A W A R D

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IN THE MATTER OF ARBITRATION

BETWEEN

FEDERAL BUREAU OF PRISONS - FEDERAL CORRECTION INSTITUTION

AND

COUNCIL OF PRISON LOCALS (AFL-CIO) - AFGE LOCAL 922

****

FMCS 01-03OL6

DRESS ISSUE

ARBITRATOR: Russell C. Neas
Tulsa, Oklahoma

HEARINGS: December 12-13, 2001
Federal Correction Institution
Forest City, Arkansas

A P P E A R A N C E S

AGENCY ADVOCATE: William Branch, Labor Relations Specialist.

UNION ADVOCATES: Roger Payne, Local President and Grievant, and Shon Foreman, 2nd Vice President.

WITNESSES: Roger Payne; Jeff Roberts, Local Steward; Ginny Van Buren, Deputy Assistant, Kevin Murphy, Sr. Officer Specialist; Tammy MCoy, Dental Assistant; Shon Foreman, Senior Officer Specialist; Rickey Martin, Facilities Manager; Brenda Hall, Registered Nurse; Vitautas Thomas, Staff Dentist; Barny Totten, Safety Manager; Charleston Iwuagwa, Health System Administrator; James Owen, Chief Dental Officer; Bobby May, Emergency Medical Technician; Hector Ledezma, Assistant Warden of Operations; Paul Celestin, Health Services Administrator; Rex Jones, Supervisor of Education. Bryan Lowry, Sr. Officer Specialist; Yvette Toro,

Physician Assistant; Kim Tillman, Teacher; Thomas Matthers, Inside General Foreman; Stanley McClendon; Safety Specialist, Joseph Tom Cook, Electrical Worker Supervisor; Terri Ballard; Pharmacist Technician; Marvin Morrison, Warden; Cindy Wright, Federal Medical Center, Ft. Worth.

COURT REPORTER: Elvetta L. Stacey, C.C.R, Wynne, Arkansas.

P R O C E E D I N G S

This is an action initiated by Local 922 of the American Federation of Government Employees, Council of Prison Locals, AFL-CIO, hereinafter referred to as the "Union," pursuant to a collective bargaining agreement with the Federal Correction Institution, Federal Bureau of Prisons, hereinafter referred to as "FCI" or the "Agency."

The term of the Master Agreement, hereinafter referred to as the "Contract," is March 9, 1998 to March 8, 2001. The Arbitrator was selected pursuant to the procedures of the Federal Mediation and Conciliation Service. The hearing was recorded and transcribed by a certified court reporter. The hearing was tape recorded by the Arbitrator. All witnesses were sworn. Both parties filed posthearing briefs.

E X H I B I T S

JOINT EXHIBITS

1. Master Agreement
2. Grievance of Roger Payne, August 11, 2000
3. Grievance Response
4. Grievance of Roger Payne, June 9, 2000

5. Memorandum for Brian Lowry

6. Grievance of Roger Payne, January 7, 2000

AGENCY EXHIBITS

1. Change Notice Number 3

2. Change Notice Number 34

3. Local Supplemental Agreement

UNION EXHIBITS

1. OSHA Monthlhy Report

2. OSHA 1910.269

3. Nursing Uniforms

4. Unisex Basic Scrubs

5. FCI Texarkana - JCAHO Review

6. Scub Uniforms

7. Dress Code

9. Arbitration award of Harold E. Moore

10. Federal Service Impasses Panel Decision and Order

11. Bryan Lowry Memo to Katie Bozeman

M A S T E R A G R E E M E N T

ARTICLE 2 - JOINT LABOR MANAGEMENT RELATIONS MEETINGS

Section a. Representatives of the employer and ten (10) representatives of the Union, or the number of Employer representatives, whichever is greater, shall meet in person at least four (4) times per year to resolve and/or negotiate, as applicable, on issues regarding personnel polices, practices, conditions of employment, and working conditions.

These meetings may be initiated by either party but may only be dispensed by mutual consent.

Section b. An agenda will be required for all meetings. Each party will exchange agenda items not less than twenty-one (21) days prior to the scheduled meeting.

Section f The parties at the national level endorse the concept of regular labor management meetings at the local level. It is recommended that such meetings occur at least monthly.

ARTICLE 3 - GOVERNING REGULATIONS

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.

1. Local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level.

Section c. The Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment, where required by 5 USC 7106, 7114, and 7117 and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

Section d-5. When locally-proposed policy issuances are made, the local Union President will be notified as provided for above, and the manner in which local negotiations are conducted will parallel this article.

ARTICLE 4 - RELATIONSHIP OF THIS AGREEMENT TO BUREAU POLICIES, REGULATIONS, AND PRACTICES

Section a. ... The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level.

Section b. On matters which are not covered in supplemental agreements at the local level, all written benefits, or practices and understandings between the parties implementing this Agreement which are negotiable, shall not be changed unless agreed to in writing by the parties.

Section c. The Employer will provide expeditious notification of the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this Agreement.

ARTICLE 6 - RIGHTS OF THE EMPLOYEE

Section a. Each employee shall have the right to form, join, or assist a labor organization or to refrain from any such activity, freely and without fear of penalty or reprisal....

Section e. Preferences regarding hairstyle and facial hair are a matter of individual concern. Employees will maintain a neat appearance and dress, considering the correctional environment, and such appearance and dress will not interfere with the security or safe running of the institution. The wearing of jewelry is a gender neutral issue. In the event of disputes, and prior to an employee being required to change their dress or appearance, alternatives will be explored.

ARTICLE 7 - RIGHTS OF THE UNION

Section a. There will be no restraint, interference, coercion, or discrimination against any employee in the statutory exercise of any right ....

Section b. In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligations imposed on it by the statute and this Agreement. This includes, in accordance with applicable laws and this Agreement, the obligation to notify the Union of any changes in conditions of employment and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority in accordance with the Federal Labor Management Statute.

ARTICLE 9 - NEGOTIATIONS AT THE LOCAL LEVEL

The Employer and the Union agree that....In no case may local supplemental agreements conflict with, be inconsistent with, amend, modify, alter, paraphrase, detract from, or duplicate this Master Agreement except as expressly authorized herein.

ARTICLE 10 - UNION REPRESENTATION ON COMMITTEES

Section a. The Union at the appropriate level will have membership on at least the following committees, where they exist, which are charged with making recommendations to the appropriate authorities on specific issues. These committees are:

1. Health and Safety, in accordance with Article 27.

ARTICLE 27 - HEALTH AND SAFETY

Section c. The Employer will establish a safety and health committee at each institution. The committee will serve in an advisory capacity to the Chief Executive Officer.....

Section e. Unsafe and unhealthful conditions reported to the Employer by the Union or emplyees will be promptly investigated. Any findings from said investigations relating to safety and health conditions will be provided

to the Union, in writing, upon request....

Section f. When a safety and Health inspection is being conducted by an outside agency such as OSHA....the Union will be invited and encouraged to have a local representative participate.

ARTICLE 28 - UNIFORM CLOTHING

Section b. The Employer will ensure that adequate supplies of security and safety equipment are available for issue to and/or use by employees during the routine performance of their duties.

Section c. The Employer will provide additional equipment or clothing for safety and health reasons when necessary due to the nature of the assignment and as prescribed by the Safety Officer.

ARTICLE 31 - GRIEVANCE PROCEDURE

Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence.

ARTICLE 32 - ARBITRATION

Section a. .... If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard.

