FEDERAL MEDIATION AND CONCILIATION SERVICE

BEFORE ARBITRATOR MARY ELLEN SHEA

In the matter of the arbitration between:	*	
	*	
U.S.P., LEAVENWORTH	*	FMCS NO. 15-57070-7
-and-	*	Grievance re Safety-Toed Shoes
A.F.G.E., LOCAL 919	*	
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INTRODUCTION

A demand for arbitration was filed by AFGE, Local 919, pursuant to the parties' collective bargaining agreement and in accordance with procedures established by the Federal Mediation and Conciliation Service. The parties jointly selected Mary Ellen Shea to act as single neutral arbitrator in the matter. A hearing was held on April 7, 2016, at the United States Penitentiary in Leavenworth, Kansas.

AFGE, Local 919 (the Union), was represented by James Thomasee, the Local President; assisted by Russ Gildner, Local Steward. U.S.P. Leavenworth (the Agency) was represented by John W. Weeks, Labor Relations Specialist; assisted by Robert Eastburn, Human Resource Manager. The following witnesses appeared and testified at the hearing: James Thomasee, Local President; Joseph Gulley, Second Vice President; Claude Maye, the Warden; and Fred Messina, the former Human Resources Manager. The parties submitted post-hearing briefs at which time the record was closed.

ISSUE STATEMENTS

The parties did not agree on the statement of issue(s) to be arbitrated. In accordance with Article 32, Section a, requires that "each party shall submit a separate submission and the

arbitrator shall determine the issue or issues to be heard". The Agency submitted following:

> Did the Agency violate the Master Agreement, Laws or Policy on June 1, 2015 with the way staff members procured boots? If not, deny the grievance. If so what shall the remedy be?

The Union submitted the following:

> Did the Agency violate the Master Agreement, Laws or Policy on June 1, 2015 with the issuance of a new (boot) procurement procedure? If not, deny the grievance. If so what shall the remedy be?

At the crux of the parties' dispute is an Agency memo stating (in part), "effective June 1, 2015, a number of changes will be made to the boot program". I have determined that, consistent with the issues, alleged violations, and remedy requested in the written grievance (Joint Exhibit #2), the issues shall be stated as follows:

> Did the Agency violate the Master Agreement, Laws or Policy when it issued the May 20, 2015 Memorandum about the boot program? If not, deny the grievance. If so what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

The Master Agreement is effective July 21, 2014 through July 20, 2017, and contains the following pertinent provisions:

ARTICLE 4 – RELATIONSHIP OF THIS AGREEMENT TO BUREAU POLICIES, REGULATIONS, AND PRACTICES

> Section a. In prescribing regulations relating to personnel policies and practices and to conditions of employment, the Employer and the Union shall have due regard for the obligation imposed by 5 USC 7106, 7114, and 7117. The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level.
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> 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.

ARTICLE 7 – RIGHTS OF THE UNION

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Section b. In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligations imposed on it by the statute and this Agreement. This includes, in accordance with applicable laws and this Agreement, the obligation to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority in accordance with the Federal Labor Management Statute.

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ARTICLE 9 – NEGOTIATIONS AT THE LOCAL LEVEL

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Section d. Once an agreement has been reached at the local level, it will be reduced to writing within fifteen (15) calendar days from the conclusion of negotiations. The local will then have thirty (30) calendar days to complete the ratification process..… If ratified, the parties will meet within seven (7) calendar days to sign and date the entire agreement.

1. once the supplemental agreement has been ratified, signed, and dated, the proposed agreement will be forwarded to the Labor Relations Office by local Management and another copy will be forwarded by the local Union to its Regional Vice President. Incomplete, unsigned, or undated agreements will be returned to the parties without action. The parties at the national level will have forty (40) calendar days from the date that the proposed agreement was signed to independently review the agreement and determine if the proposed agreement complies with the provisions of this Agreement and applicable laws and regulations; and
2. the parties at the national level will independently notify their counterparts at the local level of the results of their reviews before the expiration of the forty (40) day time limit. The reviewing parties at the national level will serve on each other copies of their reviews as they are sent to the local level. At the end of the forty (40) day review period, the local supplemental agreement will go into effect, except for those provisions which have been found by either party to be in conflict with this Agreement or applicable laws and regulations. Such conflicting provisions will be returned to the parties at the local level with explanations, at which time the local parties will do one of the following:
    a. implement the agreement as modified by the review;
    b. renegotiate the stricken provisions; or
    c. contest the striking through appropriate appeal

procedures, as outlined in Section c. of this article.

