

In the Matter of

DEPARTMENT OF VETERANS AFFAIRS
VA MEDICAL CENTER
MARTINSBURG, WEST VIRGINIA

and

LOCAL R4-78, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES, SEIU

Case No. 11 FSIP 97

ARBITRATOR'S OPINION AND DECISION

The Department of Veterans Affairs (DVA), VA Medical Center, Martinsburg, West Virginia (Employer or Medical Center) and Local R4-78, National Association of Government Employees, SEIU (Union) jointly filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119.

After an investigation of the request for assistance, which concerns the Employer's tobacco use policy,^{1/} the Panel determined that the issues at impasse should be resolved through mediation-arbitration with the undersigned, Mary E. Jacksteit. The parties were informed that if they were unable to reach a settlement during mediation, I would issue a binding decision resolving the dispute. Accordingly, on December 7, 2011, I met with the representatives of the parties at the Medical Center in Martinsburg, West Virginia. Although some progress was made during the mediation phase in narrowing the issues, a settlement of the dispute was not reached. Thereafter, the parties submitted their final offers. In reaching this decision, I have considered the entire record in this matter.

1/ The terms "tobacco use" and "smoking" were used interchangeably by the Union and are so here as well, understanding that they are both meant to cover all uses of tobacco though smoking is clearly the issue here.

BACKGROUND

The Employer provides a full range of general medical, surgical and psychiatric services to American veterans in 23 counties in West Virginia, Maryland, Pennsylvania and Virginia. In addition to running a traditional hospital, the Employer has a fully integrated inpatient and outpatient primary care program, a nursing facility and operates six community-based out-patient clinics. The Union represents 890 blue collar employees. Some are Licensed Practical Nurses (LPN's), Nurses Assistants (NA's), police officers and firefighters. Others work in food service, maintenance and housekeeping. They are covered by a master collective bargaining agreement (MCBA) that expires in November 2012.

The current Medical Center Tobacco Policy (MCM 001-16, December 2006) has been in effect for almost 5 years. In 2008, the Employer formed a committee to work on a new Tobacco Use Policy. The Employer's Chief of Police chaired the group, which included patient representatives, Human Resources (HR) employees, Director's office staff and representatives from all three unions that represent employees at the facility. On June 5, 2008, the Employer circulated a draft "Campus Tobacco Policy, MCM 001-16" for the group's consideration. That draft was finalized as a formal Employer proposal in November 2008. The Union requested to bargain and presented a counter proposal to management in December 2008. There is nothing in the record about what happened after that until April 2010 when the Employer gave the Union notice of a new policy, MCM 001-16. The parties met and the Union offered proposals to modify the proposed policy that it thought were favorably received. Instead, without further negotiations, the Employer implemented and posted its new policy as is. An unfair labor practice filed by the Union led to the resumption of bargaining in late 2010. After unsuccessful mediation efforts with the Federal Mediation and Conciliation Service the Union made a request for assistance to the Panel.

The DVA seems to hold a unique position in the federal government with respect to smoking in its facilities. An Act of Congress specifically authorizes the use of tobacco in DVA medical facilities and requires it to provide indoor smoking areas for patients and residents of such facilities. A national VHA Directive 2008-052 (August 2008) titled SMOKE-FREE POLICY FOR VA HEALTH CARE FACILITIES includes the following provisions:

- Citations to research on the harmful effects of indoor exposure to secondhand smoke.
- "The VA health care facility Director is responsible for ensuring that: a. Each health facility has an area in a detached building as a smoking area for patients or residents that is accessible, heated and air conditioned and meets the Joint Commission requirements for ventilation. Indoor smoking for patients and residents should only be allowed in such an area in a detached building. NOTE: such areas have in the past been referred to as 'shelters' or 'outdoor' smoking areas."
- "Smoking outside on facility grounds is allowed to the extent that it does not interfere with safety and public access."
- "Whenever possible, smoking areas should not be within 35 feet of any entrance of a VA health care or office building that is routinely used by patients, residents, employees or staff." "Whenever possible, in order to decrease unintended exposures to secondhand smoke . . . it is strongly recommended that there should not be any outside smoking or areas in detached buildings within 35 feet of any entrance to a health care or office building"
- "All facilities need to work to reduce the number of smoking areas on their grounds as set forth herein" [citing facilities which have reduced the number to one].