L O C A L S U P P L E M E N T A L A G R E E M E N T

ARTICLE 2 - JOINT LABOR MANAGEMENT RELATIONS MEETING

Section a: The Labor Management Relations (LMR) meetings will be held on the fourth Wednesday of each month....

Section c: Written agenda for the meeting will be exchanged at least four (4) working days before the meeting.....

ARTICLE 27 HEALTH AND SAFETY

Any employee who is soiled by body fluids or wastes shall be relieved from duty in order to bathe and change clothes prior to resuming their duties. Three sets of each size L, XL, XXL scrubs will be maintained and accounted for to issue to staff whose clothing has been soiled by body fluids and wastes.

The Employer will notify the Union of a safety inspection

by an outside agency as much in advance as possible to allow the appointment of a union representative to participate in the inspection.

Section d: The Employer will maintain cloth smocks to be worn by staff only for employees assigned to work in the food preparation areas....

Section f: Ties will be required on posts that are subject to exposure to the public. These posts will include the front entrance, visiting room, control center, escorted trips, and outside medical posts.

H E A L T H S E R V I C E S M A N U A L

CHANGE NOTICE NUMBER 3

3. DIRECTIVES AFFECTED

a. Directives Rescinded

PS 6000.04 Health Services Manual (12/15/94)

Uniform Regulations. ....

The Health Services Unit shall provide appropriate personal protective equipment (i.e., "lab" coats, etc.) and provide institution or contract laundering services for staff involved in direct patient care. This personal protective equipment shall not be taken home for laundering.

For medical staff not required to wear a uniform, professional civilian attire shall be worn. Jeans, sneakers, and other casual clothing are not appropriate during duty hours.

DENTAL CLINIC BLOOD AND BODY FLUID GUIDELINES

I. USE OF PROTECTIVE ATTIRE AND BARRIER TECHNIQUES

c. Gowns

Reusable or disposable gowns, laboratory coats, or uniforms must be worn when clothing is likely to be soiled with blood or other body fluids....Gowns may not be taken home for laundering....

HUMAN RESOURCE MANAGEMENT MANUAL

CHANGE NOTICE NUMBER 34

3. DEVELOPMENT, MANAGEMENT AND CONTROL OF UNIFORM REQUIREMENTS

> The Director retains all authority for prescribing a uniform requirement....Each Warden is delegated the authority, consistent with this policy and the Property Management Manual, to prescribe protective clothing and develop procedures for wearing any uniform. Local procedures will be developed in accordance with the Master Agreement.
>
> .... If requested by the Council of Prison Locals, committee recommendations approved by the Director will be subject to bargaining on impact and implementation.

BACKGROUND

The grievant, Roger Payne, President of AFGE Local 922, has been with the Bureau of Prisons for approximately eleven years. He has been employed by the Agency at FCI Forrest City for approximately five years. During the relevant period he held the position of First Vice President of Local 922. He had also previously held other Union positions. During his tenure with the Agency, Payne has been classified as a Physician's Assistant. At the time he filed his first grievance, Payne's immediate supervisor was Paul Celestin, Health Services Administrator.

On or about January 7, 2000, Payne was working at his regular job assignment and was wearing "scrubs." Leon Ball, Health Services Administrator at that time, informed Payne that he could not wear scrubs while on duty. Payne disagreed and filed his first grievance, charging the Agency with violations of "Master Agreement, Federal Labor Statute, Government-wide laws, rules and

regulations, 5 U.S.C., Constitutional and Civil Rights." Payne's grievance (Joint Exhibit 6) states in part:

> Mr. Ball stated that the Health Services Manual requires "professional dress." He further stated that "Mr. Payne may believe that scrubs are professional dress, but I don't and the Warden doesn't like them."
>
> This came after the Warden asked Mr. Payne a couple of hours earlier in the laboratory, with staff present, if he was a nurse.
>
> No alternatives were explored.
>
> Many staff in Health Services wear scrubs on a daily and occasional basis. The Union was not notified of this change of past practice or given the opportunity to negotiate.
>
> Mr. Payne was complemented (sic) on his dress by Health Services Management before the Warden's statement.
>
> Physicians Assistants and Physicians at the largest institution in this region and in the Bureau of Prisons wear scrubs. This is common place and scrubs are without question professional attire.
>
> Mr. Lowry, Local 0922 President, meet with Ms. Simien and she stated to Mr. Lowry that she could not do anything about it as it was the Warden's decision.
>
> Mr. Payne has been denied wearing scrubs every day since the meeting with Mr. Ball and Ms. Simien. Mr. Payne's rights have been violated every day since this meeting.
>
> This appears to be nothing more than retaliation against the Union Vice-President and discrimination. This is consistent with the memorandum from Paul B. Rissler on 10-28-99 to Ron Thompson, Phil Glover and Local President which stated the "Vice President (FCI Forrest City) is being harassed and retaliated against based on his Union affiliation."
>
> Mr. Payne has not been treated fairly in all aspects of personnel management. This is a mixed case and the disparate treatment is also an E.E.O. concern.
>
> It is further noted that the term "professional" was omitted from the Master Agreement because everyone has their own opinion of what is professional. The Master Agreement states, "employees will maintain a neat appearance and dress, considering the correctional environment, and such appearance and dress will not interfere with the security of or safe running of the institution." The Master Agreement overrides all program

statements.

Requested Remedy:

1. $500,000 for the undue and unjustified stress and hardship the Agency placed on Mr. Payne.

2. $2,000,000 for the violations of Mr. Payne's Constitutional Rights, Civil Rights, Federal laws, government-wide laws, rules, regulations and policy.

3. That all cost incurred do (sic) to this action be paid in full.

4. That the Agency cease and desist from violating the Master Agreement, governing rules and regulations.

5. That the Agency cease and desist from interfering, and restraining employees in the exercise of their rights.

6. That the Agency be held liable for any act of discrimination and that disciplinary action be taken against anyone found to have committed an act of discrimination.

7. The Agency cease and desist from violating employees' Constitutional Rights, Civil Rights, Federal Law, Federal Labor Statutes, government-wide laws, rules, regulations and policy.

8. That all Managers receive mandatory training in all areas of the violations in the instant case.

9. The Agency hold its Managers liable for violating such laws, rights and statutes.

10. That no physician assistant be treated differently than other physician assistants.

11. That all physician assistants be treated fairly without regard to race.

12. That any physician assistant be allowed to wear scrubs, not just selected individuals.

13. Any other appropriate relief that may be requested at the hearing.

14. Any other actions or sanctions deemed appropriate by the Arbitrator.

It is unknown if the Agency made a written response to Payne's grievance. Neither party could produce such a document at the hearing. It is not clear from the testimony as to what transpired following the filing of Payne's first grievance. There is no testimony or evidence of any grievance meetings or other attempts to resolve that grievance except what is stated in Payne's second grievance.

Payne's second grievance (Joint Exhibit 4) was filed on or about June 9, 2000. It repeats the alleged violations contained in his first grievance. The last paragraph on the first page was revised as follows:

> "The term 'professional' was omitted from the Master Agreement because everyone has their own opinion of what is professional. As in this case, the medical professionals believe this is professional dress. The Master Agreement states, 'employees will maintain a neat appearance and dress, considering the correctional environment, and such appearance and dress will not interfere with the security of or safe running of the institution."

The first eleven requested remedies are repeated in this grievance. The following were revised.

