

IN THE MATTER OF THE ARBITRATION BETWEEN

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: **U.S. Department of Labor** :  
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: - and - :  
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: **National Council of Field Labor Locals** :  
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Grievance: Marvin Lindsey  
ARBN-EBSA-05-06-031  
FMCS No. 060621-04001-A

APPEARANCES

For the Union:

Dennis DeMay, Vice-President, National Council of Field Labor Locals.  
Marvin Lindsey, Senior Investigator; Steward L. 2089; Grievant.  
James Weyrauch, Executive Vice-President, NCFLL.  
Lori Summers, Senior Investigator EBSA; Shop Steward, L. 2519.  
Mark Stewart, ESA, WHD Investigator; Shop Steward, L. 2089.  
Jean Bracken, Investigator EBSA; Treasurer, L. 648.

For the Employer:

Linda Hastings, Esq., Attorney.  
Lin Bartucca, Technical Advisor.  
Joe Menez, Regional Director, EBSA Cincinnati Regional Office.  
Susan Fultz, Supervisor, EBSA Cincinnati Regional Office.

Before:

Roy Francis, Arbitrator  
*Federal Mediation and Conciliation Service*

DATE: January 13, 2007  
TIME: 9:00 a.m.  
PLACE: Department of Labor  
1885 Dixie Highway  
Ft. Wright, Kentucky

## **Introduction**

The Union and Employer are parties to a Collective Bargaining Agreement providing for the arbitration of disputes before an Arbitrator designated by the Federal Mediation and Conciliation Service. In accordance therewith, and at the request of the parties, the undersigned was selected as the Arbitrator. A hearing was held on January 13, 2007, in Ft. Wright, Kentucky.

Full opportunity was afforded the parties to be heard, to offer evidence and argument, and to examine and cross-examine witnesses.

## **Background**

Grievant Marvin Lindsey has been a senior investigator with the Department of Labor (DOL) since 1991. He has been employed by the DOL since October of 1983, and has held the position of Union steward for many years.

The Grievant stated that he came to work wearing blue jeans on Friday, October 28 and Friday, November 4, 2005, without incident. The following November 10, a Thursday (but the last work day of that week, as Friday the 11<sup>th</sup> was Veteran's Day), he again came to work wearing blue jeans. His supervisor, Susan Fultz, noticed his attire and discussed the matter with the CinRO Regional Director, Joe Menez. Grievant Lindsey was subsequently advised by Ms. Fultz that blue jeans were not appropriate business attire. While he was allowed to remain at work for the day, he was warned that if he wore blue jeans again he would be sent home to change.

The following Friday, November 18, 2005, Grievant arrived at work dressed in clean blue Levis jeans with a brown belt, a button-down collar shirt, and brown shoes. Ms. Fultz again consulted with Mr. Menez as to how to proceed. After their discussion she advised the Grievant

that he would be granted a 90-minute administrative leave to go home and change into clothes that constituted appropriate “business casual” attire. When Grievant asked for a definition of that term, Ms. Fultz again consulted with Mr. Menez. She reported to Mr. Lindsey simply that denim was not business casual, but that Dockers, or similar pants, were considered business casual.

The Grievant went home as directed and changed. When he returned, he was wearing Dockers, a sweatshirt, and hiking or work boots. Grievant subsequently filed a voucher for reimbursement of “travel expenses” (*i.e.*, gasoline) incurred while driving home to change. The request was denied by the Employer, and the Union does not seek reimbursement here.

A grievance was filed, and the parties were unable to reach a mutually amicable resolution in the lower stages of the grievance process. This arbitration hearing ultimately ensued.

### **Relevant Contractual Provisions [Joint Exhibit No. 6]**

#### **Article 2 Governing Laws and Regulations**

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#### **Section 6—Past Practices**

It is agreed and understood that any prior working conditions and practices and understandings which are not specifically covered by the Agreement or in conflict with it shall not be changed unless mutually agreed to by the parties.”

#### **Article 11 [Article 54 in the 2006 Contract] Management Rights**

##### **Section 1 - General**

A. The Department retains the right to:

1. Determine the mission, budget, organization, number of employees, and internal security practices of the Department.
2. In accordance with applicable laws:

- (a) to hire, assign, direct, layoff, and retain employees in the Department, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
- (b) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted;
- (c) with respect to filling positions, to make selections from among properly ranked and certified candidates for promotion or from any other appropriate source; and
- (d) to take whatever actions may be necessary to carry out the mission of the Department.

