

94 FLRR 1-1090

**AFGE, Local 3937 and Department of  
Health and Human Services, Social  
Security Administration, Region X,  
Auburn Teleservice Center, Auburn, WA  
Federal Labor Relations Authority**

0-AR-2519; 49 FLRA No. 72; 49 FLRA 785

**April 15, 1994**

**Judge / Administrative Officer**

**Before: McKee, Chairman, Talkin and  
Armendariz, Members**

**Related Index Numbers**

**44.361 Subjects of Bargaining, Conditions of  
Employment, Work Rules, Dress Code**

**44.5214 Subjects of Bargaining, Management  
Rights, Title VII/Civil Service Reform Act of 1978,  
Section 7106(a),**

**Hire/Assign/Direct/Furlough/Retain Employees -  
7106(a)(2)(A)**

**47.8611 Grievances/Grievance Arbitration,  
Grievance Arbitration Award, Review, Grounds,  
Violation of Law**

**47.8614 Grievances/Grievance Arbitration,  
Grievance Arbitration Award, Review, Grounds,  
Does Not Draw Its Essence From Agreement**

**72.612 Employer Unfair Labor Practices,  
Unilateral Change in Term or Condition of  
Employment, Established Practice**

**72.665 Employer Unfair Labor Practices,  
Unilateral Change in Term or Condition of  
Employment, Defenses to Unilateral Change,  
Management Prerogative**

**Case Summary**

THE EMPLOYER ACTED WITHIN ITS MANAGERIAL PREROGATIVE IN REFUSING TO ALLOW EMPLOYEES TO WEAR SHORTS WHILE AT WORK. The arbitrator had found no violation of the parties' agreement when the employer refused to allow five employees to wear shorts to work, sending four of them home (with pay) to change their attire [93 FLRR 2-1369]. The union

argued that the arbitrator had misapplied the law in his failure to conclude that the employer had committed a ULP by refusing to bargain over the change in dress code or over the implementation of such a change. The Authority rejected this argument. While the arbitrator erred in declining any authority to review a ULP charge, the parties had framed the issue at arbitration purely in terms of a contractual, not a statutory, violation. As a result, the award was not deficient as a matter of law. The Authority also rejected the union's argument that the award failed to draw its essence from the agreement. The employer's policy, which had not been changed during the term of the agreement, barred employees from wearing shorts. Moreover, there was no established practice of allowing employees to wear shorts contrary to the published policy. The union's exceptions were denied.

**Full Text**

**DECISION**

**I. Statement of the Case**

This matter is before the Authority on exceptions to an award of Arbitrator Gary L. Axon filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied a grievance that involved the stipulated issue of whether the grievants were required by the Agency to adhere to standards of dress or a dress code in violation of the National Agreement. The Union argues that the Arbitrator should have found that the Agency violated the Statute, that the Arbitrator misapplied the law, and that the award fails to draw its essence from the Agreement. We conclude that the Union's exceptions provide no basis for finding the award deficient. Accordingly, we will deny the exceptions.

**II. Background and Arbitrator's Award**

The Auburn Teleservice Center (ATSC) provides information to callers regarding social security benefits. The ATSC is not open to the public,

although visitors are permitted to observe its operations. Employees are allowed to wear casual clothing consisting of jeans, T-shirts, warm-up suits, and similar attire.

On one occasion in 1991, and on four occasions in 1992, a total of five employees wore shorts to work. The Agency counseled the employees that shorts were not acceptable attire and sent four of the employees home to change their clothes, allowing them paid leave to do so. All of the employees filed individual grievances claiming that they had not been treated fairly and equitably under the parties' collective bargaining agreement and that they had been disciplined without just cause. In this connection, the employees alleged that there was no dress code at the ATSC. The Agency denied the five grievances, which were consolidated for hearing before the Arbitrator.

The parties stipulated the following issue for arbitration:

Were the grievants required by management to adhere to standards of dress or a dress code in violation of the National Agreement?

If so, what shall the remedy be?

Award at 2.

