In The Matter of Arbitration
Between

Federal Bureau of Prisons
Federal Correctional Institution, McKean, PA
And
Counsel of Prison Locals
American Federation of Government Employees

FMCS Case No. 06-52304

OPINION AND AWARD
September 6, 2006

Subject: Physical Safety of Employees—Request for Safety Shoes

Statement of the Grievance:
"Federal Prison System Directive, Executive Order or Statute violated:
The Master Agreement including but not limited to Article 9 and 28 and 5 U.S.C. 7102

"In what way were each of the above violated? Be specific.
Article 28 of the Master Agreement states 'Section g. Safety-toed footwear for uniformed and non-uniformed employees (when such employees work in a designated foot hazard area) will be shoes or boots at the discretion of the individual employee. The cost and quality of said footwear will be negotiated locally.

"1. Safety shoes will be worn by all employees who work in areas designated as foot hazard areas by the institution supplement. Therefore, any staff member who works in a foot hazard area is entitled to a shoe allowance of up to $100.00 every nine months as negotiated in the local supplemental Agreement. It should be noted that while the local supplemental Agreement states this allowance pertains only to uniformed staff, this language is in direct conflict with the Master Agreement's language first paragraph of article 9 which states '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."

"Date(s) of violation(s): 10-13-2005 and continuing until present

"Request remedy (i.e. what you want done)
"Issue shoe allowance in accordance with the locals supplemental Agreement i.e $100;00 every 9 months to all staff working in foot hazard areas, and anything deemed necessary and appropriate by any third party."

Statement of the Award: The grievance is sustained as stated in paragraphs 117, 118 and 119.

Grievance Data

Filed:	10-26-05
Agency Denial:	11-23-05
Appealed to Arbitration:	12-22-05
Heard:	3-27-06
Post Hearing Briefs Received:	5-8-06 and 5-12-06

Appearances

Agency

Alvin Calhoun	LMR Specialist (Agency Representative)
Denise A. Hale	Employee Services Manager
S. L. Robare	Associate Warden
Susan O'Rourke	AW's Secretary
Donald Reich	Captain
Stephen Housler	Safety Manager
Rodney Smith	Health System Administrator

Union

Eric Asp	Physician Assistant
Christopher Strade	Education Technician

BACKGROUND

This grievance seeks to have the Agency provide additional employees with safety-toe shoes, over and above those employees already furnished with such shoes, on the ground that, even though the grieving employees do not work constantly or routinely in foot-hazard areas they do so and pass through them with sufficient frequency to come within Article 28, Section g-1 of the March 9, 1998 Master Agreement, requiring that all employees who work in areas designated as foot-hazard areas by Institution Supplement be provided with safety-toe shoes. 1

This Federal Correctional Institution is a prison, with over 1600 convicted inmates.. Approximately 300 persons are employed at the facility to operate it and take charge of inmates. The Union represents about 200 of that number of employees The Union relies on the provisions of Article 28, Section g and g-1 and g-2 of the Master Agreement, reading as follows: 2

> "Section g. Safety-toed footwear for uniformed and non-uniformed employees (when such employees work in a designated foot hazard area) will be shoes or boots at the discretion of the individual employee. The cost and quality of said footwear will be negotiated locally. 3
>
> "1. safety shoes will be worn by all employees who work in areas designated as foot hazard areas by the institution supplement; and 4
> "2. each eligible employee is entitled to two (2) pairs of shoes and/or boots on initial issue and one (1) pair every nine (9) months thereafter." 5

The Union relies also on the provisions of Article 27, Health and Safety, of the Master Agreement, reading as follows in Section a; in defining the causes of concern: 6

> "ARTICLE 27 – HEALTH AND SAFETY
>
> "Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons: 7
> "1. the first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment; and 8
> "2. the second, which affects the safety and health of employees, involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons.
> "With respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing

its rights under 5 USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated.

"With respect to the second, the Employer agrees to furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders."

Article 28-g of the June-1999 Supplemental Agreement says that, 9

"The Employer will provide a shoe allowance in the amount of $100 for staff to purchase proper footwear. Additionally, the Employer will provide a listing of all areas in which safety toed shoes need to be utilized by staff." 10

Appendix B to Subpart 1 to Part 1910, paragraph 7, Code of Federal Regulations, of March 7, 2006, whose title is Non-Mandatory Compliance Guidelines for Hazard Assessment and Personal Protective Equipment Selection, says in paragraph 7: 11

"*Reassessment of hazards.* It is the responsibility of the safety officer to reassess the workplace hazard situation as necessary, by identifying and evaluating new equipment and processes, reviewing accident records, and reevaluating the suitability of previously selected PPE. 12

Paragraph 10 has the following provisions:

"Safety shoes or boots with impact protection would be required for carrying or handling materials such as packages, objects, parts or heavy tools, which could be dropped; and for other activities where objects might fall onto the feet. Safety shoes or boots with compression protection would be required for work activities involving skid trucks (manual material handling carts) around bulk rolls (such as paper rolls) and around heavy pipes, all of which could potentially roll over an employee's feet. Safety shoes and boots with puncture protection would be required where sharp objects such as nails, wire, tacks, screws, large staples, scrap metal etc , could be stepped on by employees causing a foot injury. 13

"Some occupations (not a complete list) for which foot protection should be routinely considered are: shipping and receiving clerks, stock clerks, carpenters, electricians, machinists, mechanics and repairers, plumbers and pipe fitters, structural metal workers, assemblers, drywall installers and lathers, packers, wrappers, craters, punch and stamping press operators, sawyers, welders, laborers, freight handlers, gardeners and groundskeepers, timber 14

cutting and logging workers, stock handlers and warehouse laborers."