## **Article 15**

### **Grievance Procedure**

#### **Section 1 - Purpose**

The purpose of this Article is to provide a mutually acceptable method for prompt and equitable settlement of grievances. The parties have a mutual interest in resolving grievances at the lowest level in a timely manner. To promote conflict resolution, supervisors, stewards, and employees should deal with the issue(s) and not personalities. Efforts should be made to resolve disputes informally prior to filing a formal grievance. Education and training in dispute resolution is a means to achieve this interest. Interest-based problem solving should be utilized as much as possible to resolve disputes. Both managers and Union Representatives should become familiar with interest-based problem solving techniques.

Supervisors and NCFLL Stewards are encouraged to meet periodically to discuss matters of mutual concern. If informal discussions do not resolve the issue(s) and a grievance is filed, a face-to-face meeting at Step 1 may be unnecessary and can be waived by mutual agreement. At any step of the process, the use of a facilitator may be useful and agreed to mutually.

Nothing in this Agreement shall be construed as precluding discussion between a bargaining unit employee and/or his/her designated NCFLL Representative and his/her immediate supervisor about a matter of concern to either of them.

Once a matter has been made the subject of a grievance under this procedure, nothing in this Agreement shall preclude either party to this Agreement from attempting to resolve the grievance informally.

In addition to the foregoing, the parties remain committed to forging new alternative dispute resolution (ADR) procedures in lieu of the standard negotiated grievance procedure. Such ADR procedures could be utilized at any step of the negotiated procedure. The parties may agree to pilot or experiment with different ADR procedures in different organizational or geographical segments of the bargaining unit.

#### **Section 2 - Coverage and Scope**

##### **A. Bargaining Unit Employee(s) Grievance**

A grievance by a bargaining unit employee(s), including probationary employees, is a request for personal relief in any matter of concern or dissatisfaction to the employee or group of employees concerning the interpretation, application, and/or violation of this Agreement; or the interpretation or application of Departmental regulations, and the

application of Government-wide regulations with respect to personnel policies, practices, and other matters affecting working conditions. In the case of an employee electing to grieve a conduct-based adverse action, within 30 calendar days of the effective date of the decision, the employee shall file a signed grievance form with the Deciding Official, Steps 1 and 2 of the negotiated grievance procedure are automatically waived, and the Union may invoke arbitration. The time frame for the Union to invoke arbitration is the same time frame the employee has to file with the MSPB, namely 30 calendar days. Therefore, it is incumbent upon the affected employee to coordinate with the Union well in advance of the deadline.

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### **C. Issue of Grievability**

If Management declares a grievance non-grievable or non-arbitrable, the original grievance shall be considered amended to include this issue. Whenever the issue of grievability is raised before arbitration is invoked, the issue will be referred to the NCFLL Chair of the Arbitration Committee and the Department's Labor-Management Relations Center for resolution.

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## **Section 7 - Procedures, Employee Grievance**

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### **C. Statement of Grievability**

Management agrees to furnish the NCFLL a final written statement of grievability/arbitrability of a grievance at the earliest Step possible but no later than 45 calendar days before the hearing.

## **Article 16 Arbitration**

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### **Section 6 - Authority of Arbitrator**

- A. Management and the NCFLL agree that the jurisdiction and authority of the chosen Arbitrator and his/her opinions as expressed will be confined exclusively to the interpretation and application of the provision(s) of this Agreement and/or Departmental regulations. However, regulations and decisions of higher authorities may be introduced as evidence regarding the interpretation and application of the provision(s) of this Agreement and/or Departmental regulations.
- B. The Arbitrator will have no authority to add to, subtract from, alter, amend, or modify any provision of this Agreement.
- C. The Arbitrator will have the authority to make an aggrieved employee whole to the extent such remedy is not prohibited by statute, higher level regulations, or decisions of appropriate higher authority, or this Agreement.
- D. The Arbitrator's decisions will be final and binding. However, the parties reserve the right to take exceptions to any award to the Federal Labor Relations Authority in accordance with its rules and regulations or the U.S. Federal Circuit Court, as appropriate.

