FEDERAL MEDIATION AND CONCILIATION SERVICE

Case # 13-56636-6

In the matter of the arbitration between:

A.F. G.E Council of Prison Locals
Local 3882-CLP33

"Union "

-AND-

U.S. Department of Justice
Federal Bureau of Prisons
FCI Ray Brook

"Employer"

Grievance:
Contract Interpretation – FCI Ray Brook

AWARD AND OPINION

Hearing held: September18, 2013

Post Hearing Briefs Received: December 7, 2013

Arbitrator: Harvey Young

APPEARANCES

For the Union
Phillip Glover, V. President of NE regional of AFGE
Steven Bartlemus, President of Local 3882
Mark Allen, V. President of Local 3882
William Dalius, Assistant Director of Administration, BOP
Tracey Fletcher, Business Manager for FCI Ray Brook
Tammi Sanderhoff, Comptroller for NE Region, BOP
Steven Orman, E.M.T.
David Parker, Unit member and passed treasurer of Local 3882
Joe Smith, Secretary, Local 3882

For the Employer
Joseph Powers, Labor Relations Specialist
Donald Hudson, Warden, FCI Ray Brook
Bradley Trate, Associate Warden, Programs, FCI Ray Brook
Valerie LaPoint, Human Resource Manager, FCI Ray Brook
Paul Adams. Captain, FCI Ray Brook

INTRODUCTION AND ISSUE

The Federal Corrections Institution (FCI) at Ray Brook, New York (henceforth called the Employer or Agency) is a medium security prison that houses 1,170 inmates and employees approximately 230 persons, including non-union staff. The Union representing the facility's employees is Local 3882-CLP33 of the A.F. G. E., Council of Prison Locals (henceforth called the Union). The parties are covered by a collective bargaining contract known as the Master Agreement dated March 9, 1998 to March 8, 2001.(Joint Exhibit #1) (J. Ex.) Although it has not been ratified, the parties agree that they are bound by the terms and conditions of this contract. (Hearing Transcript p.14) (H.T.)

The Union filed a grievance over the actions of the Agency when it implemented a change in a Memorandum of Agreement (MOU) that had been in effect for nine years. The parties were unable to resolve the issue and the Union filed with the FMCS for Arbitration. Harvey Young of Philadelphia, Pennsylvania was selected as the Arbitrator. An arbitration hearing was held on September 18, 2013 at the Bureau of Prison's (BOP) Ray Brook, New York facility.

Issue: At the hearing, the parties were unable to agree on the issue to be arbitrated and agreed that the arbitrator had the authority to frame the issue based on the evidentiary record.

The Union defines the issue as the Employer's violation of the MOU and thus the Master Agreement, when the employer unilaterally abrogated a section of the MOU concerning the supplemental cost of steel-toe safety footwear. The union's second issue is that the Employer violated a long standing past practice which provided the unit members the same rights as found in the MOU.

The Employer states that there is no past practice issue. It maintains the issue is whether it rightfully and necessarily amended the MOU.

Arbitrator's ruling on issue: The issue is: Did the Employer have the right to unilaterally amend the parties' MOU? If it did not, what should the remedy be?

At the time of the hearing, both parties were allowed full opportunity to present sworn testimony, exhibits, to cross-examine, and for rebuttal. The individual who initiated the grievant was present and testified. The record was closed by the arbitrator on December 7, 2013 upon the receipt of post hearing briefs.

BACKGROUND

In 2000, the parties agreed to a MOU concerning the purchase of steel-toe footwear. This agreement stated that the Employer would provide a $ 75.00 voucher, on an annual basis, to each

uniformed bargaining staff member for the purpose of acquiring safety-toe footwear. (Agency Exhibit #2)(A. Ex.) and (H.T. p.73) This agreement was supplemented by the practice of permitting those members of the unit who wanted to pay an amount exceeding the $75.00 dollars for their steel-toe footwear to do so by purchasing the shoes and then giving the receipt to the Employer. The employee would then bear the remainder of the cost.

