Before The Impartial Arbitrator Harvey Young, ESQ

U.S. Department of Justice, Federal Bureau of Prisons

Agency,

and

American Federation of Government Employees,
Local 3882 (for all bargaining unit employees)

Union

Case No. 13-0617

UNION'S POST HEARING BRIEF

The Union, representing all bargaining unit employees, American Federation of Government Employees, Local 3882, requested this arbitration to contest management's decision to disallow employees from supplementing their safety-toe footwear orders, which they have been permitted to do in accordance with a negotiated agreement at the United States Department of Justice ("Agency"), Federal Bureau of Prisons at its FCI Ray Brook, New York facility since 2004.

On May 7, 2013, the Agency issued an electronic message to all staff implementing a new policy on safety-toe footwear purchases (U-6). This action violated the Master Agreement (J-1) in the Preamble as well as Articles 3, 4, 7, 27, and 28. It also violated a long-standing Memorandum of Understanding dating back to 2004 (U-5) and a memorandum established by the Agency, the Keith Hall memorandum (U-4).

The Agency claims it had no choice but to take this action because the procedure of allowing employees to order safety-toe footwear in excess of the price the Agency was required to pay as long as the employee paid the additional amount directly to the vendor was "illegal." In other words, an employee wants safety-toe shoes/boots that cost $150, but the Agency is only required to pay $100. By the terms of the 2004 Memorandum of Understanding, the employee has always been allowed to order the higher-priced footwear and pay the additional cost directly to the vendor. Yet, despite having allowed it for nearly a decade, the Agency suddenly deemed it "illegal" and abruptly ceased abiding by that portion of the Memorandum of Understanding. However, through both testimony and documents the Union believes it is abundantly clear that there is nothing "illegal" about this procedure as claimed and the Agency is in violation by refusing to follow the negotiated agreement.

On September 18, 2013, an arbitration hearing was held in this matter before Arbitrator Harry Young, ESQ, at the Agency's FCI Ray Brook, New York facility. At the close of the hearing, the parties agreed to submit post-hearing briefs to the Arbitrator postmarked no later than thirty (30) days after receipt of the transcript from the court reporter. This deadline for these briefs was extended by mutual agreement due to the federal government shutdown and an illness of the Agency representative to December 5, 2013. .

I. THRESHOLD ISSUES

There were no threshold issues raised by either party at the hearing.

II. BACKGROUND

For at least the last nine (9) years and possibly even longer, staff at FCI Ray Brook were permitted to supplement their safety-toe footwear order. Formally, since 2004, the Union and Agency operated pursuant to a Memorandum of Understanding (MOU) (U-5) that was clear, specific, and comprised of explicit language on this issue. The negotiated procedures were continued in updated MOUs through four (4) different CEOs at the facility. Even absent a negotiated MOU, the length of time this practice has been in effect at FCI Ray Brook would readily constitute a long-standing past practice.

The Agency began discussions with the Union in January 2013 on this issue. They attempted to persuade the Union that it was mandatory they alter the MOU and could no longer allow employees to supplement the safety-toe footwear amount. The Union would not agree to this change. Time and time again during the course of this case the Agency claimed they offered to bargain with the Union over this change. Unfortunately, the Agency's version of bargaining consisted simply of telling the Union what it wanted to do, refusing to negotiate the crux issue, and then simply doing what they wanted to do with zero regard for the Union's rights when the Union refused to roll over and comply with their demands. At no time did the Agency utilize any of the appropriate procedures provided to it by the government for when bargaining impasses occur. The Federal Labor Relations Statute has established procedures to follow in bargaining disputes and impasses which the agency failed to utilize (see Attachment 1). In fact, Associate Warden Brad Trate (Witness) even admitted during testimony that the Agency failed to follow the appropriate procedures. (See testimony of Witness Trate, Tr., pg. 254-255, line 1-17.)

