In the matter of

TOWN OF ROCKY HILL

-and-

LOCAL 1303-112 OF COUNCIL #4, AFSCME, AFL-CIO

Case No. MPP-8505

In the matter of

TOWN OF ROCKY HILL

-and-

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 315

Case No. MPP-8520

APPEARANCES:

Shipman & Goodwin
By: Thomas B. Mooney, Esq.
for the Town of Rocky Hill

J. William Gagne, Jr., Esq.
for Local 1303-112, Council #4, AFSCME

Donna M. Fiorentino, Esq.
for Local 316, IBPO

DECISION and ORDER

On February 29, 1984, Local 1303-112 of Council #4, AFSCME, AFL-CIO (the AFSCME Union) filed a complaint with the Connecticut State Board of Labor Relations (Labor Board) alleging that the Town of Rocky Hill (the Town) had engaged and was engaging in prohibited practices within the meaning of Section 7-470 of the Municipal Employee Relations Act (the Act), in that

The Respondent, through its agents, has violated the Act by unilaterally and without negotiations changing conditions of employment.

On or about February 23, 1984, a sign was posted in the Police Department, prohibiting smoking. It has been a long standing
practice to smoke in the office.

REMEDY SOUGHT:

Full and Comprehensive statutory remedy, including but not limited to an order to cease and desist.

(Exhibit #1)

On March 5, 1984, Local 316 of the International Brotherhood of Police Officers (the IBPO Union) filed a similar complaint with the Labor Board, alleging that the Town had engaged and was engaging in prohibited practices within the meaning of Section 7-470 of the Act in that:

On or about February 29, 1984, Chief Phillip Schnabel posted NO SMOKING signs in the dispatch area of the police department and has prohibited smoking in that area. Previously smoking had been allowed in the dispatch area, and the change was made without bargaining with the Union in violation of M.E.R.A. Sec. 7-470 (1) and (4).

REMEDY

1. That the NO SMOKING signs be removed and smoking again be permitted in the dispatch area.

2. That Town be ordered to bargain with the Union prior to implementing changes in conditions of employment.

3. Any other remedy the Board deems just and proper.

(Exhibit #2)

After the requisite preliminary administrative steps had been taken, the two cases were consolidated for purposes of the pre-trial hearing and for the hearing before the Labor Board. On March 21 and May 16, 1985, the parties appeared before the Labor Board for a hearing. All parties were represented by counsel and were provided a full opportunity to adduce evidence, examine and cross-examine witnesses, and make argument. All parties subsequently filed post-hearing briefs.

On the basis of the whole record before us, we make the following findings of fact, conclusions of law, and order.

Findings of Fact

1. At the hearing on March 21, 1985, the parties submitted the following stipulation of fact:

STIPULATION OF FACT

On August 31, 1984, a pre-trial hearing was conducted in Rocky Hill on the above-referenced cases. As a result of that hearing, the parties were able to reach a partial stipulation of fact. The parties further agree that the complaints, stipulation, attached exhibits and record from the hearing, shall comprise the final record in this case.
1. The Town of Rocky Hill is an [sic] municipal employer within the meaning of the Municipal Employee Relations Act (the Act).

2. IBPO, Local 316 is an employee representative organization with [sic] the meaning of the Act.

3. Local 1303-112 of Council 4, AFSCME is an employee representative organization within the meaning of the Act.

4. There is a contract in effect between AFSCME and the Town running from July 1, 1983 to June 30, 1985. (Ex. #4)

5. There is a contract in effect between IBPO and the Town running from July 1, 1981 to June 30, 1984. (Ex. #5)

6. In October, 1983, the Town purchased a new computer system with three terminals, two printers and power supplies for use in the dispatching and records room and detective bureau of the Police Department.

7. In the first several months after the computers' installation, they suffered a series of mechanical malfunctions.

8. On or about the last week of February, 1984, the Town posted signs banning smoking in the dispatching area and the records area. (Ex. #5)

9. Both the records area and the dispatching area are air conditioned, as is the entire Town Hall complex.

10. In March, 1984, the IBPO began negotiations for a successor agreement to the 1981-1984 contract. Neither the Town nor the IBPO have raised the issue of the no smoking signs.

11. In May, 1984, the Town installed carpeting in the records and dispatching area and raised the height of the stands that support the computers, in order to help alleviate mechanical malfunctions.