12. That all physician assistants be allowed to wear scrubs, not just selected individuals.

13. That the offending party(s) be mandated to attend sensitivity and diversity training.

14. That a posting be required by the offending party (agency).

14. (sic) Any other appropriate relief that may be requested at the hearing.

15. Any other actions or sanctions deemed appropriate by the Arbitrator.

The Agency's response to Payne's June 9 grievance (Joint Exhibit 5) signed by Warden Marvin Morrison, states in relevant part:

> As per the Master Agreement, Article 31, Grievance Procedure, "Grievances must be filed within forty 40) calendar days of the date of the alleged grievable occurrence." This grievance was not filed within the time frames as defined in the Master Agreement. Therefore, this grievance is rejected."

Again, there is no evidence of any grievance meetings or other attempts to resolve Payne's June 9 grievance, other than that contained in his third grievance (Joint Exhibit 2). This grievance duplicated the charged violations contained in the first two grievances, and repeats all of the basic arguments contained in the first two grievances. The following was added.

> Mr. Payne had worn scrubs on prior occasions. Mr. Celestin informed Mr. Payne that he had been given the grievance by Ms. Bozeman to try to resolve it. Mr. Payne and Mr. Celestin reached a mutual agreement and the grievance was not arbitrated.
>
> Mr. Payne began to wear scrubs in Health Services like other staff and after approximately one week Mr. Payne was informed by Celestin that he had been instructed by Hector Ledezma to inform Mr. Payne he could not wear scrubs any longer. Each day Mr. Payne has been denied wearing scrubs violates his rights. Other staff wear scrubs on a daily basis in health services. Other physician assistants of different races have worn scrubs.
>
> The Hospital Administrator agreed that the wearing of qscrubs is acceptable and agreed to Mr. Payne wearing scrubs.
>
> It is unfavonable that some staff can wear scrubs, but for the Union Vice President it would affect the security or safe running of the institution.
>
> It is clear by prior arbitrations that blue jeans, sandals, and tennis shoes are acceptable dress. The Union is not aware of one case of violating the security or safe running of the institution due to wearing scrubs, blue jeans, sandals, shorts, culottes, and tennis shoes. Scrubs, tennis shoes and sandals have been worn at FCI since its inception by non-uniform staff.
>
> It would appear that high heel shoes would be a greater safety issue and less appropriate for the correctional environment, but this has been acceptable because this type of dress has been typified by management.
>
> It would also appear that OSHA standards are not being

met with the clothing required by electricians. The uniform does not meet OSHA requirements but 100% cotton, such as blue jeans and a t-shirt, does meet their requirements. This is a undue safety hazard for staff. It appears that the safety of staff has taken a back seat to the type dress that management desires.

The list of requested remedies was again revised. The first ten were again repeated with various revisions made to numbers 11 through 16, i.e.,

11. That all employees be treated fairly without regard to race.

12. That union and non union employees be treated in a fair and equitable manner.

13. That a Bureau wide posting be mandated.

14. That all non-uniform bargaining unit employees be allowed to wear any and all clothing that does not jeopardize the security and safe running of the institution as agreed to in the Master Agreement.

15. Any other appropriate relief that may be requested at the hearing.

16. Any other actions or sanctions deemed appropriate by the Arbitrator.

The Agency's response to the above grievance (Joint Exhibit 3) dated 9-8-00 and signed by Warden Marvin Morrison, states in part:

> The same grievance was filed on June 9, 2000. You received a response to that grievance on July 7, 2000.
>
> Mr. Payne is not being singled out for any reason, since no staff in the Health Services Department are allowed to routinely wear scrubs as their daily work attire. We are simply enforcing this compliance with the uniform regulations and past practice. Therefore, grievance is denied.

THE ISSUES

The parties had not executed a joint submission agreement prior to the hearing, and none was submitted to the Arbitrator at the hearing. The parties were unable to agree on the issues at the

outset of the hearing. The Agency took the position that there was a threshold issue, arguing that the grievance was not arbitrable because it had been untimely filed. The Agency proposed the following issue:

> "Was the grievance filed within the forty calendar days of the alleged grievance occurrence in accordance with Article 31, Section d of the Master agreement and, if not, the grievance should be dismissed as not timely filed."

The Union argued that the grievance involves a continuing violation, and therefore could be filed at any time.

Being unable to agree on the issue, the parties stipulated that the Arbitrator should frame the issue after hearing the case on the merits. The threshold issue is: Was the grievance timely filed?

The parties were also unable to agree on the merit issue. The Agency proposed the following issue:

> "Did the Agency violate the Master Agreement by requiring the grievant to dress in accordance with the language contained in the Health Serviqces Manual? If so, what shall be the remedy?

The Union argued at the outset of the hearing that the two basic issues were denial of the grievant's right to wear scrubs in the Health Services Department and the Agency's violation of an OSHA regulation. The Union argued that there were also other issues involving dress code, past practice, disparate treatment, failure to negotiate in good faith, retaliation, and sexual and racial discrimination.

As determined by the Arbitrator, the issues are:

ISSUE NO. 1. Was the Agency's refusal to allow the grievant to wear scrubs a violation of the collective bargaining agreement of the parties? If so, what shall be the remedy?

ISSUE NO. 2: Did the Agency's dress code for Electricians violate OSHA regulations or the collective bargaining agreement of the parties? If so, what shall be the remedy?

THE THRESHOLD ISSUE

POSITION OF THE AGENCY. None of Payne's grievances are arbitrable, because they were all untimely filed. Article 31 of the Contract requires that grievances must be filed within 40 calendar days of the date of the alleged grievable occurrence. Payne's grievance was not filed within that time frame.

POSITION OF THE UNION. Every day Payne was denied his right to wear scrubs was a new occurrence. Each day was a continuing violation. Therefore, his grievance could be filed any time and would be within the 40-day time frame.

DISCUSSION & OPINION. The governing provision of the Contract is Article 31, Section d, which provides that "grievances must be filed within forty (40) calendar days of the date of the alleged grievance occurrence." The Agency argues that "the Contract contains clear, unambiguous language regarding the time frames for which the parties may file a grievance." The clarity of the language, per se, is not in dispute. I find that language to be crystal clear. The dispute of the parties has resulted from their different applications of that clear language to the grievant's situation during the relevant period.

The Agency takes the position that when the grievant was told

by his supervisor, Leon Ball, in 1999 that he was not allowed to wear scrubs, the grievant would have had 40 calendar days to file a grievance. The point is irrelevant since Payne settled that first grievance with his supervisor, Paul Celestin, the new Health Services Administrator. Ball had left his position with the Agency in December of 1999.

Since the Agency's response to Payne's third grievance (Joint Exhibit 3) is silent regarding the timeliness issue, it leaves a question as to whether or not the Agency had decided to withdraw its timeliness defense at that point.

It is concluded that the Agency had the right to raise the issue of procedural arbitrability at the hearing, since it had been raised at some point during the grievance procedure.

It is undisputed that Payne's third grievance filed August 11 was not filed within the contractual time limits. However, that is irrelevant since the Union has adopted a "continuing violation" defense.

> A "continuing" grievance is one where the act of the Company complained of may be said to be repeated from day to day, such as the failure to pay an appropriate wage rate or acts of a similar nature. Bethlehem Steel Co., 26 LA 550. Also see Miller Brewing Co., 49 LA 1033; Steel Warehouse Co., Inc., 45 LA 361.

The first day the Agency denied Payne the right to wear scrubs was a "grievable occurrence" subject to the contractual time limits for filing. However, if he was again denied that right the next day and every day thereafter, each such day was another "occurrence," and thus a "continuing violation." Payne's right to file a grievance was not subject to any time limits as long as that situation continued.

