

73 FLRA No. 26

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
YAZOO CITY, MISSISSIPPI

(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1013
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5773

DECISION

July 7, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I Statement of the Case

Arbitrator Ed W. Bankston found that the Agency committed an unfair labor practice (ULP) by failing to bargain over implementation of an alleged change to non-custody employees' attire and violated the parties' collective-bargaining agreement by failing to provide those employees with a uniform allowance. The Arbitrator directed the Agency to bargain over the impact of the change and provide certain non-custody employees with a uniform allowance. The Agency filed exceptions on contrary-to-law and essence grounds. For the reasons that follow, we grant these exceptions and set aside the affected portions of the award.

II Background and Arbitrator's Award

The Agency operates a federal prison complex staffed by employees in custody and non-custody departments. The Agency has a practice called "augmentation" by which it temporarily assigns non-custody employees to posts which are otherwise primarily staffed by custody employees.¹ The Agency

does not require non-custody employees to wear uniforms in non-custody positions or when assigned to custody posts, and does not pay them a uniform allowance. When augmented to custody posts, non-custody employees would wear business-casual attire.

On June 18, 2020, the Agency sent a memorandum (June memo) to all staff addressing "Non-Custody Dress Attire."² The June memo stated that "[f]or clarification purposes non-custody staff have been authorized to dress down while working their assigned custody post. Approved attire will be BDU Style Pants and Polos, or you may wear your daily business casual attire. Absolutely no jeans!"³ On July 1, 2020, the Union requested to bargain the impact of the June memo's alleged change to non-custody employees' attire. On July 8, 2020, the Agency asserted that it had no obligation to bargain. The same day, the Agency sent a memorandum to all staff that rescinded the June memo, and stated that "[a]s a reminder and in accordance with the Master Agreement, Article 6, Section e, 'Employees will maintain a neat appearance and dress, considering the correctional environment, and such appearance and dress will not interfere with the security or safe running of the institution.'"⁴

Two days later, the Union filed a grievance over the June memo's alleged change to non-custody employees' conditions of employment and the Agency's failure to provide a uniform allowance for augmented non-custody employees. The Agency denied the grievance, and the Union invoked arbitration.

The issues before the Arbitrator were, in relevant part, whether the Agency committed a ULP by failing to bargain with the Union over a change in non-custody employees' attire, and whether the Agency violated the parties' agreement and Agency policy by not providing a uniform allowance to non-custody employees.

Regarding the failure-to-bargain allegation, the Arbitrator stated that the Union properly notified the Agency of its demand to bargain "recent unilateral changes to the dress code and uniform allowance[.]" and the Agency refused to bargain.⁵ Therefore, the Arbitrator concluded that the Agency violated its contractual and statutory duty to bargain.

The Arbitrator also concluded that the Agency violated Article 28, Section f(3) of the parties' agreement (Section f(3)). Section f(3) states that "employees who . . . are reassigned from a non-uniformed position to a

¹ Award at 10.

² *Id.* at 3.

³ *Id.* The same day, the memo's third sentence was modified to state: "Absolutely no jeans, any type of camouflage,

tattered/clothes possessing holes, or any other form of inappropriate clothing!" *Id.*

⁴ *Id.* at 4.

⁵ *Id.* at 9.

uniformed position will receive an allowance” and incorporates by reference the Agency’s Program Statement 3300.03 (PS 3300.03) concerning uniforms and uniform allowances.⁶ To support this conclusion, the Arbitrator found that non-custody employees are regularly reassigned “without the required dress uniform” to custody posts.⁷ The Arbitrator reasoned that the same purposes underlying the Agency’s requirement that custody employees wear uniforms would also apply to augmented “non-uniformed” staff.⁸ Because the Agency assigned non-custody employees to the same posts as uniformed custody employees, the Arbitrator stated that the non-custody employees were also entitled under Section f(3) to the “benefits of the dress uniform and the allowance.”⁹ Consequently, the Arbitrator directed the Agency to bargain with the Union and awarded augmented non-custody employees a uniform allowance from the date of the grievance “until the violation of contract is corrected.”¹⁰

On November 8, 2021, the Agency filed exceptions to the award. On January 18, 2022, the Union filed a timely opposition to the Agency’s exceptions.¹¹