ARTICLE 27 - HEALTH AND SAFETY

Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:

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With respect to the second, the Employer agrees to furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders.

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ARTICLE 28. UNIFORM CLOTHING

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Section g. Safety-toed 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.

1. safety shoes will be worn by all employees who work in areas designated as foot hazard areas by the institution supplement; and
2. each eligible employee is entitled to two (2) pairs of shoes and/or boots on initial issue and one (1) pair every nine (9) months thereafter.

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When the current Master Agreement (above) was ratified, the Local Supplement had been in effect for 16+ years and contained the following pertinent provisions:

ARTICLE 28 – UNIFORM CLOTHING

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A supplemental clothing allowance of $110 year will be given to each uniformed employee to purchase shoes/boots. This will be increased by 5% each year of this contract.[1] Any special footwear required by the agency will be purchased by the agency. The quality of such footwear to be negotiated by the Local and the Employer. Upon entry into a uniform to position, the employee will be given $175.

Upon ratification of the current Master Agreement, the local parties negotiated changes to the Local Supplement. The (above) provision was changed as follows:

[1] At the time of the grievance, the safety footwear allowance was $252.00.

ARTICLE 28 – UNIFORM CLOTHING

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Section c. All uniformed employees will be entitled to an allotment of $200 per year to obtain a pair of safety-toed shoes/boots. This allotment will increase by 2% every other year during the life of this agreement. The first increase would occur on January 1, 2017. Employees with safety-toed shoe/boot need of a specialty type (i.e. electricians) will have their safety-toed shoe/boot purchased by the employer, if requested. Management will consider all vendors proposed by the local for purchase of safety-toed shoes/boots and will ordinarily approve the proposed vendor unless prohibited by law or a government wide regulation. All payments for these items will be between the agency and the vendor. Staff will travel on their own time and expense to approved vendors store location if they choose not to purchase from an online vendor. The employees will have 60 days from the beginning of the month of their annual uniform allowance to obtain their boots/shoes.

BACKGROUND

This grievance arose between AFGE, Local 919, and USP Leavenworth and concerns the implementation of renegotiated language regarding safety footwear.

USP Leavenworth is a medium-security facility, one of 122 institutions within the Federal Bureau of Prisons. At the national level, the Union and the Employer are parties to a collective bargaining agreement, the "Master Agreement", (Joint Exhibit #1). The Master Agreement applies to all 122 facilities within the Federal Bureau of Prisons. In addition, AFGE, Local 919 and local management at USP Leavenworth are also parties to a Local Supplement (Union Exhibit #2).

Once the current Master Agreement was finalized, AFGE Local 919 and local management had the option of re-negotiating the Local Supplement, which had not been changed since 1998. Specifically, the following provision regarding safety footwear had been in effect for 16+ years:

> A supplemental clothing allowance of $110 year will be given to each uniformed employee to purchase shoes/boots. This will be increased by 5% each year of this contract. Any special footwear required by the agency will be purchased by the

> agency. The quality of such footwear to be negotiated by the Local and the Employer. Upon entry into a uniform position, the employee will be given $175. (Union Exhibit #2)

The parties opted to renegotiate the Local Supplement and agreed on changes to the safety footwear provision:

> Section c. All uniformed employees will be entitled to an allotment of $200 per year to obtain a pair of safety-toed shoes/boots. This allotment will increase by 2% every other year during the life of this agreement. The first increase would occur on January 1, 2017. Employees with safety-toed shoe/boot need of a specialty type (i.e. electricians) will have their safety-toed shoe/boot purchased by the employer, if requested. Management will consider all vendors proposed by the local for purchase of safety-toed shoes/boots and will ordinarily approve the proposed vendor unless prohibited by law or a government wide regulation. All payments for these items will be between the agency and the vendor. Staff will travel on their own time and expense to approved vendors store location if they choose not to purchase from an online vendor. The employees will have 60 days from the beginning of the month of their annual uniform allowance to obtain their boots/shoes. (Employer Exhibit #1)

In accordance with Article 9, Section (d) 1, the Local Supplement was submitted for review at the national level. The review found that a number of provisions conflicted with the Master Agreement and were struck from the newly negotiated Local Supplement. Specifically, the first and last sentences of Article 28, Section c, were struck because they were found to be inconsistent with the Master Agreement:

> All uniformed employees will be entitled to an allotment of $200 per year to obtain a pair of safety-toed shoes/boots. (first sentence)
>
> The employees will have 60 days from the beginning of the month of their annual uniform allowance to obtain their boots/shoes. (last sentence)

According to testimony by Fred Messina, HR Manager, he learned about the "stricken provisions" or about May 18, 2015 and arranged to meet with Union President, James Thomasee. He and another management official met with Mr. Thomasee and explained they wanted to discuss implementation of the new Local Supplement, given that a number of provisions had

been stricken. Mr. Messina testified, "He [Thomasee] didn't know what we were talking about, [and said] we couldn't implement anything, and walked out of the meeting. He said he wasn't going to participate." Mr. Messina followed up by email to Mr. Thomasee:

> Although I know you said you didn't want anything to do with the implementation of this supplement, I am providing you with what was left of the agreement after the stricken language was removed. If you have any questions or think I remove something that was not stricken let me know, I will be sending it to have it printed on Wednesday. (Employer Exhibit #3)

Mr. Thomasee testified that he never said he did not want to implement but the way the Agency proposed to implement the Local Supplement was prohibited without the consent of both parties. He had responded to Mr. Messina's email the same day:

> Don't attempt to put words into my mouth or speak for me. I would obviously be involved in a proper implementation of our Local Supplement, however, your interpretation of the Master Agreement concerning implementation of stricken and contested provisions is clearly flawed, and your insistence on implementation anyway is a matter of administrative convenience and cost savings. Management's pretended involvement of the Union is disingenuous at best.
> (Employer Exhibit #3)

Mr. Messina's understanding was that the Agency had fulfilled its obligation by offering to discuss the matter with the Union and that the Union's rejection of the offer was a waiver of any rights. Mr. Messina testified the Agency was required to implement the Local Supplement without the stricken language and issued the May 20, 2015 Memorandum to explain the changes to the employees:

> In accordance with the new Local Supplemental Agreement, effective June 1, 2015[2], a number of changes will be made to the boot program. The changes are as follows:
>
> First, the institution will only be providing safety footwear to those uniformed

[2] Implementation was delayed for a period of time to allow a second review of the Local Supplement at the national level. The result of the second review did not resolve the parties' dispute and the original decision (to strike the first and last sentences) was affirmed.

> staff who work in foot hazard areas. The foot hazard areas as outlined in Institutional Supplement LVN – 1600.09B are: Armory/Lockup, Closing Issue/Laundry, Commissary, Education Industrial Vocational Training, Facilities, Food Service, Rear Gate, Receiving Depots, Tool Room, and Unicor. Correctional Services staff who are assigned quarterly posts at the Rear Gate will receive safety footwear when the quarterly roster is issued for the upcoming quarter, but no more frequently than every nine months.
>
> Second, staff will receive safety footwear will be eligible for one pair of new footwear every nine months with an allowance of $200. The full boot allowance will be available for the purchase of safety footwear every nine months. As a result of this change, the eligibility month will no longer be tied to the staff members' anniversary month, but will be nine months after the staff member's most recent eligibility month.
>
> Finally, the boot vendors that staff will have the option of using will change as of June 1, 2015. The new vendors are E. Edwards Workwear (locations in Kansas City, Kansas; Olathe, Kansas; and Grandview, Missouri), The Shoe Box (located in Leavenworth Kansas), and Redwing (locations in Kansas City, Missouri; Mission, Kansas; and Overland Park, Kansas). Other vendors may be added in the future, but these are the only three that will be available on June 1, 2015.
>
> (Union Exhibit #1)

The Union filed a grievance on June 5, 2015, alleging violations of the Master Agreement at Article 28, Section g, and Section i; Article 27, Section a; Article 7, Section b; Article 4, Section a, b, and c; 5 USC 7116; US Back Pay Act, and "any other rules, regulations, practices or statutes that were violated." The Union stated the grievance as:

> Management at USP Leavenworth has implemented new boot procurement procedures without prior negotiations with the Union, thereby depriving numerous staff of previously negotiated and agreed to footwear. This action endangers the health and safety of staff, as well as violating the Local Supplement, Master Agreement, and long-standing Local practice.
>
> The Union identified this as a continuing violation that first occurred on June 1, 2015.

The remedy requested was:

1. The agency be ordered to immediately cease and desist from these changes and return to the *status quo ante* concerning all footwear procurement procedures.
2. Make whole any staff damaged in any way by the action.