"... distinction is drawn between a single isolated action in which a grievance must be promptly filed and a continuing course of conduct in which failure to file immediately may not be considered as waiver of future right to file a claim." Grayson Controls, 37 LA 1044.

"The distinction must be drawn between a grievance based upon a continuing violation of the agreement and a grievance based upon a single isolated and completed transaction. Damages or back pay in such a case, however, will be awarded only from the date the grievance was filed." Kerr-McGee Oil Industries, Inc., 44 LA 703.

The Agency's alleged violation is clearly a continuing violation. Every day Payne was not allowed to wear scrubs was a new and separate violation. Therefore, whenever his grievance was filed would have been within one day of the "grievance occurrence," and in accordance with Article 31 of the Contract.

"If the alleged violation can be considered to impose a continuing injury to the grievant, the arbitrator may find that the grievance is a continuing one and the time limit on filing of a grievance recommences each day and, hence, a filing of a grievance is never precluded. Damages or back pay in such a case however, will be awarded only from the date the grievance was filed." Practice & Procedure in Arbitration, Owen Fairweather, 2nd. Ed., 103 BNA, 1984. Also see Kerr-McGee Oil Industries, Inc. 44 LA 701; Bethlehem Steel Co., 26 A 550; Mississippi Structural Steel Co., 55 LA 25; American Welding & Mfg. Co., 45 LA 814.

"...there is a clear distinction between claims which arise from single isolated events and those which are based upon a continuing course of Company action. It would be one thing to hold that when a transaction has not been completed a failure to process a claim concerning that transaction within the contractual time limits properly bars its later consideration. It would be quite another thing to hold that when the Company has undertaken a 'permanent' and 'continuing' course of conduct alleged to be in violation of the Agreement a failure to process a grievance within 30 days would be a bar to all future efforts to have that course of action corrected." Bethlehem Steel Co., 20 LA 91. Also see Steel Scaffolding Co., 45 LA 361.

It is concluded that Payne's grievance was timely filed pursuant to the theory of "continuing violations," and therefore

must be heard on the merits.

THE MERIT ISSUES

DRESS CODE

POSITION OF THE UNION

The Union takes the position that Roger Payne, the grievant, has the right to wear scrubs pursuant to an established past practice. The Union makes the following arguments.

Payne had worn scrubs on prior occasions and he was never informed that he couldn't.

Scrubs are accepted as professional dress, and are commonly worn at other institutions, e.g., the Fort Worth Medical Center.

The word, "professional" was omitted from the Master Labor Agreement, because everyone has their own opinion of what is "professional."

Medical professionals believe that scrubs are professional dress.

Many staff in Health Services wear scrubs on a daily and occasional basis. The Union was never notified of the change of this practice or given the opportunity to negotiate over the change.

No alternatives were explored.

Physicians and physician assistants at the largest institutions in this regions and in the Bureau of Prisons wear scrubs. This is commonplace and scrubs are considered professional attire in the medical profession.

Other staff in the Health Services Department, including physician assistants, have continued to wear scrubs to this date.

Roger Payne has not been treated fairly in all aspects of personnel management, and is being discriminated against and given disparate treatment because of his Union activity.

Payne was complimented on his dress by Services Management before the Warden's statements.

Payne is being harassed and retaliated against based on his Union affiliation.

Union members are being treated differently than non-union members by Management.

Other physician assistants of different races have worn scrubs.

The Hospital Administrator agreed that the wearing of scrubs is acceptable and agreed to Payne wearing scrubs.

Some staff can wear scrubs, but for Payne, a physician assistant, it would affect the security and safe running of the institution.

It is clear by prior arbitrations that blue jeans, sandals, and tennis shoes are acceptable dress.

No alternatives were explored.

Union members are being treated differently than non-union members by Management.

Other Physician Assistants of different races have worn scrubs

The Hospital Administrator agreed that the wearing of scrubs is acceptable and agreed to Payne wearing scrubs.

Some staff can wear scrubs, but for Payne, a physician assistant, it would affect the security and safe running of the institution.

Union members are being treated differently than non-union members by Management.

Other Physician Assistants of different races have worn scrubs.

It would appear that high heel shoes would be a greater safety issue and less appropriate for the correctional environment, but this has been acceptable because this type dress has been typified by management.

The Union is not aware of one case of violating the security or safe running of the institution due to wearing scrubs, blue jeans, sandals, shorts, culottes or tennis shoes.

POSITION OF THE AGENCY

The Agency takes the position that its dress code policies are in compliance with the Contract, Supplemental Agreement, and all applicable policies, laws and regulations. The Agency makes the following arguments.

> The only policy that covers non-uniformed staff members in Health Services is found in Program Statement 6000.05 The practice at FBI Forest City has been for PA's to wear professional attire in accordance with Program Statement 6000.05.
>
> At the hearing the grievant tried to compare his dress with that of the nursing staff. However, nurses are uniformed staff and have a national agreement regarding their attire.
>
> The Union has failed to show that the Agency's decision not to allow the grievant wear scrubs violates any law, rule, regulation, or the Master Agreement.
>
> The grievant contends he was treated differently than other PA's, and claims that "other PA's of different races have worn scrubs at FBI Forest City." Former PA Iwauagwu (black male) testified that in his 27 months at FBI Forest City he normally dressed in a suit, and that on three occasions he wore scrub tops.
>
> According to the testimony of the Health Services Administrator, the grievant was allowed to wear scrubs for approximately one or two weeks. Additionally, the Warden testified that the decision not to allow the grievant to wear scrubs was not retaliatory, discriminatory or a violation of his civil rights.
>
> The grievant was treated the same as other PA's, in that none of them are allowed to wear scrubs on a regular basis or as part of an authorized uniform.
>
> Allowing the grievant to wear scrubs for a one or two week period over the past three years does not constitute a past practice. Also, Iwauagwu wearing a scrub top three to five times in 27 months does not constitute a past practice. The party asserting a past practice has the burden of persuasion that the practice was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Veterans Administration Medical Center, Memphis, TN and NAGE, Local R5-66, NO. 8908278,

In order to establish a past practice there must be solid unrefuted evidence that the practice was known and accepted by both parties." Merely establishing that a practice is "common place" is not sufficient. Headquarters, XVIII Airborne Corps and AFGE Local 1770, No, No.81K18857,LAIRS14014(Dallas 1982).

There has been no past practice of allowing PA's to wear scrubs at FCI Forest City

The Union is attempting to gain through arbitration something they failed to gain during negotiations.

The parties negotiated a local supplement. if the Union wanted to propose a change in the PA' work attire, the local negotiations was their opportunity to bargain for that change. However, for whatever reasons, the Union, and specifically the grievant, failed to have scrubs for PA's included in the local supplement. The grievant could not recall if the Union had a proposal on the issue.

This grievance is simply another attempt by the Union and the grievant to gain what they failed to obtain at negotiations. It should also be noted that is signatory for the Union on the cover of the local supplement agreement.

The grievant's requested remedy of 2.5 million dollars for not being allowed to wear scrubs is ill-founded and baseless.

D I C U S S I O N A N D O P I N I O N

THE ISSUES. The question for the Arbitrator is whether or not the Agency had the right to refuse to allow Payne to wear scrubs at work or coming and going from the facility. The Union has the burden of proof.