EXHIBITS

Complaint MPP-8505.
Complaint MPP-8520.
Stipulation of Fact.
AFSCME Contract.
IBPO Contract.
Floor plan.
Service Agreement.

/s/ Thomas B. Mooney
For the Town

/s/ Wayne A. Gilbert
For the IBPO

/s/ Bill Kluytenaar
For AFSCME

(Exhibit #3)
2. The computer system was sold to the Town by the manufacturer, Tele-
Video Systems, Inc. It was installed by a Pennsylvania firm and later was 
serviced by TRW Service Company, the authorized local service representative 
for the seller. By February 1984 the Town had had numerous problems with 
the computer hardware and was then facing another large repair bill of some 
$7000.

3. The Town sought to purchase a service contract for the computer 
system from TRW. However, TRW required that certain conditions be met 
before the system would be placed under such a contract. The conditions' 
related principally to the environment in which the equipment was located. 
According to the "Installation and User's Guide" accompanying the system, 
there must be provided a clean environment, free of contaminants such as 
dust, carpet fuzz and smoke. Excessive moisture or oil particles in the air 
will hinder the performance of the system." *(Exhibit #11)*

4. As a result of the conditions placed upon the purchase of the 
service contract, Chief Philip H. Schnabel took steps, as detailed in the 
Stipulation above, to correct a number of the problems. One of these was to 
designate the areas where the TeleVideo computers were in operation as "No 
Smoking" areas. The areas affected were principally the dispatching area 
and the records area of the station.

5. Employees, who worked in the dispatching area and the records area 
had previously been able to smoke at their work stations. This was no 
longer permitted after the "No Smoking" order was posted. Thereafter, 
employees who wished to have a cigarette were required to leave their work 
station, if the pressure of their work permitted and if they could get 
someone to cover for them in their absence, and go to another location where 
smoking was allowed.

6. At the same time as he posted the dispatch and records areas as "No 
Smoking" areas, the Chief also posted the anteroom to his own office, where 
his secretary's desk is located, as a "No Smoking" area. The Chief's 
secretary is a smoker, but he himself is not, and he preferred not to have 
other smokers congregate in his secretary's office "smoking and blowing me 
out of my office."

7. Despite the fact that a small personal computer is in use in the 
Detective area, that space was not posted as a "No Smoking" location. This 
was explained as being a computer system separate from the TeleVideo 
system, and not subject to the service contract which the Town was attempting to 
purchase from TRW.

8. The Chief stated that "approximately 80 percent of the department 
is allowable smoking area." The areas in which smoking is presently 
permitted include corridors and hallways, the photocopy room, the training 
room with its associated offices of the animal control officer and the 
traffic and juvenile officers, the physical training room, the locker area, 
the armory, the offices of the deputy chief, the lieutenants, and the 
sergeants, the detective division, the evidence room and the booking area. 
Most of these areas are inconveniently located, at some distance from the 
records and dispatch areas where personnel are now forbidden to smoke at 
their work station.
9. Employees in the records and dispatch areas who were formerly able to smoke at their work stations whenever they wished, now must go to one of these other locations when they wish to have a cigarette. Moreover, they must first give notice of their intention to leave their posts, so that someone else can cover the position. If no one is available to cover, such as when things are busy, ‘an employee may not be able to leave for a cigarette when he/she wishes to. Employees’ complaints about the "No Smoking" rule, in addition to the inconvenience, include increased nervousness, particularly when conditions are stressful.

10. The Chief indicated that there were no formal limitations on when employees may go to smoke, but reported some complaints from supervisors concerning employees "who were abusing various areas, congregating, not doing their work, and we've had to limit smoking involved."

11. The IBPO Union President, Wayne Chandler, testified that the Union was not consulted by the Chief prior to the posting of the "No Smoking" signs in the police station. After the posting, Chandler asked for the reasons for the change, and was told that "it was management prerogative," and that it had been done because of the alleged damage to the computers.