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## **Section 7 - Grievability/Arbitrability Decisions**

The Arbitrator shall have the authority to make all grievability and/or arbitrability determinations. The Arbitrator shall make grievability and/or arbitrability determinations prior to addressing the merits of the original grievance.

### **Positions of the Parties**

#### **The Company's Position**

##### **I. Arbitrability**

The Employer contends that while the collective bargaining agreement that governs the merits of the dispute is the one that was in force when the events occurred [*i.e.*, Joint Exhibit 6], the contract governing the procedural issues of this hearing is the current contract [Joint Exhibit 5]. Therefore, the grievance may be amended at any time to include the issue of grievability/arbitrability.

The Employer contends that the matter is not a grievance as defined by Article 15, Section 2 of the collective bargaining agreement in that there is no request for “personal relief.” It argues that the subject of a dress code or appropriate office attire is neither a subject of the agreement, a departmental regulation, nor a government wide regulation.

The Employer further avers that the remedy sought has already been granted in that management has in fact declared that there is no dress code. It argues that the demand for a “public statement” is prospective and hypothetical in nature, with no allegation or evidence submitted to sustain such a request.

The Employer asserts that the understanding of what constitutes appropriate dress, specifically, the prohibition on the wearing of blue jeans, is an established past practice and thus, pursuant to Article 2, Section 6 of the contract, can only be changed by mutual agreement of the parties.

The Employer insists that the Arbitrator lacks the authority to grant the requested relief. It contends that Pursuant to Article 16, Section 6(A), his power is limited to the interpretation and application of the provisions of the collective bargaining agreement or departmental regulations. It also declares that the Arbitrator's remedial authority is limited to making the Grievant whole. Since the Grievant has not suffered a loss in this case, he cannot be "made whole." Further, the portion of the relief that requests a "public statement" is beyond the power of the Arbitrator to grant.

## **II. Merits of the Grievance**

The Employer notes that the collective bargaining agreement is silent regarding the issue of a dress code or of what constitutes "appropriate" business attire, and that the issue has never been raised by the Union in negotiations or in collective bargaining. It contends that the parties agree that there are no departmental regulations which address the subject. It is the position of the Employer that since 1983 blue jeans have not been allowed, and that even the Grievant understood this until four to five weeks prior to the grievance.

It notes that the Employer is a multi-layered agency consisting of numerous units whose missions vary tremendously from one another. Therefore it maintains that it is reasonable that different standards regarding what attire is appropriate exist in different offices. For example, it states that the agency responsible for mine inspections might logically require different attire than that of a unit with a strictly white-collar, office setting. The Employer insists that even if other units permit blue jeans on a regular or occasional basis it is not relevant to the issue before us in the instant case.

The Employer contends that a valid past practice has been established between the parties that prohibits the wearing of blue jeans. Exceptions to this rule include days during which

employees may be moving offices, or days that involve employee travel. If an employee is in transit, or stops by the office immediately prior or subsequent to traveling, blue jeans are permitted. The Employer notes that the Grievant himself was allowed to wear blue jeans on days for which he had physical therapy. It argues that the necessity for these exceptions proves the existence of the rule itself.

The Employer further notes that a “Focus Group” that met in the early 1990s suggested that management institute a “casual Friday” or “dress-down Friday” during which blue jeans would be permitted. The Employer argues that this in itself demonstrates that the wearing of blue jeans was prohibited. The Regional Director requested that the Focus Group provide specific guidelines for him to consider, but the Focus Group declined to follow-up and the matter was dropped.

The allegation that the Grievant wore blue jeans on two occasions and was not counseled was, according to the Employer, most likely due to the fact that Grievant is often seated at a desk, and that management did not notice. However, it notes that when a similar incident occurred in the past with a different employee, the individual was counseled on the “inappropriateness” of his attire, which included blue jeans; the employee complied, and the matter apparently was not pursued by the Union.

The Employer asks that the grievance be denied and dismissed in all respects.

## **The Union’s Position**

### **I. Arbitrability**

The Union contends that the current collective bargaining agreement [Joint Exhibit 5] would, pursuant to Article 16, Section 9, require an expedited arbitration hearing which must be conducted in one day. Since the instant proceeding was scheduled to take two days, the terms of

the current contract obviously do not apply. It insists that the 2002 Collective Bargaining Agreement [Joint Exhibit 6] therefore governs the instant dispute. According to Article 15, Section 7(C) therein, Management was required to furnish a final written statement of grievability/arbitrability no later than 45 calendar days before the hearing. Since Management did not raise this issue within the requisite time frame, it may not be considered.