The Arbitrator initially addressed the issue of whether the Agency's conduct in counseling the grievants and sending them home to change their clothes constituted discipline. The Arbitrator determined that the Agency's actions did not constitute discipline, based on: (1) his interpretation of the parties' agreement; (2) the fact that the grievants had not suffered a loss of pay or benefits when they were sent home to change; (3) the Agency's assertion that no discipline was intended; and (4) the absence of any claim of discipline during the pre-arbitration steps of the negotiated grievance procedure.

The Arbitrator then addressed eight arguments advanced by the Union. First, the Union argued that the Agency's dress policy was a bargainable matter and that the Agency's unilateral implementation of a

dress standard was an unfair labor practice. The Arbitrator determined that the Union's claim was raised in the wrong forum. He stated that his obligation was to interpret and apply the parties' national agreement in the context of applicable laws, rules, and regulations, and that it is the Authority's role to resolve unfair labor practice allegations. Noting the absence of evidence that the Union had raised the unfair labor practice issue with the Authority, which had then "deferred the matter to arbitration[.]" the Arbitrator declined to decide whether the Agency committed an unfair labor practice by failing to bargain over the dress standard. Award at 31.

Second, the Arbitrator addressed and rejected the Union's assertion that the Agency "bargained away" a national dress standard when it negotiated the parties' 1980 agreement. *Id.* at 32. The Arbitrator found that the current national agreement and its predecessors are silent on the subject of a dress policy.

Third, the Arbitrator rejected the Union's contention that there were no Agency dress standards that constituted past practices. Additionally, the Arbitrator found no evidence that there was a practice at the ATSC that allowed employees to wear shorts while on duty.

Fourth, the Arbitrator found unsupported the Union's claim that the Agency's Guide on Employee Conduct (Guide), which contains a dress standard, is not an enforceable regulation. According to the Arbitrator, there is a presumption that Agency rules and regulations are properly adopted and it was incumbent on the Union to prove otherwise, which the Union failed to do.

Fifth, the Arbitrator found that the Agency had not illegally implemented changes in its dress policy. In reaching this result, the Arbitrator found that the dress policy contained in the Guide had not changed during the life of the parties' agreement and, further, that there was no evidence that the Agency had varied from its policy of prohibiting employees from wearing shorts while on duty.

As to the Union's sixth argument, that the dress policy was not clearly communicated, the Arbitrator found that the grievants could not claim that they had no knowledge that shorts were unacceptable. However, the Arbitrator added that even if the grievants were unaware of the Agency's policy, the Agency cured any lack of communication when it counseled the grievants and sent them home to change their clothes.

Seventh, the Arbitrator addressed the Union's claim that in enforcing the ban on wearing shorts, the Agency had discriminated among employees on the basis of sex or age and was also "haphazard and lax" and, therefore, had not established just cause to support the grievants' discipline. *Id.* at 35. The Arbitrator concluded that the just cause provision of the parties' agreement did not apply because the grievants had not been disciplined. The Arbitrator also concluded that the charge of discrimination based on sex was "totally without merit[.]" and that the charge of discrimination based on age was not established "by competent evidence." *Id.* at 36. In addition, the Arbitrator noted that the ability to select one's own attire was not a personal right protected under the parties' agreement and, as a result, the Agency was free to establish reasonable standards of dress at the workplace.

Eighth, the Arbitrator responded to the Union's contention that even if there was an enforceable dress policy, the grievants did not violate that policy because their clothing was acceptable in the business community, was appropriate for the ATSC environment, and was not disruptive of the workplace. The Arbitrator found that the Agency's dress policy is contained in Section X(F) of the Guide, which provides guidance for employees and managers on appropriate dress at the workplace. The Arbitrator found that management's approach to a dress policy at the ATSC was consistent with the Guide and that, in fact, the ATSC at one time had a dress policy that mirrored the Guide. The Arbitrator found that management's application of the dress policy at the ATSC was extremely liberal and he

could not "fault management's application of the [Guide] on Employee Conduct standard on dress at the ATSC work site." *Id.* at 38. The Arbitrator further found that management retains the right to direct its workforce and, as such, "should be free to reasonably regulate and prescribe standards of personal attire at the job site." *Id.*

Based on the foregoing, the Arbitrator found that management at the ATSC had prohibited the wearing of shorts since the facility opened, that the rule was applicable to all employees, and that the Union failed to demonstrate that the policy was unreasonable or created a hardship on the grievants. Consequently, the Arbitrator concluded that the Agency's decision forbidding employees to wear shorts at the ATSC was within management's discretion to control and direct its workforce as prescribed in the management's rights section of the parties' agreement. Therefore, the Arbitrator found that management acted in conformity with the agreement when it counseled the grievants and sent them home to change their clothes. Accordingly, the Arbitrator denied the grievance.