III. Analysis and Conclusions

A. The award is contrary to law.

The Agency contends that the award is contrary to law because the Arbitrator concluded that it violated a contractual and statutory duty to bargain without analyzing whether the Agency made a change that gave rise to such duty.¹² The Authority reviews questions of law raised by the exceptions de novo.¹³ In applying the standard of de novo review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings.¹⁴ In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes they are based on nonfacts.¹⁵ Further, when resolving a grievance that alleges a ULP under § 7116 of the Federal Service Labor-Management Relations Statute (the Statute), an arbitrator must apply the same standards and burdens that an Authority administrative law judge applies in a ULP proceeding under § 7118 of the Statute.¹⁶

Under the Statute, agencies are obligated to bargain over changes to employees’ *conditions of employment, with certain exceptions*.¹⁷ However, rather than analyzing whether a change that required bargaining occurred here, the Arbitrator merely found – without further elaboration – that the Union requested to bargain

⁶ Exceptions, Attach. D, parties’ collective-bargaining agreement (CBA) at 66. As discussed in Section III.B, Article 28, Section f begins by stating that “[t]he [e]mployer will pay an allowance each year to each employee who is required by policy to wear a uniform in the performance of their official duties.” *Id.*

⁷ Award at 16.

⁸ *Id.* at 15.

⁹ *Id.*

¹⁰ *Id.* at 17. The Arbitrator also found that the Agency violated the parties’ agreement because it “failed to participate in the grievance process” and “admonished” the Agency “for its failure to produce witnesses at hearing as required by [the parties’ a]greement.” *Id.* at 16. The Agency did not file exceptions to this conclusion and admonishment.

¹¹ On November 18, 2021, the Union filed a motion requesting an extension of time until January 14, 2022, to file its opposition, and stated that the Agency did not oppose this request. Pursuant to 5 C.F.R. § 2429.23, the Authority’s Office of Case Intake and Publication granted the Union’s request.

¹² Exceptions Br. at 14.

¹³ *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

¹⁴ *Id.* at 306-07 (citing *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998)).

¹⁵ *Id.* at 307 (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014)).

¹⁶ *AFGE, Loc. 3954*, 72 FLRA 403, 404 (2021) (Member Abbott concurring) (citing *U.S. Dep’t of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 174 (2015) (Member Pizzella dissenting on other grounds); *NTEU*, 61 FLRA 729, 732 (2006); *AFGE, Loc. 3529*,

57 FLRA 464, 465 (2001)). The Arbitrator found that the Agency’s contractual duty to bargain is contained in Article 3, Section c of the parties’ agreement, which expressly requires bargaining only “where required by 5 [U.S.C. §§] 7106, 7114, and 7117.” Award at 9 (quoting CBA at 5). The Agency asserts, and the Union does not dispute, that the parties’ contractual and statutory bargaining obligations are coextensive. Exceptions Br. at 14 n.5. Thus, the Arbitrator’s finding that the Agency violated its contractual bargaining obligation cannot stand if the Arbitrator erred in concluding the Agency violated its statutory bargaining obligation. See *AFGE*, 59 FLRA 767, 769-70 (2010) (Chairman Cabaniss concurring) (applying statutory standards where a contractual provision expressly referred to the Statute).

¹⁷ *AFGE, Loc. 1633*, 70 FLRA 752, 753 (2018) (*Local 1633*) (finding no duty to bargain because no change had occurred). Moreover, the Authority has held that the determination of whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the agency’s conduct and employees’ conditions of employment. *U.S. DOJ, Fed. BOP*, 68 FLRA 728, 731 (2015) (citing *SSA, Off. of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646, 649 (2004)). We note that although the Authority has held that terms “working conditions” and “conditions of employment” are not synonymous, the distinction is irrelevant in the instant case because, for the reasons discussed, the Agency did not make a change of any sort. *Local 1633*, 70 FLRA at 753 (citing *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 503 (2018) (then-Member DuBester dissenting)).