It is agreed, as stated in Article 27-a, quoted above, that whether or not a site or activity is to be considered as a hazardous foot area, is to depend on the nature of the activity performed at the site and not upon the title of the employee's occupation. Safety Manager Housler noted that such foot-hazard areas exist in the recreation area, working with all electrical-installation tasks, performing mechanical welding, cutting, and brazing operations, and conducting landscaping operations. Housler said that a foot-hazard area is one in which objects would be likely to be dropped or to fall on an employee's feet. It is clear also that heavy objects which might roll over the feet must be guarded against. 15

Paragraph 2 of the same document reads as follows:

> "*Assessment and selection.* It is necessary to consider certain general guidelines for assessing the foot, head, eye and face, and hand hazard situations that exist in an occupational or educational operation or process, and to match the protective devices to the particular hazard, It should be the responsibility of the safety officer to exercise common sense and appropriate expertise to accomplish these tasks." 16

In Housler's consideration of risks, he identified the hazardous activities, source of the hazard, and assessed the risks from None, to Slight, to Extreme, identifying the potential hazards, and suggesting appropriate Personal Protective Equipment. In situations where he found the foot hazard to be "Slight," he ordered that safety shoes be worn. 17

Joint Exhibit 7, a Program Statement of August 16, 1999, states a great number of provisions regarding foot-hazard areas, protective equipment, and safety shoes. Its relevant provisions read as follows: 18

> "P. PERSONAL PROTECTIVE EQUIPMENT
>
> "1. Personal protective equipment such as safety shoes, eye and face protection, hard hats, gloves, respirators, lifelines and harnesses, and hearing protection shall be provided and worn in accordance with 29 CFR, OSHA 1926, Construction Standards, or as deemed necessary by the Safety Manager. 19
>
> "2. Protective equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. These areas shall be conspicuously marked with hazard warning signs. 20
>
> "3. Safety shoes meeting the requirements of ANSI Z.41 are required in foot hazard areas as designated by local supplement. Toe caps or foot guards may not be worn in lieu of safety shoes in designated foot hazard areas. 21

Inmate workers, medically restricted from wearing safety shoes, may work in areas not designated as foot hazard areas. Examples of work assignments that normally would not require safety shoe protection include: administrative clerks, hospital orderlies, unit orderlies and dining room orderlies. Note: **Each institution Safety Department must perform a foot hazard assessment to determine areas requiring safety shoes and areas not requiring safety shoes."** 22

Section D-2 of Chapter 7 reads as follows:

"D. RECREATION

Inmate sports participants should have the personal protective equipment appropriate for that sport. **Example:** It is recommended that eye protection be worn by racquetball players and appropriate footwear such as safety shoes worn while in weight lifting areas. 23
Recreation areas shall be clear of tripping or bumping hazards.
Jogging areas should be inspected weekly by the recreation staff to remove potential hazards."

Section C-2-c of Chapter 8 reads in relevant part as follows:

"C ELECTRICAL SAFETY
"...
"c. All safety shoes worn by staff electricians shall be nonconductive and meet the most current ANSI Standard." 24

Section F-2-c of that document says that,

"F. WELDING, CUTTING AND BRAZING OPERATIONS
"...
"2. Safety Equipment
"...
"c. At a minimum welders shall wear high top safety shoes (9 inch recommended) during welding, cutting or braising operations. For heavy work, fire-resistant leggings, high boots, or similar protection shall be used. 25
"d. All shop workers, staff, and inmates shall wear safety shoes."

"I. LANDSCAPE
"...
"Procedures
"a. Inmates and staff shall be required to wear safety shoes meeting the most current ANSI standard relating to safety shoes while operating any type of power mower. 26

"b. Use of power edgers, weed eaters, leaf blowers, lawn vacuums and chain saws shall require use of safety shoes, safety glasses or goggles, and hearing protection." 27

Section M " PERSONAL PROTECTIVE EQUIPMENT says that,

"1. Protective eye and face equipment shall be required when there is a reasonable probability of injury that can be prevented by such equipment. These areas shall be conspicuously marked with eye hazard warning signs. 28

"2. Safety shoes are required in foot hazard areas as designated by local policy." 29

Housler said that, based on his surveys, he made up the listing of inmates and staff working in foot-hazard areas, as identified in the July 21, 2005 Joint Exhibit 6, which reads as follows: 30