12. The Collective Bargaining Agreement between the Town and the AFSCME Union has a "management rights" clause, at Article XX, Section 1, which includes, inter alia, the right "(a) To determine the care, maintenance and operation of equipment and property used for and on behalf of the purposes of the Town." (Exhibit #4)

13. The Collective Bargaining Agreement between the Town and the IBPO Union has a "management rights" clause, at Article XV, Section 1, which includes, inter alia, "the Town's rights, powers and authority include... the right to make all plans and decisions on all matters involving its operation..." (Exhibit #5)

Conclusions of Law

1. An employer's unilateral change in an existing condition of employment involving a mandatory subject of bargaining will constitute a refusal to bargain and a prohibited practice.

2. These parties have contractually agreed that the purchase, maintenance and operation of Town equipment fall within the realm of management's prerogatives and are not mandatory subjects of bargaining.

3. A decision, although within the realm of management prerogatives, which has a substantial impact on the physical environment in which employees work, gives rise to a duty to bargain over that impact.

4. The Town's refusal to bargain over the change in the prior policy under which employees had been allowed to smoke while at their work stations constituted a prohibited practice in violation of Section 7-470 (a) (4) of the Act because that change had a substantial impact on the conditions of employment.
Discussion

An employer's unilateral change in an existing condition of employment which involves a mandatory subject of bargaining will constitute an illegal refusal to bargain and a prohibited practice under Section 7-470 (a) (4) of the Act unless the employer proves an appropriate defense. NLRB v. Katz, 369 U.S. 736 (1962); Hartford Board of Education, Decision No. 2473 (1969); Town of East Haven, Decision No. 1279 (1975). In determining whether a particular subject should be considered mandatory, the Labor Board applies a balancing test derived from the decision of the Connecticut Supreme Court in West Hartford Education Association v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972). The court there recognized the difficulty of drawing a clear line between conditions of employment on the one hand and managerial prerogatives on the other. In this decision the court suggested a test which balances the degree to which a subject implicates conditions of employment with the degree to which it implicates questions of managerial rights.

In DeCourcy, supra, the Connecticut Supreme Court followed the U.S. Supreme Court's resolution of the question in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85 S.Ct. 398 (1964). The Connecticut court held that there are circumstances in which a subject that concerns conditions of employment may nonetheless not be a mandatory subject of bargaining.

In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain and this alone may be sufficient reason to conclude that such decisions are not "with respect to, . . . conditions of employment". Nothing the court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions which lie at the core of entrepreneurial control. DeCourcy, supra, 162 Conn. at 583.

In Town of East Haven, Decision No. 1279 (1975), we summarized our understanding of the balancing test set forth in DeCourcy as follows:

As DeCourcy recognizes there is an area of overlap between what have traditionally been thought managerial functions and what concerns conditions of employment for the employees. In drawing the line within that area between those items that must be bargained over and those which the employer may act on without bargaining a balance must be struck. And in striking it the tribunal should consider, we believe, the.

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directness and the depth of the item's impingement on conditions of employment, on the one hand, and, on the other hand, the extent of the employer's need for unilateral action without negotiation in order to serve or preserve an important policy decision committed by law to the employer's discretion. (Footnotes omitted.)

Town of East Haven at 6.

In a considerable line of cases this Board has held that the secondary impacts of managerial decisions, if substantial, must be negotiated with the employees' representatives. Town of Willington, Decision No. 2238 (1983); City of Hartford (Fire), Decision No. 1850 (1980); City of Bridgeport, Decision No. 1485 (1977). In the present case, the issue between the parties is whether the employer may unilaterally take an action which is within the contractually agreed realm of management rights, one which is "at the core of entrepreneurial control," despite the secondary impact which that decision has upon other areas which very clearly fall within the realm of "conditions of employment.".

The employer's right to determine the care, maintenance and operation of equipment and property used for and on behalf of the purposes of the Town is recognized in the collective bargaining agreement with one of the two Unions concerned here. The decision to take steps to protect the Tele-Video computer system in accordance with the conditions set forth in the "Installation and User's Guide" is one clearly within the employer's managerial discretion, and need not be bargained with the representatives of the employees.

Yet, the impact of this employer action impinges directly and deeply on the conditions of employment of the Town's employees, and thus the balancing test must be brought into play—the balance must be struck. The question is not whether the decision to protect the computer system must itself be bargained, but whether the impact of that decision on the employees must be the subject of bargaining. We hold that it must.

