer Center, enforcement would not be an undue supervisory or financial burden.

ARBITRATION DECISIONS

Before beginning an analysis of the arguments proffered

by each party, it is appropriate to consider two prior arbitration decisions on the smoking issue, both of which involved the Agency and the Union, and one of which concerned the Woodlawn facility, the same facility here at issue.

The first case took place between the Union's Local 147 and the Palm Springs Office of the Agency, and is dated January 30, 1979. Arbitrator Robert Leventhal determined that the office was in compliance with Agency regulations when it prohibited smoking in a large work area even though such prohibition meant smokers were subjected to some inconvenience. Interestingly enough, it was the position of the Agency that it had to prohibit smoking pursuant to the regulations and the Union which argued the contrary.

Arbitrator Leventhal apparently considered alternatives to the prohibition but found none. He concluded it was not feasible to build a wall due to the air circulation system, and the work assignments made segregation of smokers from non-smokers impractical. In sum, the Arbitrator concluded that the office was in compliance with the policy even though the solution was not perfect and obviously engendered bad feelings between smokers, who had to take their smoking breaks away from their work area, outside the building often in unpleasant weather, and non-smokers who might resent the extra break time smokers got each day. (Union Exhibit 16,

a case summary circulated by the Office of Personnel Management.)

More to the point is the decision of Arbitrator Seymour Strongin dated January 30, 1980. As noted above, this case involved the Agency and Union local now before me, and while his decision is not, strictly speaking, binding upon the matter before me, it clearly merits close scrutiny and examination.

Arbitrator Strongin upheld the grievance of Neel Purvis, a non-smoker who testified in Mr. Goodman's behalf. Grievant Purvis worked in an open space area and sought a smoking ban similar to the one sought by Mr. Goodman, though Mr. Goodman appears to be seeking to have the ban apply to a larger area. Purvis had "one quadrant on one floor of the Oak Meadows Building" declared a non-smoking area by the Arbitrator and Goodman, of course, seeks to have the entire floor declared a non-smoking area.

Based upon an analysis of top level HEW communications, the Arbitrator concluded that the Secretary indicated that the type of open space in which Purvis worked was a "common work area" as mentioned in the regulations quoted earlier. Going further, the Secretary indicated clearly that he favored a liberalized definition of the phrase "immediate work environment" so that "a single employee could eliminate smoking within an entire open work area, regardless of the size of the area or the number of people working in it".

As Arbitrator Strongin stated, "Secretary Califano's interpretation of the Regulation he promulgated is entitled to some weight." Additionally, other top officials at both HEW and the Agency indicated, in writing, their concurrence with Secretary Califano's interpretation of the phrases "common work area" and "immediate work environment" and their applicability to situations like Grievant Purvis'.

Strongin concluded, "The Arbitrator must therefore conclude that the Agency has failed to implement the Secretary's Regulation, which requires supervisors to prohibit smoking in the common work area in which grievant is assigned. This area appears to consist of one quadrant on one floor of the Oak Meadows Building". (All of the above quotes and references are taken from Union Exhibit 17, Strongin's arbitration opinion and award).

ANALYSIS

With the complete background, and especially the history of prior arbitrations on the smoking issue, the analysis of the arguments of each side can begin.

It is clear that the Grievant has not, in fact, been sufficiently accommodated, no matter the extent or good faith of previous Agency efforts in this regard. While it is true that the guidelines do not envision a totally smoke-free

environment, they do provide for prohibition of "smoking if an employee objects in writing to tobacco smoke in the immediate work environment, on the basis that it is having an adverse effect upon his or her health," as the Grievant sought here.

The Agency's contention that the air quality tests demonstrated that the standard was met and thus the grievance should be dismissed because the air was thus proven to be "reasonably free of such contaminants" is not valid. The standard applicable here is a rather different one as Administrative Assistant Hendricks noted in his November 3, 1978 clarification of Agency policy. He wrote:

"Questions have been raised about those portions of the policy which relate to banning smoking per the request of a single employee, the ambient air quality, and separation of smoking and non-smoking areas. Although the policy indicates that a 5 cfm per person air exchange is the normal standard for maintaining clean air, if met it will not rebut an employee's statement that smoke in the air in his or her workplace is damaging his or her health. As a result, meeting this standard will not preempt a ban on smoking in the workplace. This is the intent of the policy, and our contacts with responsible SSA personnel concerning its implementation indicate there is no alternative for supervisors other than to react to requests to ban smoking or face possible grievances". (Joint Exhibit 8)

Thus, it is clear that the guidelines envision a personal standard and the 5 cfm standard is at best only a guide and does not control in determining whether or not smoking should be prohibited.