While the primary issue concerns Payne's right to wear scrubs. there are several questions which must be explored in order to determine whether or not his grievance should be upheld, e.g., (a) which of the negotiated agreements is governing, (b) are they clear or ambiguous, (c) what has been the past practice, (d) is there a

binding past practice, (e) what is the custom of the industry, (f) what is the law of the shop, (g) is Payne being discriminated against because of his Union activities, (h) is he the victim of disparate treatment - did the Agency uniformly enforce its dress requirements, () did the Agency fail to negotiate in good faith, (j) did the Agency violate the Contract, (k) did the Agency violate the Local Supplement Agreement, (l) did the Agency violate the Health Services Manual, (m) did the Agency violate the Human Resource Manual, (n) did the Agency explore alternatives, and (o) does the Warden have the authority to unilaterally dictate, implement and enforce his own dress code.

THE CONTRACT. A written labor contract is commonly referred to as the collective bargaining agreement of the parties. However, a collective bargaining agreement is much more than the signed contract. It is the "entire agreement" of the parties. It includes all written agreements, side agreements, oral agreements, past practices, binding precedents, all understandings, etc. In this case the governing provisions of the Contract (Joint Exhibit 1) pertaining to dress codes is Article 6, Rights of the Employee, Section e, and Article 27, Health and Safety, Section f, i.e.,

> 6-e: "Employees will maintain a neat appearance and dress, considering the correctional environment, and such appearance and dress will not interfere with the security or safe running of the institution....prior to an employee being required to change their dress or appearance, alternatives will be explored."
>
> 27-f: "Ties will be required on posts that are subject to exposure to the public. These posts will include the front entrance, visiting room, control center, escorted trips, and outside medical posts."

The Local Supplemental Agreement, Article 27, Health and Safety (Joint Exhibit 3) I, contains an identical provision pertaining to ties, and the following pertaining to other clothing policies.

> 27: "....Three sets of each size L, X, XX scrubs will be maintained and accounted for to issue to staff whose clothing has been soiled by body fluids and wastes."
>
> 27-d: "The Employer will maintain cloth smocks to be worn by staff only for employees assigned to work in the food preparation area."

The Health Services Manual (Agency Exhibit 1) contains the following clothing policies.

> Directives Rescinded: "For medical staff not required to wear a uniform, professional civilian attire shall be worn. Jeans, sneakers, and other casual clothing are not appropriate during duty hours."

PAST PRACTICE. The Union argues that pursuant to the past practice of the parties, inter alia, Payne should have been allowed to wear scrubs. The Agency argues that there has been no binding past practice. There is very little documented evidence of past practice regarding dress requirements, but there is an abundance of testimony which reveals in great detail the past practice pertaining to the wearing of scrubs, e.g.,

> Roger Payne, Physician Assistant. There has never been a dress code for the non-uniform staff.
>
> There has never been any local negotiations regarding a dress code.
>
> Prior to my grievance the Staff Attorney many times wore short skirts and skirts with split way up high. After the grievance was filed there was a noted change in her dress and I haven't seen that since.
>
> Ms. Justice wore extremely short skirts when she was here.

There have been people that wear high-heel shoes.

Several people wear ties here that are not clip on.

There was a female staff that was sent home because the Warden didn't like the particular type of shoes she was wearing. I think it was because it was showing her toes.

There was another female staff member that was sent home because she was wearing a long denim skirt that came down to about her ankles, and she was told that the Warden didn't like denim.

There was another female staff member that was sent home for wearing a denim jumper.

Have observed other staff wearing denim jeans, blue jeans, tennis shoes, scrubs. Have worn tennis shoes every day.

PA's and other staff in his department wear scrubs every day.

We have a procedure - if any employee's clothes get soiled breaking up a fight...they can change in to a set of scrubs, but they can't because the Agency doesn't have scrubs available.

He never came to work wearing scrubs and was told "not to."

Has seen staff wear jeans. Some staff sent home for wearing jeans.

Almost all staff wear tennis shoes on a daily basis since we've opened.

There is a nationally negotiated agreement for Nurses' uniforms.

Ginny Van Buren, Associate Warden. There was never a written dress code.

She counseled individuals on the dress they were wearing one time - one time a female about shoes.

Never talked to anyone in Health Services regarding clothing.

Counseled employee about wearing "mule" shoes (no back) - not considered professional attire. Asked a lady one time to go home and change her shoes.

Never saw Justice or Attorney wear anything inappropriate. Never counseled anyone about a skirt being too short or a top that was too revealing.

She didn't think wearing tennis shoes in Health Services was inappropriate.

From a management point of view, she didn't have any problem with dress issues - didn't see it as being a long-term running issue.

Kevin Murphy, Senior Officer Specialist. Former Vice President of Local 922. On Union negotiating team for Supplemental Agreement. No written or negotiated dress code during his tenure.

Left the institution in August of 1999. During his tenure he never knew of anyone being sent home because of their dress. It was not an issue.

Tammny McCoy Dental Assistant. Wearing scrubs while testifying. Has worn scrubs every day for over three years. Health Services staff wear scrubs routinely as their daily work attire, including dentist, pharmacist and nurses.

She wears scrubs to and from work. Is provided a lab coat when not doing a clinical procedure. No extra scrubs provided by Agency.

Shon Foreman, Senior Officer Specialist, Second Vice President of local 922. Has held other Union offices. At FCI over four years. No problems with dress under previous Wardens. People sent home because of dress after arrival of Warden Morrison. He sent them home.

Has observed staff in Health Services wearing scrubs, jeans and tennis shoes. Has seen Rickey Martin, Facilities Manager, wearing exercise type sweat suit coming into the institution.

Correctional officers currently allowed to wear necklaces and tongue rings (tongue pierced with earring inserted).

Brenda Hall, Registered Nurse. At FCI almost five years. Wearing lab coat, scrubs and tennis shoes, her normal uniform, while testifying. All Nurses have worn navy blue scrubs for past three years. She has observed other staff wearing jeans and tennis shoes.

Various females sent home for wearing denim skirts, open-toed shoes, sandals and sleeveless blouses. Males have worn denim shirts, denim slacks and tan slacks and not sent home.

Nobody ever said anything to her, or cared, about what she was wearing. Hospital Administrator never reviewed her clothing.

Vytautas Thomas, Staff Dentist. At FCI approximately four years. Wears scrubs when treating patients. Required to wear business clothes to and from work. Asked why he couldn't wear scrubs in to work and got no answer. During his tenure Health Services staff has worn scrubs.

He is furnished a lab coat.

Charleston Iwuagwu. Health Systems Administrator. With Bureau of 9 years. Former Physician Assistant at FCI, 1997-1999. Staff wore scrubs and tennis shoes on a daily basis. Nqothing ever said about not wearing any particular type of clothing? He wore suit to work.

He has no problem with scrubs. At FCI Beaumont, almost the entire staff, including physicians, wear scrubs.

James Owen, Chief Medcal Officer. At FCI five years. Supervises one dentist and one dental assistant. Wears Uniform of Public Health Service. Wears smock at chair side. He doesn't know who made the decision that Dr. Thomas couldn't sear scrubs to and from work. He is not going to say that scrubs are unprofessional attire.

Dental Assistant and Pharmacy Technician allowed to wear scrubs because they have to make trips to the warehouse.

PA's, other than Mr. Payne, generally wear business attire. Females will wear either a skirt or slacks and a dress top. The males, slacks and a tie.

Can only recall seeing Payne wearing scrubs in to work one or two times in five years.