## **II. Merits of the Grievance**

The Union insists that there exists but one Employer, one set of Departmental regulations, and one set of rules that apply system-wide to all employees. It states that there is no formal dress code, and points out that the Employer concurs with this assessment. The prohibition against blue jeans in the Cincinnati office is merely an unenforceable and improper manifestation of the Regional Director's personal taste or personal preference. It argues that no such standard or policy has been established within the DOL or ESBA. It also contends that if, as the Employer asserts, the ban on blue jeans had been so clearly established, there would have been no need for Ms. Fultz to consult with Mr. Menez as to how to proceed when the Grievant arrived wearing them.

The Union points out that witnesses from ESBA's around the country testified that blue jeans are and have been permitted in their offices for many years. Thus, it insists that the rule established by the Regional Director in Cincinnati is improper and contrary to the policy that is in effect nationwide. Moreover, it contends that blue jeans which are clean and neat are acceptable in many business settings.

The Union states that the Employer has acknowledged that wearing blue jeans *per se* has no negative impact on the Grievant's performance of his job, nor upon the performance of his co-workers. Were the Grievant scheduled to meet with a member of the public, he has stated

that he would not wear blue jeans to work on that day. The Union notes that the Grievant has never experienced an unexpected walk-in during the more that 22 years he has worked for the DOL. His contact with the general public is quite limited on a day-to-day basis, and the likelihood of his offending anyone by the mere fact of wearing blue denim is negligible to nonexistent.

The Union insists that the Grievant was subject to embarrassment and humiliation in being sent home because of his attire. If this rule were held to be valid, he could be subject to future discipline for its violation. The Union notes that even though the Grievant had to use his personal vehicle to travel home and back during this incident, and submitted a travel voucher for reimbursement of the resulting expenses (which was denied), he does not seek such damages here.

Further, the Grievant testified that he wore blue jeans on Friday, October 28 and Friday, November 4 without receiving any comment or warning from Management. The Union argues that this demonstrates that there is, in fact, no clear policy or valid past practice regarding blue jeans. It also notes that employees, including the Grievant, are permitted to and have worn denims of colors other than blue, further bolstering the Union's argument that the ban is arbitrary and merely a matter of the Regional Director's personal taste.

The Union requests the following remedy: "Public acknowledgement by the CinRO management that there is no dress code within the DOL, EBSA, or the Cincinnati Regional Office, and public statement that employees should not fear retaliation for not conforming to RD Menez' personal views of business casual."

## ANALYSIS AND CONCLUSIONS

### **I. Arbitrability**

#### Request for a separate hearing or teleconference on the issue of arbitrability

A telephone conference was held on Thursday, January 11, 2007 between the parties and the undersigned concerning the parties' witness lists. During the conference the Department raised the issue of grievability/arbitrability and requested that a pre-hearing phone conference be held to decide this threshold issue.

Due in part to the lack of available time between the request and the upcoming scheduled hearing itself, the request for a pre-hearing determination was denied in a Preliminary Determination issued that date. The issue of grievability/arbitrability was preserved for presentation at the hearing on January 17, 2007.

#### Discussion

The Grievant, in his initial grievance form [Joint Exhibit 1] inartfully called for: "Public acknowledgement by the CinRO management that there is no dress code within the DOL, EBSA, or the Cincinnati Regional Office, and public statement that employees should not fear retaliation for not conforming to RD Menez' personal views of business casual." The Union contends that since the DOL has no policy regarding acceptable attire, the CinRO Regional Director has no authority to impose and enforce his "personal taste" regarding business attire on the rest of the workforce.

The Employer has responded that it has granted the first part of the above request by acknowledging that there is no dress code. It contends that the second part of the requested relief is prospective in nature and that requiring the Employer to make a public statement is beyond the authority of the Arbitrator to grant.