ISSUES AT IMPASSE

The Union's final proposal drops the demand for additional enclosed, climate-controlled smoking shelters (the *status quo* of seven enclosed shelters remains in effect). It made clear its acquiescence to banning employee smoking in front of Building 500, the large hospital, and in front of the Mental Health building (213). Both of the parties' final offers propose having the 11 specific tobacco use areas designated in the Employer's policy (Medical Center Memorandum 001-16, April 2010). The Employer has revised its provision concerning the process for handling smoking policy violations and the Union accepts this language. There is no dispute about allowing employee smoking in their private vehicles while on the grounds of the facility.

What remains in dispute are the following issues:

1. Whether smoking should be generally permitted on the grounds of the Medical Center except in certain specified areas or whether smoking on the grounds should be generally prohibited except in specifically designated smoking areas (with the Employer proposing to add four additional areas.)
2. Whether the policy should require the Employer to maintain air conditioning and heat and upgrade the ventilation systems in the existing enclosed shelters.

POSITIONS OF THE PARTIES

1. The Union's Position

Smoking on Facility Grounds

The *status quo* is that employees are permitted to smoke outside of buildings, on the grounds but away from entrances. The Union's proposal moves in the direction of greater restrictions, being based on the language of VA Directive 2008-052 (a national guidance) issued in 2008. The Union's language is:

Whenever possible smoking areas should not be within 35 feet of any entrance of a VA building that is routinely used by patients, residents, employees or staff. Smoking outside on facility grounds is allowed to the extent that it does not interfere with safety and public access. At all times it must be only in areas outside the 35-foot radius of all other entrances.

The Union also proposes to:

Prohibit smoking on walking trails [these are not regular sidewalks but paved trails along the perimeter of the property] and within 35 feet of such trails.

Move the smoking area [a picnic table and receptacle] outside of the loading dock area to a spot at least 60 feet from the fenced-in oxygen tanks.

Smoking Shelters

The Union's language is:

All tobacco shelters shall be heated, air conditioned, and properly ventilated with industry standard HEPA filter ventilation systems and be maintained by the facility and properly cleaned on a daily basis.

The Union argues that its proposal on the first issue represents significant new restrictions on employee smoking compared to the *status quo* (the 2006 policy) and aligns the Martinsburg Center's policy with the national guidelines provided in VHA Directive 2008-052. It indicates that several smoking areas have already disappeared (an enclosed shelter at the loading dock which did not meet standards, and an outdoor patio less than 35 feet from the building). In particular, it finds no reason to prohibit employees from smoking while they walk on sidewalks between buildings spread out on the campus, which some frequently do. The Union rejects the Employer's contentions that pedestrian safety mandates removing the smoking area near the loading dock saying this has never been raised as a safety issue nor put forward during negotiations, but it can go for moving that area farther away from an oxygen storage area in order to exceed a 50 foot industry standard. It points out that some employee exposure to secondhand smoke is guaranteed by the requirement for indoor smoking for patients and residents (employees who must help patients and residents access smoking areas). On the second issue, the Union asserts that the current enclosed shelters are ventilated only by standard fans, in violation of the national directive, and are not well maintained.

2. The Employer's Position

Smoking on Facility Grounds

The Employer proposes banning smoking on the grounds (including walkways, grassy areas, etc.) except at the 11 designated locations indicated in its policy and four additional places:

- Behind Building 401 - shelter
- Behind Building 306 - porch
- In an area identified near the Mental Health Building (Building 213) that is not in front of the building.

- In an area identified in a space between Buildings 409 and 411.

The Employer also proposes to allow smoking in the perimeter Recreational Fields excluding the stands, basketball and tennis courts.

Smoking Shelters

The Employer opposes the Union's proposal and has no counter.

The Employer maintains it is furthering employee health and appropriately placing the focus on protecting non-smoking employees and patients by reducing potential exposure to secondhand smoke on outdoor sidewalks and other areas. It considers the national directive to set a *minimum* limit on outdoor smoking (35 feet) that it is free to exceed by allowing outdoor smoking only at specific outdoor locations. Health care is the Medical Center's mission and controlling the environment where medical care is provided is a legitimate concern and in the best interest of patients. The national directive urges facilities to reduce the areas where smoking is permitted. The loading dock vicinity presents special circumstances, namely, truck traffic that poses a threat to the safety of pedestrians. A smoking area in this location encourages pedestrians to cross the driveway, increasing the hazard. The safety concerns are evidenced by the building of a fence to keep employees from entering the area from the parking lot, and by a new stairway built to allow walking up to the main door to the hospital.

DISCUSSION AND DECISION

The Employer initiated this change in working conditions, that is, new rules governing tobacco use by employees, and consequently carries the burden to establish the need for its changes and the reasonableness of its specific proposals.