Bobby May, Emergency Medical Technician, Paramedic. At FCI approximately five years. Has worn scrubs, jeans and tennis shoes to work for at least past two years.

Has seen Health Services staff, including PA's and Nurse Practitioner, wear scrubs, jeans, tennis shoes, and denim shirts. Several females sent home because of denim

clothing. Doesn't know of any male ever sent home because of dress.

Not uncommon for staff to wear khakis. She was warned by Warden Morrison not to wear them again. She continues to wear them every week.

Hector Ledezma, Associate Warden of Operations. At FCI two years. Responsible for Health Services Department. It has not been a past practice for PA's to wear scrubs. They normally wear white lab coats. Past practice has been professional type attire.

Never been a real big concern about dress until Payne couldn't wear his scrubs. Staff "pretty much knows what's appropriate attire and what's not."

Ms. Garrison was sent home within past month. Not aware of anyone being sent home prior to Morrison becoming Warden. Not uncommon for people to wear khakis.

She has been wearing scrubs for past two years

Paul Celestin, Health Services Administrator. At FCI about two years. There has been no practice of PA's wearing scrubs to work since he has been here.

PA's wear gowns to suture. They have lab coats. The Infectious Disease Coordinator wears blue scrubs, lab jacket and smocks.

Rex Jones, Supervisor of Education. At FCI about five years. Prior to Warden Morrison, he never sent anyone home because of dress. His wife was counselled because of her dress. Garrison was sent home because of denim.

People in his department have worn sandals and open-toed shoes during past five years.

Warden informed supervisors and managers that denim, open toed shoes or backless shoes were not appropriate attire.

Bryan Lowry, Senior Officer Specialist, South Central Regional Vice President for the Council of Prison Locals. Former President of Local 922. At FCI approximately five years.

There were no dress problems with the first two Wardens. Problems started with Warden Morrison sending employees home because of his personal tastes in clothing.

He wears denim material jeans at FCI on almost a daily basis. Has worn blue jean shorts, tennis shoes, etc., and has never been questioned about his dress.

He has known of females being sent home for wearing high-heel shoes and sandals. Some employees currently wearing open-toe shoes and denim clothing.

The Agency doesn't tell him what type of attire to wear while he's doing Union business and not working as a correctional officer.

He is not aware of the Warden sending anyone home because of the tie they were wearing.

Yvette Toro, Physician Assistant. With the Bureau 13-14 years. Health Services staff wear various color jeans like the denim jeans she was wearing while testifying. Staff routinely wear scrubs and tennis shoes. Taylor and Iwuagwu have worn scrubs.

As long as she has been in medical service it has been considered appropriate to wear scrubs on a daily basis.

The majority of the staff in Health Services wear scrubs. She wears to work whatever she chooses. She chooses not to wear scrubs to work.

Kim Tillman, Teacher. At FCI over five years. Has been sent home twice, once for open-toe shoes and once for denim skirt. It is very common for staff to wear open-toe shoes or sandals.

Never shown a written dress code.

Rex Jones, Supervisor of Education, her supervisor, told her that the Warden had instructed him not to let her "act in any capacity," because of her clothing, "because she didn't represent the Education Department."

She has always worn the same type of clothing. Didn't change after Morrison became Warden. Under the two previous Wardens nobody ever said anything to her about her dress.

Morrison said he didn't want any backless shoes worn, but she continues to wear them, even now. Staff has worn these type of shoes for the past five years.

Jones said in a department meeting after she had been sent home that it was the Warden's "expectations" that denim , open-toe sandals and "mules" were not appropriate attire.

Nobody ever said anything to her about her dress when the other two wardens were there. Warden Morrison told her he didn't want any backless shoes worn. They are still being worn. "I wear them all the time, even now, because there is no dress code." Was wearing them while testifying.

After she was sent home she filed a grievance, but it was dropped. She doesn't know why.

She wears scrubs at work and to and from work.

Terri Ballard, Pharmacy Technician. At FCI since May of 1997. She wears scrubs at work and to and from work. Was wearing scrubs while testifying.

Marvin Morrison, Warden. At FCI since January of 1999. The past practice in this institution has been that no staff will wear blue jeans. That practice was in place when he arrived. Was so advised by Warden Snider.

Was not aware that the majority of staff in Health Services was wearing scrubs. "To my knowledge the only person that was wearing the scrubs was one of the dentists and he was changing into that when he came in to work, and that's the only person that I knew of at the time."

Leon Ball made the decision as to who could wear scrubs in and out of the institution.

Since he has been at FCI there has never been a negotiated dress code. He believes that as CEO of the institution he should make the final decision as to what type of dress is appropriate. The type of material is something that was in place prior to his arrival here.

There is no agreement between the parties that allows Physician Assistants to wear scrubs.

He is not aware of any past practice that allowed PA's to wear scrubs on a regular basis either at work or to and from work.

CONCLUSIONS. Although there is some conflict of testimony among some of the witnesses regarding their recall of certain past practices, the overwhelming weight of the evidence leads to the inescapable conclusions that prior to January of 1999: (a) there

was no negotiated dress code for non-uniform employees, (b) there was no official unwritten dress code, (c) there was never any dress problems under two other Wardens, (d) supervisors were not checking on employee attire, as one of the regulations requires, (e) supervisors didn't care what their employees were wearing, (f) no employees were ever sent home because their dress was not appropriate, (g) no employee was ever disciplined, warned or even counselled regarding their attire.

If the grievance had been filed prior to January of 1999, this case would have ended at this point, because the Union would have had a perfect past practice defense. The parties would have been bound by their past practice, and thereunder Payne would have had the right to wear any clothing he desired, either at work or to and from the facility.

A valid past practice defense must be based on the entire experiences of the parties over the effective period of their collective bargaining agreements, not just a conveniently selected part. Therefore, a past practice defense in this case must be based on the period from the date of the first contract to the date of the occurrence which precipitated the grievance.

For the purpose of attempting a past practice defense the actions of the parties prior to January of 1999 are irrelevant, because there had been a clear "meeting of the minds" during that period. However, all of that harmonious relationship changed abruptly upon the arrival of Warden Morrison, when he almost immediately began implementing his personal version of what a dress code should be for Agency employees.

The Warden quickly and effectively communicated to his managers and supervisors what his policy would be, i.e., all employees would be required to conform to "his expectations" of what types of clothing would be acceptable for wearing on the job or to and from the facility.

The evidence suggests that not all of the Warden's managers and supervisors were real happy about the new dress policy. Nevertheless, they accepted it and proceeded to enforce it. The sudden aggressiveness of Leon Ball, Health Services Administrator at the time, can most certainly be attributed to the Warden's new policy.

Ball's action of singling out Payne, although it was the Warden's idea, as a means of enforcing the new dress policy set off a chain reaction among the various players and ultimately resulted in the filing of Payne's grievances. Therefore, the relevant period for the purpose of a past practice defense runs from January of 1999 to the date of the occurrence which gave rise to Payne's first grievance.

