BEFORE THE AMERICAN ARBITRATION ASSOCIATION

WASHINGTON FEDERATION OF STATE EMPLOYEES (CORY SKALISKY),

Union.

and

Opinion and Award of The Arbitrator

AAA Case No. 01-18-0004-5057

WASHINGTON STATE DEPARTMENT OF CORRECTIONS.

Employer

Appearances:

On Behalf of the Union:

Christopher Coker, Esq. Younglove & Coker

Olympia, Washington.

On Behalf of the Employer:

Ohad Lowy, Esq.

Assistant Attorney General

Labor & Personnel Division

Olympia, Washington

Neutral Arbitrator

Statement of the Case.

This contract interpretation grievance came on for oral hearing on June 3, 2018 at the Washington State Department of Corrections, (The "Employer" or "DOC"), 9105 BNE Highway 99 in the city of Vancouver Washington. The grievance was filed by the Washington Federation of State Employees ("The Union") on behalf of the grievant Cory Skalisky. The interests of the Union were represented by Christopher Coker, Esq. The interests of the Employer were represented by Ohad Lowy, Esq., of the office of the Washington State Attorney General.

The DOC has seven field administrative sections across the State. Each section is headed by an appointed Administrator ("FA"). The controversy in this case surrounds the actions of the Section 7 FA, Jeff Frice. On July 27, 2018, in the course of his official duties, Frice composed and issued the following email (hereinafter "the email") which was communicated to Community Corrections Officers (CCO's) employed under his supervision in section 7.

"I have been asked my feelings about staff wearing shorts. I know this has come up before and I wanted to make sure we have a consistent statewide approach. The consistent answer is shorts are not professional representation of the agency and it can be a safety issue when wearing them and involved in use of force situation. I am directing the staff not wear shorts to work……"

On July 3, 2018, Union filed the following grievance in response to this email.

"On June 27, 2018, the grievant was notified by the Appointing Authority that staff may no longer wear shorts during work.

The Appointing Authority cited professional representation. While there is currently no dress code policy and no uniform stipends or reimbursements developed, this would need to be negotiated. An attempt at an informal resolution has been unsuccessful at this time."

Specific Remedy Requested:

Rescind the expectations delivered in email regarding clothing apparel and any other remedy to make the Grievant whole.".[1]

The parties attempted to resolve this dispute informally through the grievance procedure[2]. They were unsuccessful in doing so. As a result, the Union demanded final and binding arbitration under the provisions of Article 29.1 of the Collective Bargaining Agreement ("the Agreement"). The undersigned was selected as the impartial neutral to hear and decide the issues presented by this grievance.

Both parties were present at the oral healing and presented witness testimony and proofs in support of their respective positions. The oral portion of the arbitration hearing was declared closed pending receipt of Post Hearing Briefs. Briefs were submitted to the arbitrator on or about August 23, 2019. This award is submitted to the parties pursuant to Article 29 of the Agreement between the parties.

Issue Presented:

Did the Employer violate the terms and conditions of the collective bargaining agreement between the parties when it issued a July 27, 2018 email directing that Community Corrections Officers are forbidden to wear shorts while at work? If so, what shall the remedy be?

Relevant Provisions of the Collective Bargaining Agreement.

Article 20: Safety and Health.

[1] See Union Exhibit 1, Article 29.1.
[2] See Union Exhibits 2 and 3.

20.1 The Employer, employee and Union have a significant responsibility for workplace safety and health.

A. The Employer will provide a work environment in accordance with safety standards established by the Washington Industrial Safety and Health Act (WISHA).

B. Employees will comply with all safety and health practices and standards established by the Employer. Employees will contribute to a healthy workplace, including not knowingly exposing coworkers and the public to conditions that would jeopardize their health or the health of others. The Employer may direct employees to use leave in accordance with Article 12, sick leave, when employees self-report a contagious health condition.

C. The Union will work cooperatively with the Employer on safety and health related matters and encourage employees to work in a safe manner.

Statement of The Case

There are only minor differences between the Union and the Employer relative the operative facts. Grievant is a 19-year employee serving in the capacity of Corrections Officer 3 ("CCO-3"). His primary job function is to exercise court ordered supervision over felony convicted offenders. This involves supervisory contact with such offenders at their homes, in court, during office visits and in community settings. In the course of performing those duties, CCO's are authorized to wear bullet proof vests as innerwear or outerwear, tasers, OC spray, flashlights, knives and firearms. The grievant testified that during the course of his interactions with offenders he is involved in "use of force" situations at least twice a month.