"3. DESIGNATED SAFETY SHOE AREAS ARE AS FOLLOWS:

All inmate work details are required to wear safety shoes while performing work. It is recommended safety shoes be worn in recreation areas, weight rooms, and the gym. The only exception to this rule is when inmates are issued a soft-shoe pass from health services due to medical reasons." 31

Paragraph 6-a of that same Provision reads as follows:

" 6. ACTION

"Inmates will be issued at least one pair of safety toe shoes as they report to the institution. Every employee (uniformed) required to work in an area designated a foot hazard area by the safety manager, shall be issued safety shoes under the authority of AFGE, Article 28 Uniform Clothing, section g-1. Appropriated funds may be used for the purchase of these shoes. These employees will include mechanical services, safety, warehouse, commissary, laundry, UNICOR, vocational training, recreation, correctional services, and food service." 32

Union Exhibit 3, an OSHA statement, reads in relevant part as follows:

"General requirements. The employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole, and where such employee's feet are exposed to electrical hazards." 33

In light of all that legislation, administrative regulations, Master Agreement, and Supplemental Agreement language, the evidence appears to suggest that the Agency had agreed that the following areas were foot-hazard areas: recreation area; mechanical welding operations; cutting operations; brazing operations; landscaping operations; weight rooms; gym; armory; tool room-central; rear gate; garage; all warehouse; laundry; general work shop; weld shop; UNICOR; commissary; housing units; power house; and food service. It seems it also had provided by July 21, 2005 for the following categories of employees to have safety shoes: mechanical service employees; safety employees; all warehouse employees; commissary employees; laundry employees; UNICOR employees; recreation employees; correctional services employees; food service employees; inmate systems staff; institution counselors; and housing counselors. 34

The Agency contends that the following areas and assignments are not foot-hazard areas: hospital; physician assistants; health service staff; housing units; front entrance; compound; perimeter patrol; satellite camp; and shakedown shack. 35

The employees and areas in the above three lists are the best the Arbitrator could discern from a complicated set of party lists and statements. 36

Union Exhibit 2 contains written statements by ten different employees, saying that they were required to work on a shift or series of shifts in various safety-shoe hazard areas, without being provided with the proper safety footwear, which put them at risk of injury. 37

The Agency sees those employee statements in Union Exhibit 2 as not relevant here because they all occurred after the grievance was filed and after this arbitration was invoked. 38

The essence of the Agency defense to this Union claim is that non-custodial staff working custody posts on a temporary basis do not work in foot-hazard areas as identified by the Safety Officer. 39

The Agency says that the parties' agreement of October 14, 2005 modified the roster used to rotate non-custodial staff to custodial posts. The new roster was implemented on October 25, 2005. It is alleged that those Custodial Coverage Schedules show that most staff members were assigned to Correctional Services Posts only two or three times over a five-month period and all of them had worked in non-hazard areas. Captain Reich testified that the only foot-hazard areas identified by the Safety Officer for his Department were the Tool Room, Rear Gate, and the Armory. The Agency says that all non-custodial staff assigned to those areas already had been issued safety shoes, such as staff for medical services, and that all Correctional Services Staff had been issued safety boots. It is said that non-custodial staff typically are assigned to posts such as Housing, Front Entrance, Compound, Perimeter Patrol, or Satellite Camp, where their duties do not expose them to hazards to the feet, and that non-custodial staff assigned to the Armory, Tool Room, or Rear Gate already have safety boots because of their primary positions. 40

The Agency argues, accordingly, that the Union's requested relief is already in place, since it contends that personal protective equipment already has been issued to all Staff working in foot-hazard designated areas. 41

The Union notes that the Bureau of Prisons has created a "mission critical roster," which is a work roster in which Bureau Management has determined that certain posts should never be vacated. That roster now is implemented so that on a regular and recurring basis non-correctional officers are assigned to cover traditional correction-office posts, when the customary officers are absent. The Union claims that many of those posts, to which non-correctional officers, without proper safety shoes, are assigned, are foot-hazard areas such as Housing Units, Compound, and Rear Gate, where correctional officers wear safety shoes. It is concluded by the Union that the Agency violates the Master Agreement in its refusal to provide safety-toe shoes for the balance of what it says are about forty-five staff employees. Compared to the limited requirement for safety shoes for employees, the Union finds it odd that every inmate must wear safety-toe shoes. That covers over 1600 inmates. Only inmates with a medical slip may go without safety-toe shoes. 42

The Union says also that over one-half of the Institution Staff are required to wear safety-toe shoes as part of their work uniform. If the Staff who are required to work regularly in designated safety-shoe areas, and are required to wear safety-toe shoes then, the Union cannot see why employees who work in those areas in the absence of those employees are not afforded the same foot protection. 43

The Union, therefore, asks that the Agency be ordered to provide and pay for safety-toe shoes for every employee assigned to work in or be in a designated foot-hazard area, regardless of the duration of that employee's assignment in that area. 44