We have stated that a substantial secondary impact cannot be assumed, but must be shown by evidence. Town of Hamden, Decision No. 2145 (1982). And in order to be a mandatory subject of bargaining the impact must be shown to affect conditions of employment. Here, the impact of the "No Smoking" decision was felt very directly by the employees who had previously been able to smoke while at work, before their places of work were posted for "No Smoking." This decision by management thus had a substantial impact on what Justice Stewart in his concurring opinion in Fibreboard Paper Products, supra, called "the various physical dimensions of [their] working environment." 379 U.S. at 223.

Since the protection of the Town's investment in its computer equipment is a prerogative of management, it may be accomplished without bargaining with the employees' representatives. However, as the impact of the measures taken to protect that investment had a significant impact on an important condition of employment, the Town was obligated to bargain over that impact with the Unions.
The Town suggests that this is an issue which does not lend itself to resolution through the bargaining process, that it must be done through posting "No Smoking" signs or not at all. We are not persuaded that this is so; we believe that the employees' contributions to a resolution of the problem could be useful ones. In any event, by ordering the Town to bargain over the impact of the decision to protect the computers, it should be made very clear that we are not ordering any particular outcome to the bargaining process. We are not saying here, any more than in other situations, that the duty to bargain is the duty to agree. It is, as always, the duty to bargain in good faith in an effort to reach a resolution of a problem. And, as always, if an agreed-upon resolution eludes the parties and impasse is reached despite good faith bargaining, the Town may then take action unilaterally to protect its investment.

The parties at the hearings in this case placed great stress on the health aspects of the issue of smoking in the work place. Considerable evidence was presented on the health questions raised on the debate over the arguably detrimental effects on smokers and non-smokers alike of both first-hand and second-hand smoke. Both the Town and the Unions briefed the issue of whether provision of a smoke-free workplace is a mandatory subject of bargaining.

The Board found a decision on this issue to be unnecessary to tie disposition of the case. It is true that health and safety issues have traditionally been considered to be mandatory subjects of bargaining. Morris, The Developing Labor Law, (1982-84 Supp.) at 213-14. Indeed, the AFSCME Union cited to us our decision in City of Danbury, Decision No. 1907 (1980), where we found that a required physical fitness program for firefighters imposed by the City had to be bargained. The City argued that the program was beneficial; we responded that "the merit of a program does not keep it from being a mandatory subject of bargaining." Id. at 3.

The Town, on the other hand, suggests that the establishment of a "No Smoking" policy is strictly a management right, following our decision in Portland Board of Education, Decision No. 2001 (1981). In that case we held that the Board's unilateral decision to impose a smoking ban was not a mandatory subject of bargaining. We found that it was, instead, a matter of educational policy within the Board of Education's right to direct.

In the instant case, the merit, or not, of forbidding employees the right to smoke while at their work stations, does not affect the correctness of the employer's action here under the statutory scheme of labor relations law. We do not base our decision on principles either of morality or of health; rather we are bound to consider the issue, as we have done, in terms of what must be done when the exercise of management prerogatives has a substantial impact on the conditions of employment in the workplace.

ORDER

By virtue of and pursuant to the power vested in the Connecticut State Board of Labor Relations by the Municipal Employee Relations Act, it is hereby
ORDERED, that the Town of Rocky Hill shall

I. Cease and desist from prohibiting smoking by police department employees at their work sites unless and until the impact of such a prohibition on employee conditions of employment have been negotiated to agreement or final impasse with the exclusive bargaining representatives of such employees.

II. Take the following affirmative action which the Board finds will effectuate the purposes of the Act:

(a) Rescind the existing prohibition on smoking by police department employees at their work sites until Part I of this Order has been complied with.

(b) Post immediately and leave posted for a period of sixty (60) consecutive days from the date of posting, in a conspicuous place where the employees of the bargaining unit customarily assemble, a copy of this Decision and Order in its entirety.

(c) Notify the Connecticut State Board of Labor Relations at its office in the Labor Department, 200 Folly Brook Boulevard, Wethersfield, Connecticut, within thirty (30) days of the receipt of this Decision and Order of the steps taken by the Town of Rocky Hill to comply therewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

by __/s/ Victor M. Ferrante__
Victor M. Ferrante, Chairman

__/s/ Patricia V. Low__
Patricia V. Low

__/s/ Barbara B. Sacks__
Barbara B. Sacks