II. ISSUE

The Union and Agency could not stipulate on the issue:

The Union submitted the following issue:

> Did the Agency violate a long-standing memorandum of understanding, the Master Agreement, and past practice regarding the bargaining unit employees' ability to supplement the cost of safety-toed footwear?
>
> Did the Agency unilaterally implement a change to a negotiated MOU which began at FCI Ray Brook, New York, March 22, 2004, under then Warden D.B. Drew and continued through four (4) wardens?

III. CONTRACT INTERPRETATION AND LAW

The Agency relies upon 5 U.S.C. 7903 (J-5) in determining its unilateral right to change the MOU in question. On its face, this section of law does not discuss or make any determination that employees may not supplement the government for a piece of safety equipment. This Act has been in effect and unchanged since 1982, over two decades before the MOU in question was negotiated. It appears the Agency has just abruptly decided on its own to determine a new interpretation to the law and then attempt to eliminate employees' negotiated rights based upon this random new interpretation. The Agency, based on testimony, seems to believe it has a different set of rules under the law than other federal agencies. Title 5 covers all "Executive Branch Agencies" (see Attachment 2) and all the federal agencies listed must comply with the law. The Union provided two other federal agency MOUs for safety equipment pursuant to OSHA and Title 5 that authorize employees to supplement their safety footwear amount (U-2 and U-3); we are also adding in this brief a United States Department of the Interior memorandum that also allows this practice (see Attachment 3). It becomes difficult to

imagine that the Department of Defense, the United States Forest Service, and the United States Department of the Interior, which are all listed as Executive Agencies in 5 U.S.C., are all violating 5 U.S.C. 7903 and only the Bureau of Prisons is following the law correctly on the issue of supplementing safety footwear. A far more likely and less absurd scenario is that these other agencies are in full compliance with the law by permitting employees to supplement for better quality safety-toe footwear and that the Bureau of Prisons has simply decided to interpret an old law in a new way. But that's all it is—their interpretation, with no factual basis, and mere interpretation does not constitute grounds for violating a negotiated MOU.

It should also be noted that under OSHA regulations, employees can be permitted to supplement the cost of safety-toe footwear. The Union would also point out that under OSHA's final rulemaking in this regard, the history of protective equipment and the methods by which it is paid for are clearly laid out. It envisions that these payment and procurement procedures are subject to collective bargaining agreements (such as the one established at FCI Ray Brook), not just through agency mandates. As the Department of Labor is the parent agency of OSHA, it becomes clear that yet another, fourth federal Executive Agency properly understands the law allows employees to supplement the cost of safety-toe footwear if they so desire. Only the Bureau of Prisons seems unable to grasp the concept.

The Master Agreement between the parties (J-1) creates a collective bargaining situation for the local level. As was testified to (see Glover, tr. pg. 25-44), MOUs become part of the collective bargaining agreement once they are agreed to (see Preamble). Articles 3, 4, and 7 of the Master Agreement deal with National and Local level

bargaining and if you review the "Keith Hall memorandum" (U-4), you will see the procedure quite clearly. This document clearly states what had to happen to change MOUs related to safety-toe footwear. The Agency failed to follow these procedures as clearly stated by both Associate Warden Trate (tr., pg. 254-255) and Warden Hudson (tr., pg. 210-221). The "Keith Hall memorandum" was distributed, as was established via undisputed testimony, with the full knowledge of the National Union and the Agency in 2004. Other contractual areas of the agreement include Articles 9, 27, and 28. These, to paraphrase, deal with Local Supplemental Agreements, Health and Safety, and Clothing and Equipment issues.

The Agency throughout this case claimed the practice of employees supplementing the cost of safety equipment was "illegal." Their justification focuses on 5 U.S.C. 7903, but the Union believes it has clearly demonstrated there is no violation of law there. We now turn our attention to current law. HR 933 (U-10) is the current appropriations act under which the government is operating. Again, this act, just like 5 U.S.C., covers many federal agencies, and nowhere does it specify how safety equipment is paid for, distributed, or dealt with. The Union strongly believes that as the Agency made the claim that this practice is illegal, they bear the burden of providing evidence and documentation to prove their stance. They have failed to do so, instead offering up nothing but opinion, conjecture, and interpretation. And as much as the Agency might like it to, opinion, conjecture, and interpretation does not give them the right to violate a negotiated agreement.