The Agency argues, first, that this grievance is not arbitrable because it was not filed in timely fashion under the terms of the Master Agreement. It is said that the Local Union discussed the lack of safety-toe shoes for Health Services Staff working Correctional-Services Posts and spending time daily at the Special Housing Unit and Satellite Camp, at a Labor Management Relations meeting on August 11, 2005. The Agency charges that the Union was aware that these grieving employees did not have safety shoes even earlier, since on July 20, 2005, former Union President Biesek reviewed the Agency's Institutional Supplement regarding safety shoes and suggested that the Hospital should be added to the foot-hazard areas. The Agency did not make that addition and issued this policy on July 21, 2005. 45

The Agency conclusion on this subject is that Article 31-d of the Master Agreement requires that a grievance be filed within forty calendar days of the date of the alleged grievable occurrence, and that, if a party becomes aware of an alleged grievable event more than forty calendar days after its occurrence, the grievance must be filed within forty calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. This grievance was filed on October 26, 2005, 46

which the Agency counts as ninety-eight days after the Union became aware of this matter. Thus, it is said that this grievance is untimely and must be dismissed.

Next, the Agency notes the provisions of Article 32(a) saying that the party seeking to have an issue submitted to arbitration must notify the other party in writing of its intent prior to expiration of any applicable time limit, and that notification must include a statement of the issues involved, the alleged violations, and the requested remedy. The Agency notes that the Union did submit a written notification, but that that notification did not state expressly the three items, but simply referred back to the written grievance statement for the issues involved, alleged violations, and requested remedy. The Agency argues that such a notification by reference is insufficient under the Master Agreement requirement of Article 32(a). 47

It is said that, although not binding, cited arbitration decisions have held that grievances are not arbitrable when the moving party did not satisfy the requirements of Article 32(a) governing that notification. 48

The Union response to the Agency's claim that the grievance was untimely filed is that the Agency failed to raise that argument prior to arbitration, so that the Union could not respond to it before that, and, therefore, the Agency should be estopped from pressing that issue here. It cites an arbitration decision, holding that, if a party does not object to a procedural defect when it becomes aware of it, that party will not be heard if that question is first raised at the arbitration hearing. 49

It is argued also by the Union that grievances against continuing violations of a collective-bargaining Agreement are not considered to be untimely. The Union raised issues about safety-toe shoes on numerous occasions, trying to resolve the issue informally. The Union argues that the decisions cited by the Agency are not similar, because in those cases the Union simply failed to take any action, whereas, here, the Union made every attempt to resolve this matter informally and at the lowest level. Despite that, it is said that the Agency continued to violate the Master Agreement on a daily basis, and it became apparent to the Union at the October 13, 2005 Labor Management Relations meeting, that the Agency was not going to resolve this situation informally. Thus, it is said that, since the Agency continues to violate the Master Agreement, the Union thus is free to exercise its right to file a grievance for each separate occasion of violation, and each such separate occurrence constitutes the start of a new forty-day time limit in which the Union may file a grievance, since the Union becomes aware of the new violation on each day that the infraction is committed. Accordingly, it is argued that the grievance is not time barred. 50

As to the Agency claim that the Union did not comply with Article 32(a) of the Master Agreement, in that it did not notify the Agency of its intent to arbitrate this matter by filing the written statement with its three notifications, the Union urges that such a later notification to the Agency was unnecessary because the three statements (issues, alleged violations, and requested remedy) all were stated in the original, written grievance. It says that there thus was no reason for the Union to reiterate those items word for word in its later letter invoking arbitration. 51

Moreover, says the Union, after the Agency received the Union's letter invoking arbitration, the Union and the Agency jointly sent the appropriate form to the Federal Mediation and Conciliation Service, asking for a list of Arbitrators. That request is said to have stated the issue. The Union and the Agency then selected the Arbitrator and the Agency brought a Labor Management Specialist from Washington, D.C., to present the Agency case. All that took place, says the Union, without the Agency even mentioning an issue of how the Union had invoked arbitration, until the arbitration hearing. Thus, it is said that the Agency was in no way harmed because of what is said to have been its own negligence in failing to re-read the written grievance, as directed in the Union's letter invoking arbitration. 52

As to the merits, the Union testimonial evidence by Education Technician Strade is that he has had to work in foot-hazard areas on a daily basis. He is familiar with the mission-critical rules by which non-correctional staff members are called to work, without safety shoes, at posts that have been left vacant by the absence of the regularly assigned employees and to which vacancy non-correctional staff members are assigned. These posts include Housing Units, Compound Office, Shake-Down Check Area, and the Special Housing Unit. The witness said in those areas the foot-hazard arises from rolling and falling objects, as well as electrical hazards. 53

Strade noted that Union Exhibit 1, the Program Statement of May 26, 2004, recites in paragraph 4 of Chapter 10 that the CEO is authorized to issue protective clothing to, among other situations, an employee assigned to temporary duties where such clothing is required. 54