During the course of these duties, CCO's have the occasion

to exercise powers of arrest. From time to time, in the course of exercising the power of arrest, physical confrontations may unexpectedly occur between CCO's and offenders. The Union argues that given the items that they are required to wear, they become uncomfortable during periods of intense heat. This causes them to often alter client contact by avoiding fieldwork during periods of intense heat. In this context, a rule prohibiting shorts during such periods violates Article 20 of the Agreement which embodies the parties agreement to work cooperatively in matters of safety and health.

The Arguments of the Parties.

The Arguments of the Union.

On June 27, 2018, the Employer unilaterally dictated a "professional standard" or dress code, which prohibited CCO's and other DOC employees from wearing shorts contrary to at least a nine years past practice in region 7. This email directive did not modify or terminate any existing policy. The email was issued on a whim by the Field Administrator of Section 7. Assuming the email did create or modify a policy it, nevertheless, violated the collective bargaining agreement because it constituted a unilateral action prohibited by other articles contained in the Agreement.

In this case, even though the DOC alleges that the prohibition of shorts was a matter of safety, it never utilized the collectively bargained Security Advisory Committee to engage in mutual discussions to solicit input from the union prior to the June 27 email directive. The language of Article 20 of the collective bargaining agreement requires both parties to work together regarding safety related issues. If wearing shorts is a safety issue, then the DOC had a duty under the Agreement to work with the union on this issue. It did not do so. Indeed, on

July 19, 2018, less than a month after FA Frice issued his email directive, the Security Advisory Committee met.

FA Frice was not aware of this meeting. At this meeting, the dress code and whether CCO's were permitted to wear shorts was discussed. Union and Management representatives concluded that there were no specific rules or regulations regarding the definition of what is professional dress and supervisors were encouraged to address unprofessional dress/appearance with the individual employee.

The testimony of FA Frice regarding his awareness of this meeting, and his actions on June 27, 2018 demonstrate that Frice was not aware of the Security Advisory meeting nor of the requirements of Article 20 or any other provisions of the Agreement. Mr. Frice did not attempt to work with the Union prior to the June 27, 2018 email and his actions violated the requirements of the collective bargaining agreement. PHB P 5.

Given that the DOC has no formal dress code nor specific uniforms for CCO's to wear, it would negate the duty of cooperation contained in Article 20 to allow 1 of 7 Field Administrators to choose to issue a directive prohibiting shorts or requiring a certain dress standard after years of no such standard or restriction.

Article 20.3 of the Agreement requires the establishment of joint Union – Management safety committees. This email was a unilateral change to expectations for employee attire in violation of the plain language and clear intent of the Agreement. A restriction against wearing shorts creates a de facto uniform requirement. This requires the DOC to provide uniforms or a clothing allowance under Article 21. If the DOC wants to create a uniform policy, the Agreement requires that the DOC first consult with the Union under Article 20.

Throughout the hearing, the DOC asserted safety and professional attire as justifications for the June 27, 2018 email from the FA in Section 7. Historically, matters involving employee safety and dress code related changes have been held to be matters subject to the meet and confer provisions of an Agreement. The DOC readily admits that it did not discuss or bargain with the Union over shorts before issuing the June 27, 2018 email. Additionally, the Union did not waive any rights it may have to bargain matters such as safety and dress codes, which relate to employee working conditions and are mandatory subjects of bargaining. The actions of the DOC in this matter constitute a violation of Article 38 of the Agreement. This email should be rescinded.

The Arguments of the Department of Corrections.

It has long been established that where a reasonable relationship exists between the concerns of an Employer over maintaining a professional image or safety and health, and the regulation of an employee appearance, an Employer can regulate workplace attire unless the Collective Bargaining Agreement specifically states that the Employer has bargained away that right. Here, the Employer has not bargained away this right. The Union has previously waived its right to raise this issue. In this case the section 7 FA instructed staff that they could not wear shorts because it was unprofessional to do so and unsafe given the possible violent nature of the work of a community corrections officer.

Even though the Union admits that the contract is silent on the issue of shorts, it now takes the untenable position that management must bargain over every piece of attire worn no matter how professional or unsafe the attire. In this case there is a long-standing practice of prohibiting shorts.