The Comptroller General's Office of the United States Government Accountability Office (GAO) is responsible for determining if agencies are violating the

spending of appropriated funds (see Attachment 4). Any agency can submit a request to determine if how appropriation funds are being used by an agency is appropriate or not. Instead of unilaterally changing an agreement negotiated in 2004, the Bureau of Prisons could have sent in a request to GAO to have the matter reviewed. It is inexplicable that this was not done, especially in light of the fact that at least four (4) other federal Executive Agencies recognize the legality of the practice of supplementing safety-toe footwear with employees' personal funds.

When looking at the Master Agreement issues, FMCS Case #12-57050A is instructive (U-9); the arbitrator in this case, when ruling on another unilateral decision by the Agency to change how and if employees receive reimbursement for some travel related issues, clearly stated that the Agency is required to follow the procedures in Article 3 when attempting to initiate a change.

IV. ARGUMENT

The Arbitrator should order the Agency to place the MOU back into effect and grant the grievance. The Union through testimony and documents has shown there has been a negotiated agreement on this matter since 2004. Four (4) different wardens and Program Reviews in 2005, 2009, and 2011 (U-11) did not find the practice to be a violation, and at least two (2) of these wardens stated during their tenure that they had the MOU examined by the Bureau of Prisons Office of General Counsel to ensure it was legal. While the Financial Management Officer, Tracy Fletcher, stated in testimony (tr., pg. 117-121) that Program Reviews do not look at this matter, the documents indicate differently (U-11). The Program Review indicates that contracting documents were

reviewed and it would seem implausible that a $17,000 safety footwear billing would not be a reviewable area. Also, Ms. Fletcher, when questioned on this agreement that has been modified multiple times since 2004, attempted to convince us that she had no part or say in advising wardens whether this practice was illegal. As the Financial Management Office for the entire prison, she bears a significant portion of the responsibility in determining if funds were being used inappropriately. The fact is, she did not believe the practice was illegal and therefore offered no objections.

Again, as it has been from the beginning, this grievance arose because some business office staff suddenly decided they wanted to interpret an old law in a new way. Someone decided they had a new opinion and thought they could make it law. Unfortunately, as has already been stressed, opinion and interpretation do not make a practice illegal. Only documentation and direct evidence does, and the Agency has provided neither. They want us to believe their new interpretation is the proper one, but the law and at least four (4) other federal agencies disagree.

The Agency's own documents from the former head of Human Resources Management identified the original issue with safety-toe footwear in 2004 (U-4) and as is plainly written, the only issue that required correction was reimbursement by the government to employees, not employees supplementing directly to the footwear vendor. The 2004 MOU was negotiated in response to that document and made the necessary corrections; for the Agency to now use the exact same document to try to force yet another change when the law has not been altered is completely ludicrous. As the Union demonstrated in the testimony of Dave Parker (tr., pg. 185-192), the Union was approached in 2004 to change their original MOU, dated January 20, 2000 (A-2) in

response to the Keith Hall memorandum (U-4). In undisputed testimony, Mr. Parker identified the issues brought to the table and the changes made between the 2000 MOU and the 2004 MOU on safety toed footwear which were designed to bring the MOU in compliance with all laws and regulations. The Agency at that time agreed the MOU satisfied all legal requirements. The law has not changed since that time … only the Agency's interpretation has.

V. CONCLUSION

For all the foregoing reasons, the Union respectfully asks that the Arbitrator sustain the grievance and place the Memorandum of Understanding back into effect. The Union also requests that the arbitrator order anyone harmed by this action be made whole.

Finally, should the grievance be sustained in whole or in part, the Union respectfully requests that the Arbitrator retain jurisdiction for purposes of resolving any questions of the remedy in this case.

Respectfully Submitted,

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