The Agency answers that employees who are required to work in those foot-hazard areas on an intermittent basis do not qualify for safety shoes. 55

The Union disagrees, saying that foot injuries may occur within seconds and within any such short-time assignment. 56

The Agency replies that intermittent, periodic, temporary, infrequent presence in foot-hazard areas is not justification under the Master Agreement for its having to provide safety footwear. 57

During this hearing the Arbitrator asked if it would be helpful if he were to visit the sites with the parties in order to survey the activities and objects in the disputed areas, but each party said it did not think so. Thus the Arbitrator did not view any of the disputed areas. 58

FINDINGS

The first issue is the procedural one of whether or not this grievance was filed in timely fashion under the requirements of Article 31, Section (d) of the Master Agreement. 59

It is clear on the evidence that the Union did not file this grievance within forty calendar days of the date of the alleged grievable occurrence, as stated in Article 31-(d), if that date is to be taken as the beginning of these non-custodial employees working in areas without safety shoes, which areas are alleged to be foot-hazard ones. That had been going on for a long time. Nor was this grievance filed within forty calendar days of the date the Union became aware of the July or August occurrences. 60

The grievance was filed on October 26, 2005, and the parties discussed this matter on August 11, 2005 and, indeed, there was a Union suggestion about this situation on July 20, 2005. 61

If that were all to this question, the grievance would have to be dismissed as untimely, since neither of those dates are within forty calendar days of the October 26, 2005 filing of this grievance. 62

But there is more. The violation complained of is a continuing one. It occurs every working day. Thus, with the grievance filed on October 26, 2005, it covers the forty calendar days before October 26, which was September 16, 2005. Furthermore, it must be said that each day's occurrence was a new violation in a continuing situation. Thus, the grievance was filed in timely fashion, and the only consequence of the Union's delayed filing is that it could not recover relief back farther than forty calendar days before the grievance was filed. 63

The Agency urges also that the Union did not satisfy the procedural requirements of Article 32(a), in that it did not submit to the Agency a written statement of the issues involved, the alleged violations, and the requested remedy. 64

It is true that the Union did not submit a separate and later notice stating those three matters, expressly. The Agency admits, however, that the Union did submit to it a written notice, referring the Agency back to the written grievance that did state those three points. That Union written submission must be seen here as substantive satisfaction of the requirements of Article 32(a). 65

Accordingly, the very complicated substantive question of whether or not the non-custodial employees named are being required to work without adequate foot protection in foot-hazard areas must be faced and decided. In examining testimony and documentary evidence on that question and arriving at a satisfactory resolution of it, it must be remembered that the Arbitrator is doing so without the benefit of his having seen the presence or absence of the alleged hazards in the various areas, but is doing so on the basis of oral testimony and written statements painting the areas as foot-hazard ones, against those statements painting the areas as not foot-hazard ones. 66

In resolution of the substantive question decision must be based on solid and specific testimony at this hearing or on persuasive written statements, and not upon general assertions or denials. It is necessary also to separate those areas that the parties agree are foot-hazard areas requiring the Agency to provide and the employees to wear, foot 67

protection when in those places. From a long and sometimes confusing series of Union charges and Agency admissions, it is the Arbitrator's understanding that the following areas are agreed upon as presenting foot-hazard conditions such as to require the employees in them to wear foot protection. These include the Recreational Area, Areas requiring employees to perform Electrical Installation Tasks, Mechanical Welding Areas, Mechanical Cutting Areas, Mechanical Brazing Areas, Landscaping Operations, Weight Rooms, the Gym, the Armory, with its weapons, ammunition, and tanks, the Central Tool Room, the Rear Gate, the Garage, all Warehouses, the Laundry, the General Maintenance Shop, the Welding Shop, the UNICOR Area, the Commissary, the Housing Units, for only those employees who actually perform the scraping and buffing of floors, the Safety Area, Mechanical Services, Vocational Training, Correctional Services, and Food Services.

The Agency agrees that the Correctional Services Staff were authorized to wear safety shoes because in 2005 they were required to work in foot-hazard areas on a quarterly-rotation basis in any given quarter. The Agency says that Counselors and Inmate System Officers also were authorized to wear safety shoes. 68

The areas which the Agency insists do not present dangers to the feet of those working in them are the Hospital, Physical Assistance Area, Health Services Staff, certain Housing Units (aside from employees who scrape and buff the floors), Front Entrance, Compound, Perimeter Patrol, Satellite Camp, and the Shake-Down Area. 69

The Agency asserts that the following employees have been issued toe-protection safety shoes: Mechanical Employees, Safety Employees, Warehouse Employees, Commissary, Laundry, UNICOR, Vocational Training, Recreation, Correctional Services-since July 21, 2005, (This grievance was filed on October 26, 2005), Food Service Employees, Inmates Systems Staff and Officers, Institution Counselors, and Housing Counselors. As to the last named employees Agency witness Housler said he did not know why those employees had to wear safety shoes. 70

Much testimony and argument related to non-correctional officers working in certain areas, but it became clear by the end of the hearing and from the post-hearing briefs that some non-correctional officers now have safety shoes. 71