When viewed in context of the more detailed descriptions of the “Nature and Facts of Grievance” [Joint Exhibits 1 and 3] and other supporting evidence, in substance the Grievant is alleging that the Department of Labor has no policy banning employees from wearing blue jeans or any other specific article of clothing at the workplace. The rule against blue jeans, allegedly established by Regional Director Menez, contradicts this policy, or lack of policy, concerning “appropriate business attire.” The Grievant chose to express this by referring to the perhaps technically overly-inclusive term “dress code.” [According to *Black’s Law Dictionary*, a “code” is defined in part as: “A systematic collection, compendium or revision of laws, rules, or regulations. A private or official compilation of all permanent laws in force consolidated and classified according to subject matter.” (Henry Campell Black, *Black’s Law Dictionary*. St. Paul: West Publishing Co. 1983)].

The Employer took the use of the term “dress code” literally and agreed that there is no “code” *per se*. Therefore the Employer states that it has granted the remedy sought in that it acknowledges that there is no “dress code.”

But this is really an argument over semantics, as the Employer also insists that it has had enforceable rules concerning what constitutes appropriate work attire for many years. Although these have changed over time, and well-defined exceptions exist, the Employer maintains that general standards exist, and that one rule that has persisted to the present is that blue jeans are not allowed.

Specifically, the Employer contends that “what constitutes appropriate dress within the Cincinnati Regional Office has been in place for several years” [January 11, 2007 letter from Linda Hastings to Dennis DeMay] and is so well established as to constitute a past practice.

Thus, technicalities aside, the Employer in effect asserts that it has long had a “dress code” as that term might be used in daily parlance. Furthermore, an established, valid past

practice in essence is part of the employment contract: “A union-management contract is far more than words on paper. It is also all the oral understandings, interpretations and mutually acceptable habits of action which have grown up around it over the course of time.” *Coca Cola Bottling Co.*, 9 LA 197, 198 [Jacobs, Arbitrator]. Thus while the Employer may be correct in stating that *changing* a past practice requires mutual agreement of the parties, the alleged *violation* of a valid past practice is arbitrable under Article 15, Section 2, and Article 16, Section 6(A) of the contract.

The request for a “public statement” is merely another way of saying that the rules promulgated by Regional Director Menez are improper and unenforceable.

Furthermore, the intentional failure of an employee to dress appropriately according to established rules is often viewed as insubordination, which may form the basis of progressive discipline. Although inartfully expressed, the instant grievance is a demand for personal relief within the meaning of the collective bargaining agreement.

Finally, in determining whether a particular merits-related dispute is within the scope of a valid arbitration agreement, the U.S. Supreme Court, for one, has noted that there is “a presumption in favor of arbitration.” *First Options of Chicago, Inc., v Kaplan*, 514 U.S. 938, 944 (1995). *See, Moses H. Cohn Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration...”); *Rivard Graphics Supply and Equipment, Inc. v. Hull Printing Co., Inc.*, 994 F. Supp. 118, 120 (Dist. Conn. 1998) (stating that arbitration should be required “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”) [internal quotations omitted].

Therefore, regardless of which collective bargaining agreement governs procedure, for all of the foregoing reasons, the within grievance fits the contractual definition as put forth in Article 15, Section 2 of either contract, and the matter is arbitrable.

## **II. Merits of the Grievance**

Both parties were extremely well represented in this dispute and presented persuasive arguments. Although the Union's arguments were compelling, the nature of the evidence put forward was insufficient to provide a basis to justify sustaining the grievance. The Arbitrator is convinced by more than a preponderance of the credible testimony and evidence submitted that the Employer has had in place for many years a valid and reasonable ban on the wearing of blue jeans in the workplace. The well-defined and specifically carved-out exceptions to this rule, mentioned above, do not detract from this finding; in fact, as they say, the necessity for specific exceptions indicates the existence of the rule itself.

The Union failed to establish that the various EBSAs, or the DOL itself, have a single, unified "dress code," or lack thereof, which would negate the validity of the ban in effect at CinRO, and it failed to demonstrate that the ban is unreasonable, whether in terms of societal standards of fashion or as an infringement upon the rights of employees.

As an initial matter, the fact that Ms. Fultz consulted with Mr. Menez prior to confronting the Grievant does not indicate confusion or the lack of a policy on blue jeans. It merely represents prudent consultation with one's superior prior to taking action against an employee.