### III. Positions of the Parties

#### A. Union

The Union argues that the Arbitrator's finding that only the Authority has jurisdiction to resolve unfair labor practice charges is "in violation of law" and fails to draw its essence from the parties' agreement. Exceptions at 2. Specifically as to the claimed violation of law, the Union states that provisions of the Statute contemplate that grievances can include alleged violations of the Statute. The Union maintains that, based on the evidence of the Agency's repeated refusals to bargain over the dress policy at the ATSC, the Arbitrator was "obligated by existing [Authority] case law to reach the unfair labor practice issues, to find violations of 5 USC [chapter] 71, and to order appropriate make whole remedies for the employees and the Union." *Id.* at 4.

The Union also argues that the Arbitrator misapplied law in finding that the Agency had the right to prescribe standards of personnel attire in

exercising its right to direct the workforce. The Union maintains that the Agency's dress policy was bargainable as to substance, impact, and implementation, and that it is not "an unrestrained retained management right" as the Arbitrator found. *Id.* at 5. In support of its argument, the Union states that the Authority has found proposals negotiable that related to agency dress policies and that an arbitrator is bound by Authority decisions, as well as laws, rules, and regulations, and not simply the "four corners" of an agreement. *Id.*

The Union further argues that the Arbitrator made no findings to indicate that the Union had waived its right to bargain over a dress policy. To the contrary, the Union notes the Arbitrator's finding that the parties were unable to reach agreement on a dress policy during contract negotiations and that the matter was left unresolved. The Union also claims that the Arbitrator overlooked the fact that even if negotiations at the national level had been unsuccessful, the Union retained the right to bargain over the practices, procedures, and arrangements for implementing a dress policy at the local level. In this regard, the Union states that the Arbitrator's finding that the Agency exercised its rights under section 7106(a)(2)(A) of the Statute unlawfully "superseded the Union's rights under 5 USC 7106(b)(2) and (3)." *Id.* at 6. In sum, the Union maintains that by unilaterally implementing a dress policy without affording the Union any notice or opportunity to bargain, the Agency violated sections 7106(b), 7114(b), and thereby 7116(a)(1), (5), and (8) of the Statute. *Id.* at 5.

Finally, the Union claims that the award fails to draw its essence from the parties' agreement because it directly contradicts the express language of the agreement. The Union explains that the agreement "specifically incorporated into its jurisdiction references to the parties' rights and responsibilities under 5 USC [c]hapter 71." *Id.* Thus, in the Union's view, the Arbitrator was required to determine whether those agreement provisions had been violated and to order appropriate remedies. The Union asserts

that the Arbitrator's failure to interpret and apply the provisions constituted an infidelity to the Arbitrator's obligation to apply all agreement terms and evidence a manifest disregard "for the parties' clear intent to incorporate the statutory provisions by reference into the contract." *Id.* at 5.

#### B. Agency

The Agency contends that the Arbitrator indirectly addressed all the unfair labor practice issues by finding that the Agency did not unlawfully implement a dress policy unilaterally and that ATSC management did not change either the existing dress policy or its application. For the same reason, the Agency also asserts that the negotiability of a dress policy is not at issue in this case. In the Agency's view, the Union is simply disagreeing with the Arbitrator's findings and conclusions. The Agency adds, however, that if there are issues that the Arbitrator failed to resolve, the case should be remanded for the limited purpose of addressing only the issues deemed appropriate by the Authority. In this regard, the Agency maintains that there is no need to vacate the entire award.