“recent unilateral changes to the dress code and uniform allowance.”¹⁸

Upon reviewing the record, we find that no change occurred here that triggered the Agency’s duty to bargain. As set forth in the award, the June memo stated that non-custody employees could “dress down while working their assigned custody post . . . or . . . wear [their] daily business casual attire.”¹⁹ And the Arbitrator credited witness testimony that non-custody employees wear “business casual”²⁰ attire or “personal clothing”²¹ when assigned to custody posts. Moreover, the record demonstrates that the Agency authorized non-custody employees to wear business casual attire both *before and after* the Agency issued the June memo, and that the “dress down” attire authorized by the June memo is an *optional* alternative to business casual attire.²² Thus, the record does not support the Arbitrator’s conclusion that the Agency changed non-custody employees’ conditions of employment. Consequently, we find that the Arbitrator erred by concluding that the Agency had an obligation to bargain.²³

Accordingly, we grant this exception, and set aside the portion of the award finding that the Agency was obligated to bargain over the non-custody employees’ alleged change in dress attire.²⁴

B. The award fails to draw its essence from the parties’ agreement.

The Agency argues that the award fails to draw its essence from Article 28 of the parties’ agreement, and is contrary to PS 3300.03, because those provisions obligate the Agency to pay a uniform allowance only when

the Agency requires an employee to wear a uniform and, here, the Agency does not require non-custody employees to wear uniforms when temporarily assigned to custody posts.²⁵ It is well-settled that when a collective-bargaining agreement incorporates a regulation with which an award allegedly conflicts, the matter becomes one of contract interpretation because the agreement, not the regulation, governs the matter in dispute.²⁶ In this case, it is undisputed that the parties’ agreement incorporates PS 3300.03.²⁷ Therefore, because the Agency’s challenge to the Arbitrator’s application of PS 3300.03 presents a question of contract interpretation, we apply an essence analysis to assess the Agency’s arguments.²⁸

The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.²⁹

PS 3300.03 establishes that the Agency “retains authority for prescribing a uniform requirement [and] authorizing a uniform allowance.”³⁰ Moreover, it provides that the Agency is authorized “to issue a uniform allowance to those employees who are *required* by the agency to wear a prescribed uniform.”³¹ And Article 28, Section f provides that “[t]he [e]mployer will pay an allowance each year to each employee who is *required* by policy to wear a uniform in the performance of their

¹⁸ Award at 9 (citing Exceptions, Attach. B, Grievance at 1; Exceptions, Attach. E, Tr. (Tr.) at 28).

¹⁹ *Id.* at 3 (emphasis added).

²⁰ *Id.* at 13 (quoting Tr. at 38).

²¹ *Id.* at 15 (quoting Tr. at 138).

²² See, e.g., Exceptions Br. at 20; Opp’n Br. at 5; Tr. at 38-39; Exceptions, Attach. F, Tr. Day 2 at 229-30; Exceptions, Attach. G, Union’s Post-Hr’g Br. at 3.

²³ *Local 1633*, 70 FLRA at 753.

²⁴ Because we set aside the Arbitrator’s finding that the Agency was obligated to bargain over the alleged change to attire, we find it unnecessary to address the Agency’s arguments that it had no duty to bargain because the matter was “covered by” the parties’ agreement. Exceptions Br. at 9-12 (arguing that matter is “covered by” Article 18); *id.* at 15-18 (arguing that matter is “covered by” Article 28). See *U.S. DOD, Domestic Dependent Elementary & Secondary Schs.*, 72 FLRA 601, 605 n.53 (2021) (*DOD*) (Chairman DuBester concurring) (finding it unnecessary to address remaining exceptions after setting aside award as contrary to law). Moreover, to the extent that the Agency challenges the Arbitrator’s interpretation of Article 28 as part of its contrary-to-law exception, Exceptions Br. at 9, 12-13, we address this argument in Section III.B.

²⁵ Exceptions Br. at 18-23; see also *id.* at 9, 12-13.

²⁶ *AFGE, Loc. 3254*, 70 FLRA 577, 581 (2018) (*Loc. 3254*) (citing *U.S. Dep’t of the Navy, Naval Air Station, Pensacola, Fla.*, 65 FLRA 1004, 1008 (2011)).