This analysis now will deal with those employees and areas on which the parties differ as to the foot hazards present and the need or lack of it for foot protection for employees working there full time or some percentage of full time. 72

It is essential in all this analysis to keep in mind that this is not a mere matter of employee appearance, but is the foundation for insuring that Agency employees be kept free of reasonably probable injury to their feet. 73

One of the main areas and employees in these categories are the non-correctional officers, allegedly assigned on a regular and recurring basis to foot hazard posts in order to relieve absent custodial personnel. It is said that the Agency has decided that certain posts should never be vacated. It therefore has created a Mission Critical Roster. Thus, non- 74

correctional officers are assigned to cover traditional correctional officer posts. The Union claims that many of these posts are in foot-hazard areas and that that includes Housing Units, the Compound, and the Rear Gate.

The Agency answers that employees who are required to work in those foot-hazard areas only on an intermittent basis do not need safety shoes. The Union disagrees, saying that foot injuries may occur within seconds and within any such short-time assignments. The Agency position is that only intermittent, periodic, temporary, infrequent presence in foot-hazard areas is not justification under the Master Agreement for its having to provide safety footwear. 75

The sweeping conclusion of one Union witness that the whole facility is a foot-hazard area is too general to be persuasive. The Union stresses on this point, however, that, if that is not accurate, why do all inmates have to wear safety shoes all the time? 76

The ten written statements in Union Exhibit 2 occurred after the grievance was filed and for that reason are not convincing here. While it reasonably might be concluded that any hazardous events cited there would have occurred as well before the grievance was filed, that supposition cannot help here because no specific foot-hazards were stated in any of those ten statements. 77

It is essential to realize that the dangers that this Arbitrator must be concerned about here and the risks to be guarded against by the employees' wearing safety-toe foot protection in these areas is not a possible harm that builds up gradually from exposure over an extended period of time, such as the harm to miners' lungs that come on gradually from repeated, long, and cumulative exposures to certain gasses in the mines. 78

This danger and risk can and will occur within a second, when a heavy object being carried is dropped on the foot, or a heavy object falls from a shelf onto the foot, or a heavy object rolls onto and over the foot. A risk from any of those events is no higher after long and continued presence in foot-hazard areas than it is immediately upon entering such an area. But that concept, too, could be overdone. An employee's presence in for a few minutes an agreed foot-hazard area only once in four years on a leap year February 29, would not justify requiring employees to wear safety shoes all the rest of the time. 79

But none of these disputed places and times of an employee's presence in them is so ridiculously extreme. The undeniable fact that heavy objects may be dropped, or fall, or roll onto feet, within a second, casts serious doubt on the Agency's insistence on concepts such as intermittent and infrequent presence. 80

The Agency evidence, testimonial or documentary, makes frequent use of the words, "intermittent," "infrequent," "occasional," periodically," but those concepts appear to pay insufficient attention to the fact that these serious risks can become actual events and injuries within seconds of being in or passing through a designated foot-hazard area and without waiting for hours or days to elapse. 81

As shown by Agency Exhibits 7, 8, and 9, it rates type of activity being assessed as presenting a risk ranging from None, through Slight, to Extreme, and when the Safety Manager's reassessment of the risks is found by him to be in the "Slight" range regarding foot hazards, the Agency has decided that steel-toe safety shoes must be worn during that activity in that area. 82

It is true that Joint Exhibit 6 presents a July 21, 2005, Institution Supplement by the Warden saying that "Every employee (uniformed employee) required to work in an area designated as a foot-hazard area by the Safety Manager shall be issued safety shoes, but that seeming limitation to "uniformed employees" is overcome by Section 32 of the Master Agreement in which the parties have agreed that safety-toed footwear for uniformed and non-uniformed employees (when such employees work in a designated foot-hazard area) will be shoes or boots at the discretion of the individual employee. The Master Agreement language governs, over that of a Warden's statement. 83

It is necessary now to decide on whether the Safety Director's conclusion that an area, said by the Union to be a foot-hazard one, is not, and, therefore, does not require employees to wear safety shoes there. 84

The Arbitrator's understanding of the testimony and documentary evidence, which sometimes is confusing and uncertain, is that there are nine such areas. These would be the Hospital, Physical Assistance, Health Service Staff, Housing Units – except those employees actually operating the equipment doing the buffing and stripping of floors -- Front Entrance, Compound, Perimeter Patrol, Satellite Camp, and the Shake-Down Shack. 85

By the same kind of assessment of the evidence, it seems that the Union agrees that the following employees have been provided with safety shoes before working in various areas, such as, Mechanical Services Employees, Safety Employees, Warehouse Employees, Commissary Employees, Laundry Employees, UNICOR Employees, Vocational Training Employees, Recreational Employees, Correctional-Service Employees, since July 21, 2005, Food Service Employees, Inmates System Staff, and Housing Counselors. 86