3. The agency pay any and all attorney fees.
4. Anything else deemed necessary by the arbitrator.

(Joint Exhibit #2)

The Employer denied the grievance. Warden Maye sent the following letter dated July 2, 2015 to Mr. Thomasee:

> This is in response to the grievance received on June 5, 2015, on behalf of the American Federation of Government Employees Local 919....
>
> ***
>
> … On May 1, 2015, the Union and Management received the Local Supplemental Agreement back from the legal review that was completed at the Labor Relations Office. Master Agreement, Article 9, Section 2, states "At the end of the 40-day review. The local supplemental agreement will go into effect, except for those provisions which of been found by either party to be in conflict with this Agreement or applicable laws and regulations." In regards to safety toed footwear, the language struck out of the local Supplemental Agreement provided one pair to all uniform staff every 12 months. This part of the provision was in conflict with the Master Agreement, Article 28, Section g, which provides safety toe footwear every nine months and "when such employees work in a designated foot hazard area. Therefore the provision in effect is a combination of the Master Agreement and the new Local Supplement.
>
> Master Agreement, Article 28, section i, states "any additional uniform items, when appropriate for health and safety reasons, will be negotiated at the local level." Safety toed footwear is not an additional item, as they have already been specifically negotiated in the Master Agreement under Section g of this article.
>
> In regards to Article 27, Section 8, if staff do not work in a foot hazard area the agency, as the employer, has furnished "employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Thus we have met the obligations of Article 27 Section a.
>
> Regarding Master Agreement, Article 7, Section b, Management attempted to meet with you on May 18, 2015, and discuss the new Local Supplement that was in effect, and how to implement the provisions that were not struck, as provided for in Article 9, Section d (2). You stated in the meeting that you wanted no part of implementing the new supplement and walked out of the room.
>
> In regards to Master Agreement, Article 4, Sections (a) (b) (c), safety toed footwear is specifically addressed in the Master Agreement and Local Supplement, therefore it is not a past practice. The safety toed boot procedures are a combination of the Master Agreement and new Local Supplement both of which

were negotiated.

> The grievance lacks specificity in regards to alleged violations of 5 USC 7116, and the US Back Pay Act. Therefore, I am unable to provide in response to these. Based on the above, your grievances denied for lack of merit, as well as rejected due to lack of specificity. (Joint Exhibit #3)

The parties were unable to resolve the grievance, which was subsequently submitted to arbitration.

POSITIONS OF THE PARTIES

THE UNION

The Union argues that the Agency violated the Master Agreement, the Local Supplement and past practice regarding safety footwear as evidenced by the June 1, 2015 memorandum announcing "changes", which clearly deviated from existing agreements and past practice and which were not negotiated with the Union as required.

The Union argues the Agency failed to provide prior notice of changes to the safety footwear program; failed to negotiate over the changes; and failed to negotiate over the impact of the changes before issuing the May 20, 2015 memorandum. As the exclusive representative of the bargaining unit (Article 1-Recognition), the Agency must first notify the Union of such changes and negotiate to agreement about such changes (Article 4-Relationship of this Agreement to Bureau Policies, Regulations, and Practices). In addition, the Union points to Article 3-Governing Regulations[3], which requires the Agency to "meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment…prior to implementation". The Union notes the "obligation to notify the Union of any changes in conditions of employment" is reiterated at Article 7-Rights of the Union.

[3] Note: the Union did not refer to Article 3 in its written grievance (Joint Exhibit #2).

According to the Union, the Agency announced several changes to the safety footwear program in the May 20, 2015 memo (Union Exhibit #1), including a decision that management "will only be providing safety footwear to those uniformed staff who work in foot hazard areas"; a decision that eligible bargaining unit members would receive "an allowance of $200[4]"; and a decision to change members' choice of vendors: "only three [will] be available on June 1, 2015". The Union pointed to evidence and testimony that some bargaining unit members who had been "ineligible" for safety footwear on/after June 1, 2015 were, nonetheless, assigned to work in foot hazard areas (including "standing mainline") in violation of Article 27-Health and Safety. The Union contends the Agency violated the collective bargaining agreement and/or past practice by its unilateral implementation of changes to the safety footwear program.