In 2004, the Agency determined that this practice was not in conformance with its purchasing practices. In a memorandum sent to Assistant Directors, Regional Directors, Wardens and Training Center Directors, by Keith E. Hall Director Human Resources Management Division, Mr. Hall Stated:

Section 7903 of Title 5, United States Code only allows the furnishing of special clothing or equipment, it does not authorize cash disbursement/reimbursement to the employee ... In view of the above, safety shoes must be purchased by the Bureau of Prisons using required government procurement procedures (via the Master Card,...) The Bureau cannot and shall not reimburse staff for the purchase of safety shoes. The acquisition and payment for these items must be between the government and the vendor...

We are aware that local supplemental agreements...may contain procedures which are inconsistent with the regulations. Furthermore, these agreements, after being negotiated by responsible officials at the local level, were subject to the agency head review process at the Central Office in accordance with the Master Agreement...Although practices and procedures found to be inconsistent with government wide regulations in a collective bargaining agreement may not continue, in most circumstances management does not have the right to unilaterally implement a new practice or procedure without first negotiating such new practice or new procedures with the Union. Therefore, those facilities who have agreements in conflict with the regulations need to act immediately to develop new procedures." (U. Ex. #4 pp.1-2)

As a consequence, a new MOU was agreed to by the parties which required the Employer to pay the vendor directly for employee safety shoes, rather than repay the employee after the shoes were purchased. It also permitted employees, themselves, to pay the vendor directly for the balance of the cost, if the safety shoes were more than the allocated amount which was increased to $100. (U. Ex. #5 pp.6-7) This Memorandum of Understanding became part of the local supplemental agreement. It was updated in 2009 to increase the number of vendors and again in 2011 to further increase the number of vendors from which employees could buy their steel- toe safety shoes. An Addendum was added to it on May 8, 2012. (U. Ex. #5 pp.1-5)

In 2013, the Employer reviewed this practice and concluded that it violates 5 UCS 7903, its authorization law, and OSHA Regulation 29 1910.132(h). For these reasons, the Agency determined that the practice must be discontinued. The Agency notified the Union of this and asked to negotiate a new MOU concerning steel-toe footwear. On the afternoon of May 7th the negotiations broke down after two sessions of bargaining over Impact and Implementation (I and I) of the new management directive. That same afternoon, the Employer notified the entire staff by email that it would no longer honor that part of the MOU permitting employees to pay the difference between the cost of the footwear and what the Employer paid because it was not in conformance with the laws governing its appropriations and spending. The Union filed a grievance over this action on May 21, 2013 and subsequently filed for arbitration on June 10, 1913 under the terms of agreement.

PERTINENT CONTRACT LANGUAGE (MASTER AGREEMENT)

PREAMABLE: This Agreement and such supplementary agreements and memorandums of understanding by both parties as may be agreed upon hereunder from time to time, together constitute a collective agreement between the Agency and the Union.

ARTICLE 3: GOVERNMENT 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 b. In the administration of all matters covered by this agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules and government-wide regulations in existence at the time this Agreement goes into effect.

Section c. 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 any policies, practice, and/or procedures.

ARTICLE 4: RELATIONSHIP OF THIS AGREEMENT TO BUREAU POLICES, REGULATIONS AND PRACTICES

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.

Section g. Safety-toe footwear for uniformed and not-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.* (Emphasis added)

PERTINENT AGENCY POLICY

PROGRAM STATEMENT (Property Management Manual) (Dated 5/26/2004)

1. **PURPOSE AND SCOPE**: To provide controls for real and personal Bureau property and to provide operational direction for staff responsible for property management.
2. **CHAPTER 10, P.2:** All employees whose work areas are designated as a foot hazard area by an Institution Supplement will wear safety shoes. When safety shoes are required, they will be provided at Government expense to uniformed or non-uniformed employees alike...
3. **SUMMARY OF CHANGES:** No changes with respect to safety shoes are noted from the previously issued Program Statement.(p.-2)

PERTINENT FEDERAL LAWS AND REGULATIONS

5 U.S.C. §7903: Protective Clothing and Equipment

Appropriation available for the procurement of supplies and material and equipment are available for the purchase and maintenance of special clothing and equipment for the protection personnel in the performance of their assigned tasks ...