²⁷ The relevant provisions incorporating PS 3300.03 are Article 28, Section f, see *infra* note 29 and accompanying text, and Article 28, Section h, which states: “Uniforms for all staff will be in accordance with policy, and only those staff occupying positions outlined in policy will be eligible for a uniform allowance.” CBA at 67.

²⁸ See *Loc. 3254*, 70 FLRA at 581.

²⁹ *NAGE*, 71 FLRA 775, 776 (2020) (citing *U.S. Dep’t of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).

³⁰ Opp’n, Attach., Ex. 7, PS 3300.03 at 71.

³¹ *Id.* (emphasis added) (citing 5 U.S.C. § 5901).

official duties.”³² The subsections of Section f also establish the times when those employees entitled to an allowance will receive it.³³ Section f(3), on which the Arbitrator relied, further states that “employees who transfer or are reassigned from a non-uniformed position to a uniformed position will receive an allowance . . . within the first week of assuming uniformed duties.”³⁴

The Arbitrator interpreted Section f(3) as requiring the Agency to pay a uniform allowance to the non-custody employees because they are regularly reassigned to custody posts, and custody employees wear uniforms when in those posts.³⁵ But despite acknowledging that non-custody employees were *not required* to wear a uniform while in the custody posts, the Arbitrator concluded that non-custody employees are entitled to the “benefits of the dress uniform and the allowance” under Section f(3).³⁶

We find that the Arbitrator’s conclusion does not represent a plausible interpretation of the parties’ agreement. In this regard, it is apparent that Section f establishes – as a threshold requirement – that to be eligible for a uniform allowance, an employee must be “required by policy to wear a uniform in the performance of their official duties.”³⁷ And PS 3300.03 reiterates this requirement, and explicitly allows the Agency to determine whether an employee is required to wear a uniform. Here, the record demonstrates that the Agency does not require non-custody employees to wear a uniform when augmented to custody posts. Because this prerequisite for a uniform allowance is not present for the employees at issue in the grievance, we find that Article 28 cannot be interpreted as entitling those employees to a uniform allowance.³⁸ Accordingly, we conclude that the award fails to draw its essence from the agreement and set

aside the portion of the award finding a violation of Article 28, PS 300.03, and the associated remedies.³⁹

IV. Decision

We set aside the award, in part.

³² CBA at 66 (emphasis added).

³³ Section f(1) states that eligible employees will receive the allowance “each year . . . on or before the anniversary” of the employee’s “entry on duty” with the Agency. *Id.* Section f(2) states that “new employees covered by this section will be issued an allowance within the first week of employment.” *Id.*

³⁴ *Id.*

³⁵ Award at 14-15.

³⁶ *Id.*

³⁷ CBA at 66.

³⁸ We note that the Arbitrator was clearly disturbed by the Agency’s policy of not requiring employees to wear uniforms when augmented to custody posts. *See, e.g.*, Award at 15 (explaining that a uniform is a “sign . . . of authority” not provided to non-custody employees (quoting Tr. at 130-34)). And we share these concerns. However, because the record shows that the Agency does not impose this requirement, we feel constrained to agree that the award is contrary to the wording of the parties’ agreement.

³⁹ *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 58 FLRA 553, 554 (2003) (setting aside award after finding that the same contract provision at issue in this case did not entitle non-custody employees to a uniform allowance); *see also AFGE, Council of Prison Locs.* 33, 59 FLRA 381, 382-83 (2003) (upholding award finding that this same contract provision did not entitle non-custody employees to a uniform allowance). The Agency also argues that the Arbitrator exceeded authority by concluding that the Agency had an obligation to bargain over its augmentation of the non-custody employees to custody positions. Exceptions Br. at 24-28. But the Arbitrator did not order the Agency to bargain over this issue. Rather, the Arbitrator required the Agency to bargain over the purported change in the augmented non-custody employees’ “dress policy.” Award at 16 (emphasis added); *see also* Opp’n Br. at 26 (conceding that the Arbitrator did not direct the parties to negotiate augmentation, but rather to negotiate “a uniform allowance as it relates to the non-custody staff who are being regularly and routinely augmented”). Because we set aside the portion of the award finding a violation of this duty to bargain, we need not address the Agency’s exceeded-authority exception to the same portion of the award. *DOD*, 72 FLRA at 605 n.53.