Analysis of the past practices which occurred from January 1999 forward, as revealed by the above testimony, leads to the following conclusions: (a) Warden Morrison became concerned over what employees were wearing to and from the facility, never considered a problem by the two wardens proceeding him, (b) Payne ordered to stop wearing scrubs at work, a common practice in his department prior to and following January of 1999, a unilateral change in a condition of employment without notice to or negotiations with the Union, (c) three female employees sent home for wearing "denim," because "the warden doesn't like denim," which

resulted in financial loss to the emloyees due to cost of making round trip to their home driving their personal vehicles, (d) unequal enforcement of rules (management favoritism) i.e., Staff Attorney allowed to wear extremely short skirts "slit way up," (e) Staff members sent home for wearing jeans, an unannounced change in policy, (f) female employees sent home for wearing mules and high heels, an unannounced change in policy, (g) Staff Dentist ordered to wear "business clothes" to and from the facility - Warden claims he doesn't know who gave the order, (h) Dental Assistant and Pharmacy Technician allowed to wear scrubs, because "they have to make trips to the warehouse," a new issue, (i) Bobby May (female EMT-Paramedic) warned by Warden to stop wearing khakis, but she continues to wear them - another unannounced change of policy. (j) Correctional officers allowed to wear "tongue rings" (tongue pierced with earring inserted), a reflection on Morrison's judgment and credibility?

PAST PRACTICES BINDING? Even the Warden admits that there has never been a negotiated dress code. Absent any written policy, the nearest thing to an agreement of the parties is that reflected by the past actions (practices) of employees, supervisors and Management, to which both parties had tacitly acquiesced during the tenure of two previous Wardens.

The Agency argues that there is no binding past practice, citing "Veterans Administration," supra, i.e.,

> "The party asserting a past practice has the burden of persuasion that the practice was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties."

There is also an implied Agency argument that this Arbitrator is bound by a set of "general rules" for determining whether a past practice has been established, i.e.,

1. Does the claimed practice concern a significant term or condition of employment.

2. Was the alleged past practice of such long standing and was it acquiesced in by the employer so that it would be inequitable to discontinue such practice.

3. Did the contracting parties seek to incorporate the claimed past practice into the written labor agreement.

4. Was the alleged practice a matter known to all members of the bargaining unit concerned, and was such practice used with a certain degree of frequency so as to have been consistently relied upon by the employees. Was the asserted past practice one that has existed over a substantial period of time so as to become a fixed and routine procedure well known and utilized by the parties.

6. Was the alleged past practice so detailed and well defined that it was accepted and implemented by both parties.

The Agency argues that "allowing the Grievant to wear scrubs for a one or two week period over the past three years does not constitute a past practice, nor does Iwauagwu wearing a scrub top three to five times in 27 months. The Agency would possibly have a valid argument if the past practice in dispute was "the wearing of scrubs by Physician Assistants," and Payne and Iwauagwu were the only employees in the Health Services Department

The Agency's attempt to base the right of an employee to wear scrubs on some special function of the job, e.g., "has to make trips to the warehouse," has only served to cloud the issue. There is no foundation for such a proposition. Payne is correctly basing his right to wear scrubs on the past practice of employees in Health Services. The general practice of wearing scrubs by

employees in that department satisfies all of the universally recognized criteria of a binding past practice.

Assuming arguendo that Young's past practice defense is not adequate, he has proposed other issues which could provide the basis for his position, e.g., retaliation, disparate treatment, sex discrimination, Contract violations, etc.

UNION ACTIVITIES. Payne argues that one of the reasons for the Agency's denial of his right to wear scrubs is their displeasure with his Union activities, and they have taken this opportunity to retaliate. Young is obviously a strong Union activist and a thorn in the side of Warden Morrison. However, discrimination due to Union activities is one of the most difficult things to prove in arbitration even when it is true.

Young recalls one incident when Morrison was visiting his work area and upon observing him dressed in scrubs said to Young, "I didn't know you were a Nurse." Young interpreted that as a showing of disrespect for a Union Official. However, the thought process in Morrison's mind which caused him to make that remark could have been nothing more than an attempt to be friendly. His motive can't very well be proved by speculation.

There are certain management actions which have been interpreted by arbitrators as indicative of retaliation against a union member for his union activities, e.g., assignment to undesirable work or shifts, assignment of excessive amounts of overtime, denial of requests for accrued leave or vacation time, etc. However, as in all forms of alleged discrimination, the test is whether managements's action can be shown to have been for no

reason other than retaliation.

SEX DISCRIMINATION. Nurses perform work similar to that of PA's in many respects. The Agency's staff of female Nurses were wearing scrubs at the time Young was ordered to stop. He views that as "sex discrimination." The Union cites a letter from Leon Ball addressed to "Registered Nurses, Pharmacy Technician and Dental Technician," dated August 17, 1998 (Union exhibit 6) in which he states in part:

> This memorandum is giving approval to the female health care staff of FCI Forest City in the wearing of medical clothes called "Scrubs," to and from their duty station to include the wearing of the attire during their duty time.

The Union also cites Morrison's grievance response, dated September 7, 2000 (Joint exhibit 3) in which he states in part:

> Mr. Payne is not being singled out for any reason, since no staff in the Health Service Department are allowed to routinely wear scrubs as their work attire. We are simply enforcing this compliance with the uniform regulations and past practice.

The conflict of the above cited policy statements is obvious, and the documents speak for themselves. If not sex discrimination, it was most certainly disparate treatment of ~~Young~~ Payne.

RACE DISCRIMINATION. Charleston Iwuagwu (black), former PA at Forest City, testified that he and other Health Services employees wore scrubs routinely. Allowing Iwuagwu to wear scrubs, but denying Young the right is viewed by ~~Young~~ Payne as racial discrimination. If not, it was clearly disparate treatment of ~~Young~~ PAYNE.

CONTRACT VIOLATIONS. The Union has correctly charged the Agency with several violations of the collective bargaining agreement of the parties, i.e.,

ARTICLE 4 - Section a.

> "The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level."

The precise date of the implementation of Warden Morrison's new personalized dress code was not established at the hearing, but it is presumed to have occurred shortly after Morrison's arrival at Forest City. In any event, there is unrefuted testimony that several female employees had been "sent home" due to wearing certain types of clothing Morrison "didn't like."

A change in the local dress code was obviously a "change in working conditions." The Contract contains no exceptions to the requirement of Article 4-a that the Union be notified of changes. The Union was not notified and therefore the Agency violated the Contract.

Morrison's unilateral implementation of his new policy without notice to the Union or negotiations with the Union was a violation of Article 4, Section c, i.e.,

> "The Employer will provide expeditious notification of the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this Agreement."

ARTICLE 7, Section b.

> "In all matters relating to...conditions of employment, the Employer will...notify the Union of any changes of employment and provide the Union the opportunity to negotiate...."

Article 4-a requires the Agency to "inform" the Union, and Article 4-c requires the changes to be "negotiated," but Article 7-b

has the additional requirement that the Agency "give the Union the opportunity to negotiate," which is interpreted to mean that the Agency has the obligation to initiate the negotiations by offering the Union a proposal.

ARTICLE 6, Section e.

> Employees will maintain a neat appearance and dress, considering the correctional environment, and such appearance and dress will not interfere with the security and safe running of the institution.

In situations where safety, security, or efficiency are not a consideration, but only how the employee "appears" to the Warden or fails to live up to his "expectations," the Agency has no right to send the employee home, order him to change his attire, or take any disciplinary action.

When Young was ordered to stop wearing scrubs, nobody told him he didn't have a "neat appearance and dress," nor did they inform him that the fact that he was wearing scrubs was jeopardizing the security and safe running of the institution, a ludicrous concept. The Warden didn't have that problem with the Nurses or other staff members, so how can he now in good faith testify that Young was not being "singled out."

CONCLUSION. It is undisputed that the parties have never had an official written dress code, other than the very brief standard contained in Article 6-e. There was not even an unwritten dress code under the two previous Wardens, and there is no evidence of a single problem during their administrations which could be attributed to employee attire.