Union witness Strade, an Educational Technician, said that, while he was not a full time Correctional-Services employee, he has worked there two or three full days within a month. He said also that in Education Services he was in recreational areas with its weights and in vocational training with its building-trades materials stored on high shelves. He has worked there two or three times a month. He has done all the assigned duties in the Recreational and Vocational-training areas. 87

Union witness Asp, a Physician Assistant, does any health-care activities, responds to emergency services in pill lines to inmates in the Camp and Special Housing Units (disciplinary areas), and in Recreation. He has done that about three times a week. All the balance of his work is in the Cell. 88

Asp referred to Article 27a-2 of the Master Agreement, which says that with respect to safety and health concerns from the inherent hazards associated with normal industrial operation, the Agency agrees to furnish employees places and conditions of employment that are free from recognized hazards that are likely to cause health or serious physical harm, in accordance with applicable federal laws, standards, codes, regulations, and executive orders. 89

Asp said that he would leave the Hospital about twice a day and would go to the Special Housing Unit and the Camp. He is not assigned to Correctional Posts. In the Special Housing Unit he is subject to the heavy and unruly food cart. He does that about once a week or once every week and a half. 90

The Agency stresses that the Institution Supplement of July 21, 2005, says that the Safety Department has the primary responsibility for establishing which areas are deemed foot-hazard areas. 91

But that does not mean that any such Safety Department conclusion is beyond challenge. 92

The Union notes that the Institution Supplement lists specifically employees in Mechanical Services, Safety, Warehouse, Commissary, Laundry, UNICOR, Vocational Training, Recreation, Correctional Services, and Food Service Employees as those required to work in areas designated as foot-hazard areas. 93

As to Union charges about foot danger from the buffing and stripping operations, the Agency agrees that it did have floors waxed up to grievance time, but that is no longer done, since Windex is used now. The Union agrees that buffing and stripping have ceased, but it says they still were being done at grievance time. 94

The Union stresses that Chapter 10 of the Program Statement of May 26, 2004, says that the CEO is delegated the authority to prescribe protective clothing, which may be issued for an employee assigned to temporary duties where such clothing is required. The Union says that is Bureau wide and takes precedence here. 95

On the merits, the Agency contends that, of non-custodial staff employees working in custodial areas, few, if any, are assigned to work in hazardous-duty areas and, if they are, they already have safety shoes or that the frequency of such assignments are intermittent at best, so that those non-custodial employees do not meet the criteria for eligibility for safety shoes. It is argued that the mere fact that an employee intermittently is present in a foot-hazard area is not sufficient to meet the criteria of "high risk" of foot injury. Thus, the Agency says that non-custodial staff employees detailed infrequently to Correctional Services should not be given safety shoes in foot non-hazardous areas. 96

But there is no legislative, administrative, or Master Agreement language to justify the Agency's use of a "high risk" test. 97

The Union has asserted that a number of named areas are foot-hazard ones, even though not so designated by the Agency. But, as to a number of them, there is nothing but bare Union assertion, without any specific or detailed evidence, either documentary or testimonial. 98

The Agency says that Section P of Chapter 1 of the Program Statement of August 16, 1999, says that protective equipment shall be provided and worn as prescribed by the Safety Manager. 99

The Union stresses that OSHA standard for Occupational Foot Protection says in CFR129, 190.136(a) that the employer shall insure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling, or rolling objects or objects piercing the sole, or where such employees feet are exposed to electrical hazards. 100

The Union emphasizes that that Administrative Standard says nothing about an employee in a "high risk" area of foot injury, but speaks more realistically of "a risk." 101

The Agency agrees that there are over twenty foot-hazard areas so designated by the Safety Manager, and that there are about thirteen classes of employees who have been provided with safety shoes. Thus, neither of those matters require further consideration here. 102

Detailed consideration and analysis, where the record includes sufficient data about an area, will be given to those areas which are foot-hazard areas but which the grieving employees do not work in constantly, and to those areas which the Union insists are foot-hazard areas, but as to which the Agency disagrees. 103

In all these considerations it is necessary to realize that, as mentioned above, the possible injury to an employee's feet can happen in an instant, so that its occurrence is not one that builds up only with accumulation of time in the area. It is equally important in making these general findings that the subject is physical injury, possibly severe, to human feet, and not just the possibility of catching a cold in the head. Another significant point is that, because of the possibility of severe injury, the outcome of all these general findings must always err, if error there be in these general conclusions, which are not mathematically specific calculations, on the side of assuring safety by minimizing the risks, and that is accomplished under this Master Agreement by the employees wearing safety shoes. In this regard, the admonition of Chapter 1, Section P, Personal Protective Equipment of the August 16, 1999 Program Statement is very significant. It says that Personal Protective Equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. 104

Moreover, the requirement of Paragraph 4 of Agency Exhibit 5, an OSHA Guideline, must be seen as very significant. It says that the safety officer is to select the protective equipment which ensures a level of protection greater than the minimum required to protect employees from the hazards. 105