When DOC managers have seen employees wear clothing that was unprofessional or posed safety risks, The DOC always required employees to change attire.

Additionally, it must be remembered that in 2015, a dispute arose over a management prohibition against wearing shorts. The Union submitted a demand to bargain over this prohibition and then affirmatively withdrew that demand to bargain. It did not further object to this prohibition on wearing shorts. Here, the Union cites Articles 20, 21, 38.1 and Article 50 as having been violated without providing any testimony on how the Articles are actually at issue or how the Employer violated these articles.

Moreover, when the DOC directed employees not to wear shorts, it was exercising its management right to regulate attire, ensure professionalism and oversee the health and safety of the workers. There is no limitation on the safety concerns an Employer may address and to do so does not require, as the Union asserts, the provision of equipment or apparel.

The DOC has an obligation to prevent and remedy safety issues as they arise. It did so under WISHA regulations and under traditional labor law as well. The public pays a good deal of attention to the appearance of Department of Corrections staff. There are negative impacts to the DOC when the public perceives that DOC staff are not meeting attire standards expected by the public. There were numerous complaints from the public regarding the dress of DOC staff.

In this case, the past practice was that shorts were not allowed. This practice was established by strong proof in the record that it was unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice.

Burden of proof.

The controversy in this case raises a question of contract interpretation. The Union has alleged a violation of Articles 20, 21, 38.1 and 50 of the Agreement. The Union must shoulder the burden of coming forward with evidence of the contract violation and proof of that violation by a preponderance of the evidence, meaning that it is more likely than not that the June 27, 2018 email directive prohibiting the wearing of shorts by CCO's working in section 7 violated one or more of these articles.

At the outset of the testimony, the parties agreed on several facts. First, no dress code existed to govern what CCO's wear on duty.[3] Second, the CCO position description mandates that CCO's are to be "dressed appropriately" for the professional position. Third, that" dressing appropriately" for the professional position has not been defined in the position description or in any other documents or managerial directives. Finally, that supervisors retain the managerial discretion to raise issues of inappropriate professional dress with individual employees on a case-by-case basis.

The grievant testified that he has served in the position of Community Corrections Officer for a period of 16 years. During that time, he had worn shorts over an 8 or 9 year period.[4] During that same period he had seen others wearing shorts. [5] He described it as a" common practice" on hot weather days.[6] Additionally, prior to the issuance of the email in question, grievant had never been directed or told that he or any other CCO could not wear shorts. [7]Moreover, he had never been aware of

[3] Indeed, the Section 7 Field Administrator who issued the email directive against wearing shorts testified that at the time that the question of the propriety of shorts came to his attention, it was his understanding that there was no "current policy that addressed work attire."
[4] Tr. 22, Line 17-20.
[5] Tr. 22, Line 25, Tr. 23. Line 1-2.
[6] Tr. 23, Line 3-5.
[7] Tr. 24, Line 6-9.

a supervisor either questioning him about wearing shorts or questioning how he was "presenting" the DOC.[8] This testimony was not rebutted.

Joseph Reece Campbell is a 20 year Community Corrections Officer. According to him, prior to the June 27th, 2018 email directive, he had worn shorts and had never been directed as to what he could or could not wear.[9] He further testified that when he interviewed for the position of Community Corrections Officer in September 1999, everyone who interviewed him for his position wore shorts.[10] When he inquired about the dress of his interviewers, he was told that the agency had no dress code.[11]

He also testified that during his tenure as a CCO he had the occasion to complain, to upper management about CCO's who wore low cut clothes, spiked haircuts, and painted hair. When asked why these things were tolerated, he was told," We don't have a dress code policy. We can't enforce any of this. You want long hair, have long hair, you want to pierce your nose, pierce your nose"[12]. On cross-examination, Campbell testified that he did not believe there has ever been a dress standard because he had seen some outrageous dress habits and the agency had said for years that there was "nothing, we can do about it". [13]

Additionally, according to Campbell, some managers say that shorts are fine while some managers say that a suit and tie is fine.[14] Although Campbell wears shorts when it is hot outside, he will wear pants to minimize the risk of exposure to threats from needles, hepatitis, feces and drugs. He wears cargo shorts that he believes are highly professional. They are knee length

[8] Tr. 26, Line 2-5.
[9] Tr. 39, Lines 14-18.
[10] Tr. 40, Line 16-25, Tr. 41, Lines 1-19.
[11] Tr. 41, Line 1-2.
[12] TR 43, line 22 – 25.
[13] TR 53, line 24 – 25, TR 54, line 1 – 5.
[14] TR 55, line 20– 21.
[15] TR 65, line 7 – 10.

shorts.[15] On the issue of whether or not CCO's wore shorts during periods of intense summer weather, the testimony of Campbell corroborates the testimony of the grievant. This corroborating testimony was not rebutted.