#### IV. Analysis and Conclusions

The Union contends that the award is contrary to law because the Arbitrator failed to find that the Agency violated the Statute by changing its dress policy without bargaining with the Union over the change or the impact of that change. We disagree that the Arbitrator was required to resolve the grievance under either section 7106 or section 7116 of the Statute. Significantly, in this regard, we note that the parties framed the issue solely in terms of a contractual, not a statutory, violation. Therefore, the Arbitrator appropriately determined that he was authorized to resolve only the issue of whether the Agency had violated the national agreement by its conduct.\* Accordingly, the Union has not established that the award is deficient because the Arbitrator failed to determine whether the Agency violated the Statute by its actions.

The Union also contends that the award fails to

draw its essence from the parties' agreement because the Arbitrator disregarded language in the agreement incorporating the rights and responsibilities embodied in the Statute. In order for the award to be found deficient because it does not draw its essence from the collective bargaining agreement, the Union must establish one of the following: (1) the award cannot in any rational way be derived from the collective bargaining agreement; (2) the award is so unfounded in reason or in fact, so unconnected with the wording and purposes of the collective bargaining agreement, as to manifest an infidelity to the obligation of the Arbitrator; (3) the award evidences a manifest disregard of the collective bargaining agreement; or (4) the award does not represent a plausible interpretation of the collective bargaining agreement. For example, U.S. Department of the Air Force, Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma and American Federation of Government Employees, Local 916, 47 FLRA 98, 100-01 (1993) [93 FLRR 1-1056]. The Union has not demonstrated by any of these measures that the award does not draw its essence from the collective bargaining agreement.

The Arbitrator expressly found that the Agency had not changed its dress policy during the life of the parties' agreement. In light of that finding, the Arbitrator properly proceeded to determine whether the Agency's dress policy permitted employees to wear shorts while on duty. The Arbitrator found that there was no past practice allowing the wearing of shorts and that the parties' agreement was silent on the subject of a dress policy. The Arbitrator then proceeded to examine the applicable Agency regulation, the Guide, and determined that, under the agency's consistent policy, employees could not wear shorts while on duty. In these circumstances, the Union has not shown that the Arbitrator's conclusion that the Agency was merely enforcing its consistent dress policy in prohibiting the wearing of shorts is irrational, implausible or unconnected with the wording of the agreement. Rather, in continuing to contend that the Agency unlawfully changed its

policy, the Union is merely disagreeing with the Arbitrator's findings and attempting to relitigate this issue before the Authority. Such contentions do not provide a basis for finding the award deficient. See U.S. Department of Defense, National Guard Bureau, Michigan Air National Guard and Association of Civilian Technicians, Michigan State Council, 48 FLRA 755, 761 (1993).

Accordingly, we conclude that the award is not deficient on either ground asserted by the Union.

#### V. Decision

The Union's exceptions are denied.

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\* Although not relevant to this case, the Arbitrator erred insofar as he concluded that, in general, an arbitrator has no jurisdiction to resolve unfair labor practice issues. Section 7103(a)(9)(C)(ii) of the Statute defines the term "grievance" broadly to include "any claimed violation . . . of any law, rule, or regulation affecting conditions of employment[.]" Thus, an employee or union may allege in a grievance that an agency violated any law, including the Statute. U.S. Department of Health and Human Services, Region V and National Treasury Employees Union, Chapter 230, 45 FLRA 737, 743-44 (1992) [92 FLRR 1-1243]. In addition, section 7123(a)(1) of the Statute, which precludes judicial review of Authority decisions in arbitration cases unless the decision involves an unfair labor practice under the Statute, clearly contemplates the arbitration of grievances involving unfair labor practices. *Id.* at 743. See also *Internal Revenue Service v. FLRA*, 963 F.2d 429 (D.C. Cir. 1992) [92 FLRR 1-8021]; *National Treasury Employees Union and Federal Deposit Insurance Corporation, Washington, D.C.*, 48 FLRA 566, 570-71 (1993) [93 FLRR 1-1239]. However, an arbitrator's authority to determine unfair labor practice issues derives from the issue that is presented to him. See *American Federation of Government Employees, Local 916 and U.S. Department of the Air Force, Oklahoma City Air Force Logistics Command, Tinker Air force Base, Oklahoma*, 46

FLRA 1338, 1342-43 (1993) [93 FLRR 1-1032].