OSHA Act of 1997, Section 19: Federal Agency Safety Programs and Responsibilities

(a) It shall be the responsibility of the head of each Federal agency (not including the United States Postal Service) to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under Section 6. The head of each agency shall (after consultation with representatives of the employee thereof)—
    (1) Provide safe and healthful places and conditions of employment, consistent with the standards set under section 6;
    (2) Acquire, maintain, and require the use of safety equipment, personal protective equipment and devices reasonable necessary to protect employees; ...

OSHA Regulation 29 CFR 1910.132 (h): Payment for protective equipment

Except as provided by paragraphs (h) 2 through (h)6 of this section, *the protective equipment, including personal protective equipment (PPE) used to comply with this part, shall be provided by the Employer at no cost to employees.* (Emphasis added)

SUMMARY POSITION OF THE PARTIES

The Union's Position:

It is the Union's position that the Employer unilaterally abrogated the contract for what amounts to no apparent reason. The Union believes that it had a valid Memorandum of Agreement that had been part of the contract since 2004 and had been updated and agreed upon in 2009, and 2011. (Union brief, p.5) (U. brief) The practice at issue is the ability of employees at the facility to supplement the cost of safety shoes by directly paying the vendor the difference between what the Agency pays the vendor and the actual price of the shoes. According to the Union, "Four different wardens and Program Reviews in 2005, 2008 and 2011 did not find the practice to be a violation and at least two of these wardens stated during their tenure that they had the MOU examined by the Bureau of Prison Office of General Counsel to ensure it was legal". (U. brief, p.8) and (H.T. pp. 54-56, 75)

A program review is a Financial Management Program Review of the institution conducted by the Financial Management Review Section of BOP. In each year that these reviews were conducted, the institution at FCI Ray Brook was certified that the "Financial Management operation at the institution is operated in accordance with applicable law and policy; and property and resources are efficiently utilized and adequately safeguarded". (U. Ex. # 11)

The Union further states that after the MOU had been approved by management in three separate MOUs, the Agency now says that it does not conform to the law governing the allocation and

authorization of PPE funds, 5 USC 7903, and has unilaterally cancelled that part of the MOU relating to the ability of unit members to directly pay the vendor any additional cost of their safety shoes.

The contention of the Union is that nothing in the authorization laws has changed during the time that the MOU has been in effect. According to the Union, 5 USC 7903 has been in effect since 1966, the last version occurring in 1982. (H.T. p.67) The Union believes that 5 USC 7903 is ambiguous and is subject to a wide range of interpretations. There is no clear reason for its new interpretation other than the Agency has decided to do so and feels that it can.

In addition, the Union believes that the Employer acted too hastily in unilaterally changing the MOU without negotiating the Impact and Implementation (I & I) of the changes the Employer wanted to make. The Union firmly believes that the Employer should have sought federal mediation to assist in resolving the issue and then, if the issue was still unresolved, appeal to the Federal Impasses Panel for resolution. The Agency did neither of these alternatives. Instead it abrogated the contract, and then claims it still wants to negotiate changes in the MOU.(H.T. pp. 223,225-226,243,246) This to the Union is unrealistic because once the Agency abrogated the MOU, its action ended the possibility of a settlement. Negotiations, according to the Union, are not realistic when the Employer unilaterally made the changes that it sought while the negotiations were in progress.