Travis James Hurst is a 17 year Community Corrections Officer. He works in Section 1. He testified that he had not received a directive from any supervisor or manager prohibiting shorts.[16]. Moreover, he occasionally wears shorts when he is doing fieldwork in extremely hot conditions.[17] To his knowledge there was no prohibition against wearing shorts[18]. During cross examination, he testified that he wears shorts about a half a dozen times during the summer when he is out conducting fieldwork for almost the entire day. [19] This testimony corroborates the testimony of the grievant and that of Campbell on the issue of whether or not CCO's wore shorts during summer periods. This testimony was not rebutted.

Jennifer Thomas is the Council Representative for the Union. She testified that the Union had no prior knowledge that the June 27, 2018 "email" was about to be issued. Upon receipt of the email, she made informal attempts to resolve the matter in light of the fact that no dress policy existed. She testified that when a matter impacts working conditions like being able to wear a certain attire, " we would come to the table and discuss and negotiate what that actually looks like".[20]

Thomas further testified that there were inconsistencies in the interpretation of professionalism from one Field Administrator to another[21] and although the email indicated that

[16] Tr.70, line 10.
[17] Ibid, line 13-16.
[18] TR 70, line 8 – 16
[19] TR 73, line 1 – 2
[20] Tr 78, line 8-12.
[21] Tr 78, line 13-16.

the directive was a statewide directive, the Union found that the directive was applied differently among the Field Administrators. Further, Thomas had no direct information that any section other than Section 7 was prohibiting the wearing of shorts. [22]

Thomas further testified that in July 2018, approximately one month after the issuance of the email from Section 7, a meeting of the Security Advisory Committee was convened. The committee is composed of management and union members from each section across the state of Washington and not just from section 7. During this meeting, a union steward raised the question whether shorts would be allowed to be worn. The consensus response from both management and union members attending the meeting was that there was no dress code policy for the Community Corrections Division. In the judgment of Ms. Thomas, the written minutes of this meeting were confirmation that the Section 7 email directive was not a statewide directive and was being applied inconsistently across the sections.[23]

Jeff Frice, Field Administrator for Section 7 testified about the set of circumstances that prompted him to issue the "email" to the CCO's in section 7. He was presented with a question about whether shorts were permitted. According to Frice, "I was new to the position. I said let me reach out and see what the "consistent answer is".[24] Further, when he sent the email, he was not aware of any position taken by the state on whether shorts were permissible.[25] Since Frice did not know what the statewide approach was, he "sent out an email to the Field Administrator group asking what "their position is".[26] Their response to him was they don't allow shorts to be worn in their

[22] Tr 81, line 14-18.
[23] Tr. 83, line 17- 22.
[24] TR.124, line 21 – 25.
[25] Tr. 125, line 1-2.
[26] TR. 125, line 3–9

respective sections.[27]

Frice also testified that he had seen three or four people wearing shorts in his section "5 to 10 times".[28] Frice testified that he had seen Rob Reese Campbell wearing shorts. Frice also testified that he saw John Coff, a supervisor, wearing shorts "throughout the years". Additionally, one of his reportees, Jeff Angelo, also wore shorts. According to Frice, Angelo was not disciplined by him for wearing shorts nor was any CCO under his supervision disciplined for wearing shorts. [29]

Once he received the responses to his email, he took the following steps:

"I reached out, I got that consistent answer back that, no, they don't allow it. I then reached out to my supervisor, who's the regional administrator, Steve Johnson and said, this is the answer I got back. I'm getting ready to respond, but I just wanted to make sure I'm on track with your viewpoint, too, to make sure that I'm staying in line, and he, then, staffed it with the Assistant Secretary Pevey, to see what his position was, and then I put together this email and sent it out all it once to the section of what the answer was.[30]

On cross-examination, Frice was questioned about Union Exhibit 6, the minutes of the statewide Security Advisory Committee that met on July 18, 2018, almost one month after he issued the challenged "email". In that meeting, the issue of whether shorts were permitted was raised.