The DVA's latest 2008 national directive technically sets tobacco use policy for patient, resident, guest, contractor and non-bargaining unit employees, specifically leaving policy for represented employees to the collective bargaining process. But in practical terms it describes the DVA's current standards concerning smoking on its facilities and both parties treat it as an applicable authority here.

The fairest reading of the directive is that its thrust is to significantly constrict the indoor smoking that Congress guarantees to veterans. The discussion of risks of secondhand smoke focuses on indoor exposure. In treating outside smoking the directive's language is plain: "Smoking outside on facility grounds is allowed to the extent that it does not interfere with safety and public access," and is strongly recommended to be kept at least 35 feet away from entrances.

A careful reading indicates that the directive uses the term "areas" differently than the parties here to refer to the enclosed, climate-controlled tobacco locations, not any place outside.^{2/} Thus, the recommendation to reduce smoking "areas" is really not a justification for the Employer applying a blanket ban on outdoor smoking except in prescribed locations. The Arbitrator is bolstered in making this conclusion by the fact that the Employer could provide no example of any other DVA facility adopting an employee smoking policy like the one it has proposed, that is, going far beyond the national directive standard of allowing outdoor smoking except as limited as described above. Comparability is a relevant consideration and no rationale as been provided for why this particular facility needs stricter standards than the rest of the DVA system.

It is noted that under the national directive outdoor smoking can be limited where it interferes with safety. The parties dispute whether there is an actual hazard at the loading dock created or exacerbated by the current smoking area (featuring a picnic table and receptacle). Smokers are definitely not the only pedestrians in this area. The Employer did not contradict the Union's presentation that employees and patients routinely walk through the area on their way to and from the offices and eating facilities in the main hospital building because the loading dock provides the only entrance to the building on that side and the only entrance directly into the lower level. While there is a fence and new steps, there are no signs banning pedestrian entry, no reports of incidents (complaints by drivers, near misses, accidents, etc.) and no record of any safety issue being raised with the Union outside of these negotiations. Consequently, the Arbitrator is not convinced that smoking in this vicinity is a safety problem as it is being made out to be, as opposed to pedestrian use in general. The Union has agreed to move the smoking area farther

^{2/} See this in paragraph 4(c): "[I]t is strongly recommended that there should not be any outside smoking or areas in detached buildings within 35 feet . . ."

back. If "facts on the ground" come to demonstrate that smokers, specifically, are creating actual safety issues, then the "safety" limitation may apply.

Safety might become relevant in another respect. The Union emphasizes the openness of the outside areas of the Medical Center's campus and the natural ventilation of the open spaces to mitigate secondhand smoke. But there may be places beyond 35 feet that do not provide that, such as where there are long, narrow spaces between buildings, through which non-smokers must pass to reach building entrances. In any such locations safety considerations could justify preventing smokers from gathering there. This would be a matter for the parties to consider together.

The Union's proposal makes a concession to eliminate any possibility of employees or patients encountering smokers on the walking paths they might seek out for exercise and this is a reasonable accommodation to non-smokers and patients using these paths.

The Arbitrator will not venture into the arena of the ventilation of enclosed smoking shelters. The condition of these shelters is longstanding and nothing suggests that the Union has felt the need to address this through normal channels such as a grievance. The Union offered no information about what would be required, and what costs would be incurred to carry out its proposal. The Panel has not ventured into specifications for smoking shelters and this Arbitrator will not do so either. The national directive speaks to the applicable standard.

ORDER

The parties shall adopt the following to resolve the outstanding issues:

Smoking on Facility Grounds

Smoking outside on facility grounds is allowed to the extent that it does not interfere with safety and public access and at all times must be beyond 35 feet from any building entrances.^{3/}

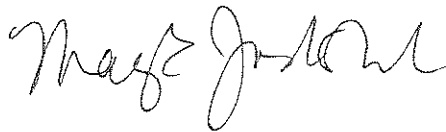
3/ As indicated earlier, the parties agree that no smoking is allowed in front of Buildings 500 and 213. There is no reason to retain the caveat "whenever possible" since no

Smoking is prohibited on walking trails and within 35 feet of such trails.

The smoking area outside of the loading dock area will be moved to a spot at least 60 feet from the fenced-in oxygen tanks.

Smoking Shelters

The Union shall withdraw its proposal.



Mary E. Jacksteit
Arbitrator

January 4, 2012
Takoma Park, Maryland

instance was shown to the Arbitrator where the 35-foot rule cannot be met.