The Union believes that the Employer should have established whether the practice was in conflict with the law and regulations by contacting the Comptroller General's Office of the United States Government Accountability Office (GA0). According to the Union, any Agency can make a request to determine if appropriated funds are being used correctly. The Agency failed to do this. (U. brief, pp.7-8)

The Union also cited four government agencies that permit their employees to pay a portion of the cost of safety-toe shoes. These are the Department of Defense, the United States Forestry Service, the Department of Labor, and the Department of the Interior. The last two were added in its brief. (U. Ex

#2), (U Ex. #3) and (U. brief, pp. 5-6) It is the contention of the Union that these agencies are also covered by the same laws and regulations as the BOP, but they permit their employees to share in the cost of safety shoes. The Union queries whether all of these agencies are violating 5 USC 7903? Or has the Agency misinterpreted the law, which the Union believes that it has. (U. brief, pp. 6-7)

Finally, the Union states that under OSHA regulations, employees can be permitted to supplement the cost of safety-toe footwear through collective bargaining. Further, the Union states that under OSHA's final Personal Protection Equipment "PPE" rulemaking regulations, the history of protective equipment and the methods by which it is paid are clearly enunciated. The Union contends that OSHA envisions that these payments and procurement procedures are subject to collective bargaining agreements such as the one established at FCI Ray Brook, not just through Agency mandates. As proof, the Union has entered into the record the OSHA regulation involving PPE - 29 CFR 1910, 1915, 1917, 1918 et al as Union Exhibit #1.

The Agency's Position

The Agency's contention is that its hands are tied because of the Acts and Regulations governing its appropriation of PPE equipment, 5 USC 7903 and OSHA Regulation 29 CFR 1910.132(h). The Agency defends itself by stating that it had to modify the MOU in question because it was inconsistent with law or government-wide regulations.

It is the Agency's contention that 5 USC 7903 gives the employer the authority for appropriations for the procurement of PPE while other areas of the law cover the augmentation of equipment. Thus the Agency is not allowed to receive funds from any outside source. In addition, the augmentation of funds based on the Appropriations Law Manual does not allow the Agency to supplement its appropriations. Since hazardous gear, including safety footwear, are government

property, the Agency does not supplement and cannot pay more for the item with additional contributions from outside sources, including employees. (H.T. pp. 95-96)

Further, the Agency's, **Property Manual** states in **Chapter 10, pages1&2 that... When safety shoes are required, they will be provide at Government expense to uniformed and non-uniformed employee's alike...** (A. Ex. #1)

As a consequence of the above, the Agency claims these two laws prevent the acceptance of a supplemental payment for safety-toe work shoes because (1) 5 USC (7903) is a government wide law and (2) the OSHA Act of 1970, Section .19. Federal Agency Safety Programs and OSHA Regulation 29CFR 1910.132(h) requires each Agency to pay for PPEs. Since these laws and regulation are government wide, they preclude a local agreement from being in conflict with them and the MOU in question is one such agreement.

The Employer also suggests that the Union has not presented any proof that higher management ever agreed to the MOUs in question in the first place. (A. brief, p.10) and (H.T. pp. 73-75,215)

The Agency claims that it did not end the I and I negotiations as the Union claimed. Instead it was the Union who ended them by filing a grievance and moving to arbitration. The Agency did not declare impasse and is willing to negotiate the other aspects of the MOU that it did not change. (H.T. pp.223, 225-226, 243,246) The Agency maintains that it is not at impasse. The Agency only modified the terms of the MOU which it believes were inconsistent with law or government-wide regulation. The Agency has submitted Federal Labor Relations Authority (FLRA) case law to prove its point. (A. brief, pp.13-17)

DISCUSSION

The Employer maintains that two government wide laws and regulations tie its hands and trump the MOU that is in question. These are 5 USC (7903); the accompanying Authorization laws which were not cited; OSHA Act of 1970, Section .19. Federal Agency Safety Programs and Responsibilities, and OSHA Regulation 29 CFR 1910.132(h)(1)- *Except as provided by paragraphs h(2)through h(6) of this section* (A. Brief, p.3) (Emphasis added.)

The Agency also lists a series of legal decisions which support its actions. There is a theme running through some that indicate when a long standing contract clause or past practice runs counter to a government wide law or regulation, that the past practice or contract clause is invalid even if it is negotiated properly, agreed to by the Agency head and is of long standing.