The Union asks that the arbitrator order the Agency to return to the procedures in place prior to June 1, 2015 (*status quo ante*); order the Agency to provide safety toed footwear to all uniformed employees in accordance with the long-standing practice and procedures until such time as the Local Supplement issues are adjudicated, resolved or re-negotiated; order that within 30 days of the decision, the Agency offer safety toed footwear to every eligible employee denied such footwear since June 1, 2015; and order the Agency to maintain all agreed-upon vendors[5] to ensure staff access to safety footwear. The Union asks that the Arbitrator retain jurisdiction for a period of no less than 90 days to resolve any issues concerning implementation of the remedy.

THE AGENCY

The Agency denies it violated the Master Agreement, Laws or Policy when it issued the May 20, 2015 memorandum explaining the way staff members would procure safety footwear

[4] Note: prior to arbitration, the Agency corrected the amount of the allowance.

because the Agency met all its bargaining obligations. Contract language regarding safety footwear was negotiated and ratified at the national level and was then included in the Master Agreement. In addition, language regarding safety footwear was negotiated and ratified at the local level and included in the Local Supplement. In accordance with the negotiated review procedure for Local Supplements (Article 9), some sentences were stricken because they were not consistent with the Master Agreement. Local management (Messina) offered to discuss implementation of the Local Supplement but the Union President refused to discuss the matter, thereby waiving any Union right to provide input about the May 20, 2015 Memorandum to employees.

The Agency points out that Article 9 required the Local Supplement be implemented ("the local supplement will go into effect, except for those provisions [which have been stricken]"). The Agency complied by issuing the May 20, 2015 memorandum, which simply explained changes resulting from the negotiated agreements (national level, local level, and the negotiated review procedure). The Memorandum did not trigger a bargaining obligation.

The Agency argues that the arbitrator does not have authority to order the remedy requested by the Union (*status quo ante*) because it would require joint agreement of the parties. The Agency also argues that the Union failed to establish that any staff member who was not issued safety footwear suffered any harm. Finally, the Agency argues that payment of attorney fees is not warranted since the Union was not represented by an attorney at hearing and offered no evidence of attorney involvement.

The Agency concludes the Union has not met its burden of proof and asks that the arbitrator deny the grievance in its entirety.

DISCUSSION

The question is whether the Agency violated the Master Agreement, Laws or Policy when it issued the May 20, 2015 Memorandum about the boot program. First, it is noted that the Union did not offer testimony or evidence at hearing about other violations it alleged in the written grievance: "5 USC 7116; US Back Pay Act, and any other rules, regulations…or statutes". Because the Union did not address these other alleged violations (except to quote contract language that references to 5 USC 7106, 7114, and 7117), the Union has not met its burden of proving the Agency violated 5 USC 7116, the US Back Pay Act, and/or any other rules, regulation or statutes.

The Union's evidence and testimony do establish violations of the collective bargaining agreement and/or past practice when the Agency failed to give the Union notice and/or failed to engage in bargaining before issuing the May 20, 2015 memorandum and later implementing changes to the boot program.

The Union presented evidence that the Master Agreement required the Agency to provide notice and to engage in bargaining. Articles 4 and 7 describe various circumstances when the Agency is required to provide notice to the Union and/or to engage in bargaining:

> Article 4, Section a. …. The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level.
>
> Article 4, 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.
>
> Article 4, 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.

> Article 7….. In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will …. notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate…

The Union presented evidence that the May 20, 2015 memorandum announced changes that triggered one or more of these bargaining obligations. For example, changes to the procurement procedure, generally, were "changes in working conditions at the local level" (Article 4, Section a). Another example was the change of the past practice regarding the timing of the boot allowance to either, "when the quarterly roster is issued" or "nine months after the…most recent eligibility month". These changes were "matters which [were] not covered in supplemental agreement" (stricken provisions) and were negotiable matters (Article 4, Section b). The Union established by a preponderance of the evidence, that the Agency violated the collective bargaining agreement and/or past practice when it failed to give the Union notice and/or failed to engage in bargaining with the Union before issuing the May 20, 2015 memorandum and unilaterally implementing changes to the boot program.

The Union has established a *prima facie* case of contract violations and the burden now shifts to the Agency to disprove the Union's claims or offer a defense. The Agency introduced evidence and testimony in defense of its actions and to rebut the Union's claims. If the Agency's evidence and testimony effectively refute the Union's claims, the grievance must be denied.