It is relevant also to recognize that the Agency, itself, requires safety shoes for all inmates and provides such shoes for employees only in areas when the Safety Manager finds that the risk of foot injury is only "Slight." There is no Agency response to, or explanation of, its signally different treatment of inmates and employees on this subject. 106

Moreover, it must be recalled that Section 4 of Chapter 10 of the May-2004 Program Statement authorizes the CEO to issue protective clothing to employees assigned to temporary duties when such clothing is required. If protective clothing may be issued where it is required for employees assigned to temporary duties, surely protective safety equipment--safety shoes-- may be issued to employees assigned to temporary duties where they are required. 107

The following analyses and conclusions shall be governed by those admonitions. 108

The Union notes the Agency Mission Critical Roster, under which non-correctional officers, who are without safety shoes, are assigned on a regular and recurring basis to cover posts traditionally assigned to correctional officers who have been assigned safety shoes. 109

These areas are foot-hazard areas, but the Agency says that the non-correctional officers' assignment to these foot-hazard areas is only on an intermittent basis. But, that cannot mean that during those intermittent assignments, that can and do go on for an hour or a day, those non-correctional employees are not subject to physical injury from foot-hazard risks. It is clear enough that, during such assignments, no matter how intermittent, there is a reasonable probability that they could suffer injury to their feet. The Agency said at one point that Union witness Strade said those non-correctional employees would not be assigned full time to the foot-hazard correctional duties, but would be so assigned for a full day only about two or three times a month. But that is not so negligible a period of time in a foot-hazard area as to obviate the necessity for foot protection while there. Moreover, it must be kept in mind in analyzing this matter that the Agency already requires safety shoes in situations where the Safety Manager's assessment or reassessment finds that area and its activities present only a "Slight" risk of foot injury. 110

Accordingly, it must be found that non-correctional employees subject to foot-hazard correctional posts must be provided with safety shoes. That would include non-correctional officers assigned temporarily to the Camp Office, Outside Portal Compound, and Inmate Housing Units. Analyses and conclusions on this and all such points in this record cannot help but be influenced by the Agency's decision to require that all inmates have and wear safety shoes all the time, with the physical-condition exception, which is irrelevant here. The record on this point is confusing, with the Union asserting that these non-correctional employees assigned by the Mission Critical Roster to correctional employees' posts were entitled to safety shoes, and the Agency saying at several points that they already were so provided with such shoes, by agreement with the Union, at least at the Rear Gate and during security checks that would follow on foot. 111

In either event, therefore, either by the parties' agreement or by this decision, non-correctional employees assigned by the Mission Critical Roster to posts regularly worked by Correction Employees will be provided with safety shoes 112

Union witness Strade noted also that he is in contact almost daily with heavy objects that may fall in the Vocational Training area where employees regularly assigned there have and wear safety shoes. Large models of houses are built there by inmates as part of their classes. Nails and screws accumulate on the floor and many power tools and some rolling carts are there. Employees assigned there even temporarily must have and wear safety shoes under Section G of Article 28 of the Master Agreement 113

Union witness Asp, Physician Assistant, said that on a daily basis he goes into foot-hazard areas, such as the Compound, and Special Housing Unit, where disciplinary inmates are held, and regular Inmate Housing Units, and that he must respond to emergency calls. Those foot-hazard areas are the Maintenance area, UNICOR Inmate Work Area, with industrial equipment, and the Food Services area, all of which are listed as foot-hazard areas. 114

Recitation of further details is not necessary. What is conclusive here is that any Agency employees who are assigned, even on a temporary basis, to work or be in a designated foot-hazard area must be provided with safety shoes. Even that conclusion could be taken to absurd results. For example, an employee without safety shoes who goes through a designated foot-hazard area only once every February 29, would not qualify for being provided with safety shoes. 115

Continued exploring in the minute details of each area and with which employees are assigned there, full-time or part-time, convinces that such analysis is not realistic in the solution of this very important physical-safety issue. 116

Accordingly, in light of the fact that this deals with physical safety of employees, in which question general conclusions clearly should come out in favor of increased safety, and in light also of the fact that 1600 inmates (with a physical exception) have been issued steel-toed safety shoes, it must be recognized that the balance of the employee force should also be provided with and should wear safety shoes, in addition to those who already are so provided, even if assigned only intermittently to foot-hazard areas or who only go through such areas. It is so ordered. Since no really precise answer could be given on this broad question, it is required that, if error there be in this conclusion, it be on the side of safety. 117

It should be cautioned also, however, in arriving at this general conclusion, that this overall finding would not require safety shoes for any of these grieving employees who never work in or go through any area where they would be exposed to foot hazards. That would include any of these grieving employees, if any there be, who go to and from their work assignments without going through a foot-hazard area and who work in some kind of "cell," free of any foot hazard, and do not leave it for their entire shift. 118

Accordingly, the grievance is sustained as stated in the two immediately preceding paragraphs. 119

AWARD

The grievance is sustained as stated in paragraphs 117, 118 and 119 stated above. 120

Clare B. McDermott
Arbitrator