The most important of these cases is Management Attachment #9 of its brief. Here arbitrator Paull found that the **"the Agency did not violate the Master Agreement when it implemented a change to a prior negotiated settlement relating to the furnishing of safety-toed shoes or boots at government expense to certain bargaining unit employees, because the prior settlement agreement failed to comply with an applicable federal law, rule or regulation"**[1]

In Attachment Number 1, the FLRA ruled that **"the Employer violated 5 USC 7116(a)1 and (5) by changing the past practice of paying overtime to employees stranded offshore without negotiating over the impact and implementation of the change. The Employer's contention that it was constrained by 5 USC 5542 to end its practice of paying overtime to employee stranded offshore was accepted by the FLRA. There was no obligation to bargain over the substance of the change. However, the failure to bargain over impact and implementation was an unfair labor practice."**[2]

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[1] FMCS Arbitration # 050204-53066-7,March 20,2006

[2] U.S. Geological Survey, 82 FLRR 1-1571, 9 FLRA 543 (FLRA 1982)

In attachment Number 3, the FLRA stated, **"Therefore, the arbitrator's award was contrary to law and set aside. Even the reliance on a past practice will not support a conclusion requiring the payment of premium pay in these circumstances".**[3]

In attachment #4, Management repudiated a memorandum of understanding which obliged it to pay for reflective vests worn by employees who motorcycled to work. The FLRA found that the expenditures of appropriated funds for the purchase of safety-related equipment did not satisfy the standards set forth in 29 USC 668(a) and 5 USC 7903 as determined by the GAO and thus the vests did not satisfy the standards as set forth. The Employer was privileged to repudiate the MOU, because it was not in accordance with law. [4]

Other attachments to the Agency's brief cite cases associated with the period of time that should be permitted in I and I negotiations before changes in contracts may be made, and also certain rights of management.

Mr. Dalius, Assistant Director for the Bureau of Prisons (BOP); Ms.Tracey Fletcher, Business Administratorr for the Ray Brook facility; and Ms. Tammi Sanderhoff, I Comptroller of the NE Region of BOP all testified that in one way or another the laws and regulations treat safety shoes as they do all other PPE equipment.(H.T.[pp.95-107],[pp.133-135,137,142],[pp.163,172]respectively). Since these items are government property they must all be treated in the same way including the way they are purchased. Steel-toe safety shoes are not an exception. Employees cannot pay any portion of government issued PPE safety items.

The Union's key argument is that the Employer cannot nor should not change a longstanding (nine year) provision of the contract because it now interprets the authorization law 5 USC (7903) controlling the purchasing of safety shoes differently than it had in the past. This interpretation is

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[3] Dept. of Transp., FAA and NATCA, 60 FLRA 20, 24 (2004)
[4] Dept. of Navy, Marine Corps and AFGE Local 1881, 34 FLRA 635, 638(1990)

arbitrary and, in fact, the law is so ambiguous that it can be interpreted in a variety of ways. In this case, the OSHA regulations state that collective bargaining is the best way to resolve the issue of how safety shoes should be paid.

In applying the regulations and the previous collective bargaining agreements, the position of the parties are at opposite ends of the spectrum. However, a careful reading of the exceptions to OSHA Regulation 1910.132(h)2 gives a much clearer picture of these opposite constructions and how this arbitrator shall rule.

After reviewing the laws, and regulations associated with this case, the key language is the exceptions to the OSHA PPE regulation - CFR 1910.132 (h)2-(h)6. The first of these exceptions Section (h)2 is paramount and states:

> **The Employer is not required to pay for non-specialty safety-toe protective footwear (including steel-toe shoes or steel-toe boots) and non-specialty prescription safety eyewear, provided that the Employer permits such items to be worn off the job-site.**

Section (h)2 is clear and unambiguous that the OSHA regulation regarding PPE payments does not require the payment of steel-toe safety footwear providing that the employees who must wear such shoes are allowed to wear them off the job-site which is the normal practice. OSHA's Employment Payment for Personal Protective Equipment, Final Rule 29 CFR Parts 1910, 1915, 1917 et al. (U.EX.#1), explains why steel- toe safety shoes and steel-toe safety boots are exempted from payment by the Employer.