The Agency contends the Union's grievance specifically relates to the provisions stricken from the Local Supplement and, for this reason, the dispute is governed by Article 9, not Article 4 or Article 7. According to the Agency, it complied with Article 9 procedures for implementing the Local Supplement and fulfilled any bargaining obligations it required. The May 20, 2015 Memorandum did not constituted a change and did not trigger a bargaining obligation. The

Memorandum combined changes that had already been negotiated at the national level, the local level and as a result of the negotiated review procedure (Article 9). The evidence and testimony offered by the Agency, however, do not support the its arguments.

Once they were notified that the Local Supplement had "conflicting provisions", the parties were required to address the stricken provisions by pursuing one of three options (Article 9, Section d):

> Section d. ….At the end of the forty (40) day review period, the local supplemental agreement will go into effect, except for those provisions which have been found by either party to be in conflict with this Agreement …Such conflicting provisions will be returned to the parties at the local level with explanations, at which time the local parties will do one of the following:
>
> a. implement the agreement as modified by the review;
> b. renegotiate the stricken provisions; or
> c. contest the striking through appropriate appeal procedures, as outlined in Section c. of this article.

The first option allows the "local parties" (both parties, not one) to implement the Local Supplement without the stricken language. This means the local parties must agree to implement the Local Supplement without the stricken language (and without further negotiation). The Agency acknowledges the Union did not agree to this option.

The second option allows the parties to "renegotiate the stricken language". The Agency contends the Union waived this option thereby releasing the Agency to implement the revised procurement procedure described in the May 20, 2015 Memorandum. This is not supported by the evidence. First, there is no indication that "waiver" is an included option at Article 9, Section d (b). In addition, an agreement to implement while waiving bargaining would duplicate the first option. Also, there is no evidence that Article 9, Section d, includes an option to unilaterally implement changes (if the Union waives bargaining and) even if the unilateral changes are consistent with the Master Agreement. Finally, the evidence does not support the Agency's claim

that the Union did not want to be involved in implementation or that the Union effectively waived its right to negotiate:

> Don't attempt to put words into my mouth or speak for me. I would obviously be involved in a proper implementation of our Local Supplement, however, your interpretation of the Master Agreement concerning implementation of stricken and contested provisions is clearly flawed….
>
> (Employer Exhibit #3)

The third option provides an appeal procedure "to contest the striking". The Union did not pursue this option because it does not question the validity of the national-level review of the Local Supplement. Nor was there any evidence the Agency "contested the striking".

Despite the contractual mandate that the local parties will pursue one of the three options at Article 9, Section d, the Union and local management had not fulfilled this requirement when the Agency issued the May 20, 2015 memorandum announcing changes to the boot program. For these reasons, I do not agree that the Agency was exempt (or excused) from notice and bargaining obligations because of Article 9 or because the May 20, 2015 memorandum was simply the combined result of negotiated agreements. I find the Agency's decision to issue the May 20, 2015 memorandum and making unilateral changes to the boot program was not permitted by Article 9. The Union correctly argued that Article 4 and Article 7 required the Agency to provide notice to the Union and engage in bargaining with the Union before implementing changes to the boot program.

The Union had also submitted testimony and evidence that some employees were denied the safety footwear allowance on/after June 1, 2015, and were later assigned to work in a foot hazard area (such as "standing mainline"). The Agency objected, saying there was no evidence that any employee suffered harm. The Union is not required to prove harm in order to prove a contract violation. There is no dispute that the Master Agreement requires the Employer to

provide safety footwear, "when such employees work in a designated foot hazard area" (Article 28, Section g). This means the employee must be provided safety footwear at the time s/he is required to work in a foot hazard area. There is no exception for an occasional or short assignment to a foot hazard area. I find the Agency violated the collective bargaining agreement when an employee was denied a safety footwear allowance on/after June 1, 2015 and was later assigned to a foot hazard area.

Foot hazard areas are determined by the Safety Department and are listed in Institution Supplement, LVN-1600.09 (Employer Exhibit #2). The list includes "All Food Service Departments" but the parties could not agree whether this includes the dining halls (which is where most officers are when they "stand mainline"). Most officers are required to "stand mainline" for every meal and the assignment can last an hour or more. Officers are stationed in the dining halls and in the vicinity of the dining halls. The officers monitor the inmates as they move through lines, get their food trays, move to the dining areas, and for the duration of each meal. The Union argued that the dining halls and vicinity are included in "All Food Service Departments" and are "foot hazard areas". The Agency disagrees. The Institution Supplement (Employer Exhibit #2) does not explain or define the precise areas that are included (or not included) in "All Food Service Areas". If other evidence exists to clarify the meaning of "All Food Service Departments", it was not submitted. I find the Union has not met its burden of proof that "standing mainline" is in a foot hazard area. (This is a conclusion about the sufficiency of proof, not about the meaning of "All Food Service Departments".)