In a similar vein, medical documentation of an employee's adverse reaction to smoke is clearly not required. That the Grievant gathered these documents should not be considered against him and while there may have been some confusion over who was the Grievant's supervisor and to whom he submitted these notes from his doctor, his credibility was by no means destroyed. The Grievant was required to submit one document, the written objection to tobacco smoke in his work environment, and he met that obligation.

The Agency's position that the Grievant's work area is only his work station and those nearby is not correct. With the previously discussed arbitration decision as a precedent, the more correct view is the larger area, given an open space setting. The concept of "immediate work environment" in this context must include ambient smoke that can waft across a large room, as well as smoke that comes from employees walking with lighted cigarettes, cigars, etc. Thus, when taken together the Grievant's "common work area" and "immediate work environment" must be given their broadest meaning and application. To not do so would vitiate the very purpose of the entire

non-smoking program.

Concerning operational efficiency and increased costs from prohibiting smoke on the entire fifth floor, such prohibitions have been upheld in the Palm Springs and Oak Meadows case, discussed previously. If there is some inconvenience to smokers who can no longer smoke at their work places, that is simply an inherent cost necessitated by compliance with the Agency guidelines. As quoted earlier, when smoking is prohibited in a working area, smokers will have designated smoking areas in which they may smoke. Obviously when the Secretary first directed this in his January 11, 1978 letter and policy statement, he clearly envisioned smokers would not be smoking at their work places and some short-term loss of operational efficiency could be expected. He believed that the long-term effects of this policy, increased health and well-being of employees, would more than compensate for this. In sum, to accept the Agency's interpretation would open a door to complete abrogation of this policy which would be illogical in the extreme. Similarly, to argue that seeking compliance and enforcement of such a smoking ban would over-burden supervisors is specious. The role of a supervisor is to enforce applicable rules and regulations, whatever they may concern.

To grant the Grievant the relief he seeks will not require prohibitively expense measures. No walls need be

constructed, indeed no employee need be relocated on account of his or her smoking/non-smoking preferences, which could well represent a cost savings over the current patchwork system of accommodating individual preferences in this regard.

As to the suitability or lack thereof of the observation lounge on the fifth floor for a "smokers lounge", it is not really central to this decision. It is not the role of the Grievant to determine where smoking shall be permitted; paradoxically, he is concerned where smoking shall be prohibited. Secretary Califano himself wrote, "In recognition of the rights of smokers, supervisors will establish areas in which smoking is permitted". (Joint Exhibit 4) It is thus the obligation of the supervisors to establish a smoking area, not the Grievant. In fact, the fifth floor observation lounge may well be suitable for a smokers lounge but whether it is or is not does not and cannot affect the outcome of the grievance.

There is perhaps some validity in the claim that a prohibition of smoking may well discriminate against those who smoke since it would, at the very least, deprive them of their current practice of smoking at their work place. If there is truth in this argument, it is nonetheless what the Secretary intended. By his act of promulgating this policy on smoking he chose to do this, as was his right as the head of the Department. Ours is a society in which few rights

indeed are absolute, and smokers are often subject to restrictions in airplanes, hospitals and schoolrooms, to name but a few instances.

Concerning the argument about restricting the activities of non-employees by instituting a smoking ban on the fifth floor, similar actions occur all the time in institutions cited in the paragraph above. Surely a visitor or vendor, or outside contractor may be reasonably expected to comply with applicable rules and regulations. If, for example, outsiders must sign in on a security system or be accompanied by an employee, as often is the case, then it is feasible to expect compliance with rules about not smoking, as well.

CONCLUSION

Based upon a consideration of the facts presented, prior arbitration awards, the Secretary's policy and the Agency's guidelines, the grievance must be sustained. Smoking must be prohibited on the work area of the entire fifth floor of the New Computer Center, as the Grievant has requested.

It is not, strictly speaking, within the scope of this case or the arbitrator's authority to determine where smokers may have their smoking area. If management believes the fifth floor observation lounge is suitable, they may declare that to be a smoking area, consistent with this decision.

On a final matter, the Agency in its post-hearing brief

submitted an attachment, an excerpt from the General Services Administration concerning management of building and grounds, specifically the part concerning smoking rules. The Union, by letter, stremuously objected to this claiming it is improper "to try and introduce additional evidence after the close of the hearing". The Agency wrote in reply that it was not improper and they are correct. Rather than new evidence, this was in the nature of argumentation and support for it which is permissible, and as a public document it is certainly not unfair to the other side to seek to utilize it. Be that as it may, the contested document did not influence the decision.

A W A R D

The grievance is sustained. The Agency violated its policy on smoking in the situation of employee Thomas Goodman. Smoking shall be prohibited on the work area of the entire fifth floor of the New Computer Center Building, and shall be posted accordingly.

AE Berkeley

ARTHUR ELIOT BERKELEY

January 22, 1982