Frice testified that he chose to ignore the findings of this committee set up under the collective bargaining agreement.[31] It

[27] Tr. 125 line 7-9.
[28] Tr. 126, line 1-4. Additionally, he testified that over the" five years I've been here I've seen three or four people wear shorts throughout that period of time". TR 125, line 20– 22.
[29] TR 128, line 18 –22
[30] TR 127, line 1 – 11.
[31] TR 143, line 3– 5.

was his testimony that he had not seen those meeting minutes at the moment that he issued his Section 7 directive.[32]. When asked on cross examination whether he had been out in the field observing the work of CCO's, he testified that it had been quite a while since he had been out in the field and he wouldn't know whether an individual was wearing shorts unless an individual wore shorts to an "event".[33]

David Thompson testified on direct examination for the State of Washington. Thompson is the Field Administrator, for Section 4. He testified that he had not seen the other people wearing shorts and that the issue of shorts had "never really come up, no".[34] According to him, Frice sent out an email to all of the "FA's kind of polling to see what the opinion was of wearing shorts in our different sections".[35] He recalled that his response was that shorts were not allowed because the issue had never come up and he felt strongly that it was unprofessional and not necessarily safe. [36]

On cross examination, Thompson admitted that there was no policy prohibiting shorts in the DOC. Moreover, he testified that he had never seen a statewide directive prohibiting DOC employees from wearing shorts. Moreover, he has never issued a directive in his section prohibiting people from wearing shorts.[37]. According to him, a new employee would not necessarily know that the concept of "professional" attire, does not include shorts unless someone brought it to the attention of the new employee.[38]. Thompson also testified that during the 19 month period that he

[32] TR 143 line 10 – 14.
[33] TR 149, line 4– 12.
[34] TR 156, line 14– 19.
[35] TR 156, line 23 – 25.
[36] TR 157, line 1 – 6.
[37] TR 169 line 11– 23
[38] TR 172 line 8 –21

had been acting in the position of Section FA, he had not been out in the field and seen anyone wearing shorts. [39]

Kelly Lynn Miller testified for the State. She is the Field Administrator for section 6. She was contacted by a CCO in her section who wanted to know what her expectations were with regard to wearing shorts. She informed the employee that shorts were inappropriate, unprofessional clothing and if they were wearing shorts that they needed to change.[40]

When she worked as a CCO she never saw anybody wearing shorts. In her capacity as a Community Corrections Supervisor there was an incident where she saw staff wearing shorts, but it wasn't her staff. She testified that she could have corrected the employee, but she didn't feel like it was her place.[41]

Additionally, in her capacity as Field Administrator, she committed her expectations that staff would not wear shorts to writing in a staff meeting which took place on April 28, 2016. [42] In her Section, there was an exception to this expectation. CCO's who were on a bike patrol in her section were allowed to wear shorts. [43]

On cross examination, Miller admitted that there was no policy that made a distinction between CCO"s on bike patrol and those officers who were not on bike patrol. According to Miller, this distinction resulted from a directive that she made in a supervisors meeting.[44]

David Ganas, Field Administrator, Section 1, testified that he did have a discussion with Frice about the shorts issue, and his answer was that shorts were not allowed because he considered

[39] TR 173 line 2,3.
[40] TR 178, line 15– 24.
[41] TR 179 line 4 – 10.
[42] See Employer Exhibit 7.
[43] TR 187 line 14– 23.
[44] TR 188 line 10– 21.

them to be a safety issue.[45] On cross-examination Ganas was asked how a new employee would know that he or she is not allowed to wear shorts. Ganas responded that he had never put out a directive about it because it had not been an issue. If he found someone was wearing shorts, he would let them know directly.[46].

Ron Pedersen, Field Administrator for Section 2 testified that he could not recall receiving a specific email from Frice but he did recall" a lot of dialogue about shorts".[47] Pedersen testified that in his section, shorts are not permitted on two grounds, first, professionalism, and second, a safer working environment for employees. [48] Pedersen testified that there is no specific dress code of which he was aware other than the position description which describes the expectation of professional dress. [49]Further, he testified that he can only speculate on how a new employee in his section would know not to wear shorts on the first day of employment. [50]

On cross examination, he testified that he was not aware of any agency policy that defines professionalism.[51]. Moreover, in his Section he had not issued any personal directives defining what is or is not professional in terms of attire.[52] Jeanette Michelle Dixon, Labor Relations Consultant testified on behalf of the State. She testified that the issue of shorts as permitted attire came up in 2015 in Section 4.