The Agency's problems with employee dress, both on and off the

job, began almost immediately upon the arrival of Warden Morrison at Forest City in January of 1999. Morrison apparently didn't bother to become familiar with the Contract, or chose to ignore it, when he decided to implement his own personalized version of an employee dress code, and in so doing caused the Agency to be in violation of several Contract provisions.

The Warden's order that Young had to stop wearing scrubs was a violation of a binding past practice and was illegal under the Contract. Moreover, it caused Young to suffer disparate treatment in the Health Services Department. Young has been damaged as a result of the Agency's actions, and therefore must be made whole.

THE REMEDY. Payne's grievance requested 14 remedies, including $500,000 for "stress and hardship," and $2,000,000 for "violations of his constitutional rights." It is axiomatic that in order to claim the cost of damages, there must be proof of loss. Young has not demonstrated that he has suffered any financial loss as a result of not being able to wear scrubs.

Payne didn't explain at the hearing or in his posthearing brief in what manner he considers that his constitutional rights have been violated, or how he thinks this Arbitrator would have jurisdiction in such a challenge. He has been provided due process under the Contract.

The Agency will be directed to reinstate Payne's right to wear scrubs on the job or to and from the facility. I don't find the other 11 requested remedies to be appropriate or necessary. If the Agency should repeat any of its violations, the Union still has the protection of the negotiated grievance procedure.

THE OSHA ISSUE

BACKGROUND

On October 3, 2001, a safety inspection of the facility was conducted by a team composed of S. McLendon, Safety Specialist, T. Mathers, General Foreman, and A. Winfrey, Maintenance Worker Supervisor. The results of that inspection were recorded in a report titled "Occupational Safety and Environmental Health Monthly Report" (Union Exhibit 1), which states in part:

> An inspection of your assigned areas was conducted. Corrective action on noted deficiencies is required within five working days from receipt of this report. Your response will be routed in memo format through the respective Executive Staff Member to the Safety Department.
>
> General Comments: Staff working with energized lines or parts of equipment of 50 volts or more need to have clothing that isn't made of polyester, acetate, nylon, or rayon. (OSHA 1910.2691.6.i.ii.iii).
>
> (Safety and Facilities are working together for a solution).

The distribution of that report is not clear. There is nothing on the report to indicate either addressee or copy distribution. The first action taken as a result of that report was apparently taken by Joseph Cook, Electrical Worker Supervisor and Union Steward, who testified that the problem had been called to his attention by Stanley McClendon, Safety Specialist, about a year ago.

Cook testified that he obtained a copy of the above-referenced OSHA regulation from McClendon and took copies to Thomas Mathers, Inside General Foreman, and Rickey Martin, Facilities Manager. There is no evidence that either Mathers or Martin expressed any interest in seeking a solution to the problem at that time. According to

Cook, they told him they had discussed the matter with Safety and they didn't think they were in violation.

It is unknown when or how Payne became aware of the problem. He wrote in his first grievance dated August 11, 2000 (Joint Exhibit 2):

> "It would also appear that O.S.H.A. standards are not being met with the clothing required by electricians. The uniform does not meet O.S.H.A. requirements but 100% cotton, such as blue jeans and a t-shirt, does meet there requirements. This is a undue safety hazard for staff. It appears that the safety of staff has taken a back seat to the type dress that management desires."

THE ISSUE

Did the Agency's dress code for Electricians violate OSHA regulations or the collective bargaining agreement of the parties? If so, what shall be the remedy?

POSITION OF THE UNION

The Union takes the position that many OSHA violations have gone unanswered even at the threat of staff's safety. The Union makes the following arguments.

> The personal taste of the Warden has put staff's lives and safety at risk. The Agency has known about the safety violations for approximately 2 years but has done nothing to resolve them.
>
> The violations of the Contract and OSHA regulations that are putting staff's lives and safety at risk could have been solved with simply allowing staff to wear 100% cotton clothing.
>
> The Agency has been written up by their own Safety Manager, but has not corrected the problem. The Agency

has demonstrated through taking no action to correct this problem, a lack of concern for the safety and lives of the bargaining unit staff.

The Agency did not even address the OSHA violations in their statement of the issue or in their denial of the grievance.

POSITION OF THE AGENCY

The Agency takes the position that the issue has been resolved and the Facilities Department is in compliance with OSHA regulations. The Agency makes the following arguments.

The grievant is quick to point out that the appropriate remedy for this issue would be to allow the electricians to wear blue jeans and a t-shirt. Again, the Agency denied the grievance citing that the same grievance was filed June 9, and rejected on July 7, 2000.

wA relatively obscure OSHA regulation was identified and brought to the attention of Management during a monthly safety inspection. Management took corrective action to resolve the issue by purchasing cotton coveralls for staff to wear over their uniforms when working with electricity.

The Agency is left guessing as to why the Union failed to bring what they claim was a safety issue immediately to Management's attention rather than making a generic claim in the grievance.

The grievant fails to provide any specifics to the Agency regarding what regulation was violated and how.

The Union's suggestion that allowing staff to wear blue jeans and t-shirts to work as a remedy casts doubt on their sincerity.

DISCUSSION AND OPINION

The term "OSHA violation" as commonly referenced throughout the hearing is a misnomer. There was no inspection conducted by OSHA,

and there is no evidence that the Agency has ever been charged by OSHA with a violation of the OSHA dress code for Electricians, i.e.,

> The employer shall ensure that each employee who is exposed to hazards of flames or electric arcs does not wear clothing that, when exposed to flames or electric arcs, could increase the extent of injury that would be sustained by the employee.
>
> Clothing made from the following types of fabrics, either alone or in blends, is prohibited by this paragraph, unless the employer can demonstrate that the fabric has been treated to withstand the conditions that may be encountered or that the clothing is worn in such a manner as to eliminate the hazard involved: acetate, nylon, polyester, rayon.

The Agency claims they have solved the problem by obtaining cotton jump suits for issue to Electricians or other employees who may be exposed to electrical hazards. The Union apparently doesn't agree that the jump suits comply with the OSHA standard.

The parties have obviously anticipated these types of problems and have made provisions for their resolution, e.g., Article 27 which provides for the establishment of a Health and Safety Committee to serve in an advisory capacity to the Warden, and also provides that problems reported by the Union will be promptly investigated.

It is unknown if such a committee has been established. If not, the Union had the right to demand that the Agency comply with that Contract provision. That is a much more practical approach to solving safety problems than filing grievances.

Article 2 of the Contract provides for Joint Labor Management Relations Meetings by management and Union representatives. Meetings may be initiated by either party and each party is required to submit an agenda. There is no evidence the Union ever utilized such meetings as a means of resolving the Electricians dress code problem. All of which suggests that the Union may not have been properly

motivated to add this issue to the grievance.

The Union has failed to sustain its burden of proving that the Agency's dress code for Electricians has violated the Contract or OSHA regulations. Therefore, the Agency's position must prevail in this issue.

A W A R D

THRESHOLD ISSUE. The grievance was timely filed and is therefore arbitrable on the merits.

DRESS CODE ISSUE. The Agency did not have the right to order the grievant to stop wearing scrubs. The Agency is hereby directed to allow the grievant to wear scrubs on the job and to and from the facility.

OSHA ISSUE. The Agency's dress code for Electricians did not violate OSHA regulations or the Contract.

Russell C. Neas
Arbitrator

March 16, 2002
Tulsa, Oklahoma