The Union also argued that the Agency violated the contract or past practice when it changed the "agreed-upon vendors". According to the current Local Supplement,

> …Management will consider all vendors proposed by the local for purchase of

> safety-toed shoes/boots and will ordinarily approve the proposed vendor unless prohibited by law or a government wide regulations….

The Union offered no testimony or evidence to establish that the parties had agreed on certain vendors, which vendors had been changed, or whether the Agency had improperly rejected vendors proposed by the Union. The Union has not met its burden of proving the Agency violated the contract or past practice by changing agreed-upon vendors. Similarly, the Union offered no testimony or evidence to support its remedy request that the Agency be ordered to pay attorney fees.

In summary, the Union established a *prima facie* case that the Agency violated the collective bargaining agreement or past practice when it issued the May 20, 2015 Memorandum and made changes to the boot program. The Agency's evidence and testimony failed to prove a legitimate or contractual defense and failed to rebut the Union's case.

In conclusion, I find the Agency violated the collective bargaining agreement and/or past practice when the Agency issued the May 20, 2015 Memorandum making unilateral changes to the boot program without prior notice to the Union and without engaging in bargaining with the Union over the changes. I also find the Agency violated the collective bargaining agreement and/or past practice when it denied the safety footwear allowance to some employees on/after June 1, 2015 and later assigned the same employees to work in a foot hazard area.

REMEDY

The Union asked that the arbitrator issue a *status quo ante* remedy; require the agency to "provide safety footwear to all bargaining unit employees"; and "to maintain all agreed-upon vendors…until such time as the Local Supplement issues are adjudicated, resolved or re-negotiated". The requested remedy cannot be granted because it conflicts with the parties'

agreed-upon limits to an arbitrator's authority at Article 32, Section h:

> The arbitrator's award shall be binding on the parties….The arbitrator shall have no power to add to, subtract from, disregard…any of the terms of…this Agreement….

The *status quo ante* remedy requested by the Union must be denied. An order requiring a return to the procedures in place prior to June 1, 2015 and an order that the Agency provide all employees with safety footwear requires the arbitrator to disregard, either Article 28, Section g (mandates safety footwear "when…employees work in a designated foot hazard area") or Article 9, Section d (requiring implementation of Local Supplement "except for those provisions which have been found by either party to be in conflict with this Agreement").

> … the local supplemental agreement will go into effect, except for those provisions which have been found by either party to be in conflict with this Agreement…at which time the local parties will do one of the following…

As remedy, the Agency is hereby ordered to immediately rescind the May 20, 2015 memorandum and any references to it or the changes it describes and which changes were implemented on or after June 1, 2015. The Agency is further ordered to engage in retroactive bargaining[6] with the Union over changes to the boot program. The Agency is further ordered to offer the safety footwear allowance to any bargaining unit employee who was denied such footwear on/after June 1, 2015 and who was then assigned to work in a designated foot hazard area. Regardless of the actual date the employee is offered the safety footwear allowance, the employee's "eligibility month" will be the month s/he was first assigned to work in a designated foot hazard area after being denied the safety footwear allowance.

The Union's request that the arbitrator retain jurisdiction to resolve remedy issues assumed complications arising from a *status quo ante* remedy and is not necessary here.

[6] "retroactive bargaining": as if bargaining prior to May 20, 2015.

AWARD

The Agency violated the Master Agreement and/or past practice on June 1, 2015 when it issued the May 20, 2015 Memorandum and made changes to the boot program.

The Agency is hereby ordered to immediately rescind the May 20, 2015 memorandum and any references to it or the changes it describes and which changes were implemented on or after June 1, 2015.

The Agency is hereby ordered to engage in retroactive bargaining with the Union over changes to the boot program.

The Agency is hereby ordered to offer the safety footwear allowance to any bargaining unit employee who was denied such allowance on/after June 1, 2015 and who was then assigned to work in a foot hazard area. Regardless of the actual date the employee is offered the safety footwear allowance, the employee's "eligibility month" will be the month s/he was first assigned to work in a foot hazard area after being denied the safety footwear allowance.

Mary Ellen Shea, Arbitrator
July 7, 2015