The Field Administrator in Section 4 sent out a section wide email stating her expectation that shorts would not to be worn in that section.[53] According to Dixon, this email prompted the union

[45] TR 194, line 1; TR 195 line 1–4.
[46] TR 199, line 6 – 11
[47] TR 203, line 1– 7
[48] TR 203, line 10– 15.
[49] TR 206, line 18 – 22.
[50] TR 206, line 23 – 25; TR 207, line 1– 5.
[51] TR 215, line 20 – 25
[52] TR 215, Line 3 – 7.
[53] See State Exhibit 4.

to file a demand to bargain.[54] That demand was ultimately withdrawn by the union. [55]

Discussion and analysis

The collective bargaining agreement is silent on whether shorts are allowed or prohibited. Given this silence, the arbitrator must draw his interpretive conclusions from the course of conduct between the parties as it relates to wearing shorts historically in the workplace. The unrebutted testimony is that CCO's in section 7 wore shorts for a period of between 5 to 10 years.

This is corroborated by section 7 Field Administrator Frice who issued the offending email directive. Frice also admitted that there was no statewide policy or directive governing attire. He also testified that he witnessed a CCO wearing shorts in his section and had not disciplined them. Outside of section 7, Field Administrators who testified, asserted that the issue of shorts never came up in their section, that shorts was never an issue, and that they never saw anyone wearing shorts in their section.

They also testified that although they personally and professionally disapproved of shorts in their sections, they never issued a directive against wearing shorts. One field administrator who made opposition to shorts known to their staff, testified that she declined to correct or discipline a staff member whom she observed wearing shorts because she did not feel it was her place to do so. Additionally, that FA permitted CCO's on bike patrol to wear shorts.

These field administrators testified unanimously that if the issue of shorts had come up in their section they would be opposed to the wearing of shorts on grounds of safety and

[54] TR 224, Line 2 – 13.
[55] TR 225, line 7– 16. See Union Exhibit 6.

security. This evidence does not rebut the affirmative testimony by section 7 community corrections officers that they wore shorts and of the testimony by FA Frice that corroborated these observations over a 5 to 10 year period.

This evidence establishes a consistent course of conduct and practice between the parties over at least a 9 year period that CCO's in Section 7 would wear shorts during periods of hot weather and management would not dictate their attire unless, on a case-by-case basis, an individual supervisor believed that the attire of an individual CCO was "unprofessional" a term that remained undefined.[56]

The evidence establishes that the parties conducted themselves in this fashion for years prior to the issuance of the June 27, 2018 email directive and also subsequent to that directive. That much is made clear by the minutes of the Security Advisory committee of July 18, 2018. Those minutes, issued one month after FA Frice's Section 7 directive, reaffirmed the prior consistent course of conduct between the parties that with respect to the wearing of shorts, there was no dress code dictating that shorts could not be worn. Thus, a status quo, was established and reaffirmed that no dress code or dress policy existed to govern CCO attire other than the job description standard of professionalism monitored by FA's on a case by case basis.

Ordinarily, the silence of the contract language on the issue of appropriate wearing attire and the absence of a history and course of conduct between the parties, would mean that the regulation of wearing attire would fall within the province of the right of management to establish reasonable rules of attire

[56] The evidence that CCO's on bike patrol in at least one section were allowed to wear shorts indicates that to the extent that a "No shorts" rule was enforced, that it was done so inconsistently and not uniformly.

and to require employees to maintain a professional appearance during work hours. The test of whether a work rule or policy is "reasonable" turns on whether or not the rule is reasonably related to a legitimate objective of management and is clearly stated so that employees can appreciate its import.[57]

Additionally, an adequate review of whether a rule is reasonable invites an examination of the number of employees adversely or positively affected by the rule, the degree of the inconvenience or benefit to those employees, the health or safety purpose behind the rule and the appropriateness of any other stated justification for the rule. In **Southern Bell Telephone and Telegraph**., 74 LA 1115(1980,Duff)the arbitrator upheld a prohibition against shorts being worn by coin telephone collectors on the ground that the interests of the employee in being comfortable was subordinate to the interests of the Employer in conveying an attractive image to the public. In this case, the Employer asserts public image, professionalism and safety concerns as justification for the issuance of the email directive dated June 27, 2018.