As early as 1994, in a nationwide policy memorandum on the issue of payment for required PPE equipment, OSHA stated, **"where PPE is very personal in nature and used by the employee off the job, such as is often the case with steel-toe safety shoes (but not metatarsal foot protection), the issue of payment may be left to labor-management negotiations."**(Final Rule p.2)

Furthermore, in **Section IV part B Exceptions** (p. 9) of the above document, OSHA justifies its position thusly**..."In the proposed rule, the Agency reasoned that safety-toe protective footwear should be exempted because it was sized to fit a particular employee and is not generally worn by other employee due to size and hygienic concerns: was often worn away from the jobsite; was readily available in appropriate styles; ...OSHA also noted that the 1994 memorandum exempted safety shoes from the Employer payment requirement".**

In **Section XIV** (p. 54) the document further states: **"By tradition in this country shoes are considered unique items of a personal nature. Safety shoes are purchased by size, are available in a variety of styles, and are frequently worn off the job, both for formal and casual wear. Furthermore, it is neither feasible for a different employee to wear the shoes each day nor feasible that upon resigning form the position an employee will leave the shoes behind to be worn by another individual."**

OSHA has ruled that safety shoes are a special case of PPE equipment. There is no government wide regulation that requires an Agency to pay the full price for safety-toe shoes and safety shoe-boots. Consequently, the first law cited by the Employer governing its actions 5 U.S.C. (7903) is moot. In fact, CFR 1910.132(h2) negates management's belief that safety-toe shoes should be treated the same way that it treats other types of PPE equipment.

The consequence of this is that the Employer may well have acted inappropriately when it opened negotiations to resolve what it considered a conflict between the MOU in question and the laws governing the acquisition and implementation of PPE associated with steel-toe safety shoes and steel – toe safety boots. It is thus doubtful that the Agency had the authority to abrogate the aforesaid provision in the MOU. In short, the Agency and the Union had a valid MOU which was part of its contract for nine years.

Although the Agency in its brief suggests that the Union was unable to prove that higher management approved the MOU which was updated twice, it was in force without any problems during the administration of four local CEOs over a period of nine years and agreed to by 4 different wardens. In fact, two stated that they checked with their legal staff before agreeing to it. (U. brief, p.8) and (H.T. pp. 54-56, 75)

This leads to the final open issue which is whether the Agency's Property Management Manual **Chapter 10** is controlling. It states in part **... When safety shoes are required, they will be provided at Government expense to uniformed or non-uniformed employees alike.**

The Property Management Manual is an Agency wide policy statement as noted in page 1 of the document - 1. **PURPOSE AND SCOPE. (To provide controls for real and personal Bureau property, and to provide operational direction for staff responsibilities for property management.).** This Manual is a Bureau level policy which is not derived from higher government-wide laws, rules and regulations.

Therefore, the Master Agreement clause trumps the Agency's Property Management Manual because **Article 3 Section a. of the Master Agreement... takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules and regulation's.**

The Master Agreement states in **Section 28-Uniform Clothing: Section g. Steel-toe safety 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.** And further, **Article 3**: Section a. 1 states that **local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level.**

The parties had a long standing agreement beginning in 2004 until 2013 when the Employer gave the Union notice that the MOU did not meet certain legal criteria and had to be changed. The Agency's deliberate action, made in good faith, was, nonetheless, inconsistent with appropriate law and regulations. Its actions must be reversed.

As a consequence of the above discussion, the Employer inappropriately and unilaterally eliminated the section of the MOU permitting unit members to supplement the purchase of steel-toe safety footwear.

AWARD

The grievance is sustained. The Employer shall withdraw its email directive of May 7, 2013 and immediately return the contract to the status quo ante. The Employer shall immediately reinstate Item 2 of the MOU between the parties dated October 13, 2011 which permit employees to supplement the purchase of steel-toe safety footwear.

So Ordered

Harvey Young

Harvey Young. Arbitrator

January, 15, 2014