In the case at hand, the arbitrator will not apply a ***Duff*** analysis to the facts of this case. This is because the evidence in this case establishes a course of conduct between the parties that directly contradicts the directive issued by FA Frice. There was no such course of conduct present in the Duff award. That forecloses a discussion of the reasonableness of the directive under a ***Duff*** analysis. The parties have an established course of conduct between them that no dress code or policy exists that governs the wearing of attire in general and shorts in particular.

Article 20.1 C does require that DOC and the union "work

[57] Elkouri and Elkouri, *How Arbitration Works* (8th Ed. (2016), Section 13-151.

Cooperatively in matters of safety and health". The clear implication of this language is that a mutual and reciprocal obligation exists between the DOC and the Union that they will consult with each other on matters related to safety and health. This reciprocal obligation also means that with respect to matters of safety and health, neither party will act unilaterally. The DOC asserts that the matter of shorts is related to safety and health. The arbitrator agrees. However, the parties are mutually bound by the covenant contained at Article 20.1 C.

The status quo with regard to employee attire prior to the directive was that there was no code or policy that addressed any specific attire, including shorts. The course of conduct between the parties demonstrated that the single limitation on employee attire was the requirement that they dress in a" professional" manner.[58] The June 27, 2018 email directive by FA Frice was a unilateral attempt to alter that status quo.

Did the Union waive its right to bargain over the directive issued by FA Frice?

The question of whether the DOC was obligated to bargain with Union over its 2015 directive prohibiting shorts for CCO's is beyond the jurisdiction of the arbitrator. The assertion of the DOC in its post hearing brief is correct. The arbitrator only examines this issue for the purpose of determining whether by withdrawing that demand, the union has waived or surrendered any right to object in this hearing to the June 27, 2018 section 7 directive issued by Field Administrator Frice.

The short answer is that the union has not waived or surrendered the right to assert an objection in this arbitration. In order to justify a waiver in this case there must be a showing

[58] Indeed, the evidence in this case establishes a sub rosa, or unofficial understanding that the power of management to restrict the attire of employees wasn't limited to nonexistent.

that the withdrawal of the demand was a clear, voluntary, and unmistakable waiver of its **right to object** to prohibitions against the wearing of shorts.

Here, the Union did withdraw its demand to bargain but preserved its right to object by specifically stating in that withdrawal that "We may refer it to a more appropriate venue at another time".[59] This was a clear indication that the Union did not intend to surrender or foreclose its right to challenge a prohibition against shorts. This reservation effectively rebuts any waiver argument.

The State argues that there is a clear practice in this case of prohibiting the wearing of shorts. At best, the evidence establishes inconsistent and uneven enforcement of this "practice". The majority of FA's testified forthrightly that the issue of shorts had not been an issue in their sections. In fact, no other Field Administrator had issued a formal directive that shorts could not be worn in their sections and one Field Administrator actually permits shorts to be worn during bike patrol duty.

Additionally, the evidence establishes that FA's operated under an informal general approach that they had little to no authority to dictate attire because there was no "dress code". Finally, when presented with a consensus opportunity to render judgment on the legitimacy of shorts as attire both the Union and Employer took the position that there was no policy in existence that prohibited the wearing of shorts. The arbitrator can draw only one interpretive conclusion from the evidence of this course of conduct. The "status quo" that existed on June 27, 2018, and thereafter was that there was no policy in existence that permitted or prohibited the wearing of shorts.

[59] See Union Exhibit 5 at Page 1.

This ruling does not stand for the proposition that shorts are permitted. This ruling does not stand for the proposition that shorts are prohibited. This ruling simply restores the status quo that existed prior to the issuance of the June 27, 2018 email and leaves the parties to their respective rights under Article 20.1 C of the Agreement. The issuance by Frice of the June 27, 2018 email prohibiting shorts was a unilateral violation of the duty to cooperate found at Article 20.1 C of the Agreement. Therefore, the June 27, 2018 email must be, and is hereby rescinded and the status quo prior the issuance of the directive is restored.

It is so ordered.

Richard M. Humphreys, J.D.

Date of Award: October 4, 2019