The testimony regarding the practices at other regions was anecdotal, based upon personal observations of witnesses who did not make policy. It was not accompanied by the submission of any documentary evidence demonstrating the existence or absence of a formal policy one way or another. Only unsupported assertions were supplied. Union witnesses merely

reported that workers in the Atlanta, Miami, and Chicago offices wore blue jeans more or less at will, although infrequently, and apparently without any disciplinary response from management (at least to the extent that these particular witnesses were aware). No witnesses were produced who indicated that blue jeans were ever permitted at CinRO, however.

The equally persuasive testimony provided by Mr. Menez did not contradict the above statements; however, it indicated that the policy concerning “acceptable business attire” varied among the regions: for example, offices in Kansas City and Dallas were said to also allow blue jeans, but only on designated “dress down” or casual days. Thus the Union failed to demonstrate the existence of system-wide standards of appropriate attire (or lack thereof).

It was, however, independently established beyond doubt that the Cincinnati Regional Office in particular has never allowed employees to wear blue jeans as a general rule (omitting any discussion of the specific exceptions made for certain special, well-defined circumstances). As discussed in *Federal Aviation Administration and Eastern Region & Marine Engineers 70 LA 226* (Duff, Arbitrator), it is acceptable for standards of dress in the federal sector to be decided at the local level.

There is no dispute that standards of what constituted acceptable attire at work have evolved at CinRO, as they generally have throughout the nation. In the early 1980s, male employees at CinRO were required to wear coats and ties to work, and women wore dresses, or blouses and skirts. Over the years what was considered acceptable became more informal, and standards gradually relaxed. Thus, men could hang up their coats, but still had to wear ties. Later, ties were no longer required and open collar shirts were allowed. At some point ten to fifteen years ago women were allowed to wear pants. Today, denims of other colors are permitted. Blue jeans may be allowed some day, but it was firmly established that standards have not yet relaxed to that extent.

While it may be true that in many work establishments blue jeans are accepted as appropriate business attire, many others hold to the opposite opinion. Society has not yet reached a point where such a prohibition *per se* would be considered an unreasonable, arbitrary, or capricious exercise of management rights. Moreover, the Union did not argue that such a ban was an archaic, out-of-date fashion perspective that is no longer relevant. In fact, we note that the Grievant testified emphatically that if he were scheduled to meet with a member of the public on a given day, he would be sure to avoid wearing blue jeans.

Much evidence was provided—including testimony from the Grievant himself—indicating that the Employer’s general ban on blue jeans:

1. was clear and unequivocal;
2. was applied consistently;
3. was known to both the union and management;
4. existed for a substantial period of time; and
5. occurred repeatedly over time.

The Grievant testified that he knew from the beginning of his tenure that blue jeans were not considered acceptable, and that this fact is communicated to employees in their initial interview.

He further acknowledged that Regional Director Menez held a meeting for employees and explained what constituted “appropriate dress.” Although Grievant stated that there followed much talk about “how ridiculous it was,” he acknowledged that the employees were put on notice.

Moreover, on October 26, 1994 a “Focus Group,” consisting of two Employer representatives, two Union representatives, and two employees, met to discuss various ways to improve morale and workplace practices. A summary of this meeting, in part, was submitted as Employer’s Exhibit 1. “Suggestion No. 15” requested that the Employer: “Designate two days a month as ‘casual dress’ days. Permit employees to wear jeans or other casual clothes on those days.” Obviously, blue jeans were not permitted at the time the memo was written.

As explained by Mr. Menez, the rationale for the ban on blue jeans was neither arbitrary nor capricious:

An organization's or office's reputation and image as a professional organization depend on the appearance of employees as well as on their performance and conduct. As such, one should dress in professional business attire that is consistent with one's position and responsibilities as well as with the PWBA CinRO image. One's office attire, in my judgement, makes a statement about the office and about a person as an individual. [Employer's Exhibit 1].

The Union did not present sufficient credible evidence to demonstrate that such a position is unreasonable or otherwise inappropriate in the context of the facts and circumstances of this case.

Mr. Menez continued the above response as follows: “[I]n order to consider having ‘casual dress day(s)’ or a ‘dress down day’ it seems that one must first understand what that means in relationship to what is expected as professional business attire on all other days.”

[Employer's Exhibit 1]. He called for further discussion.

The matter was raised again following a subsequent Focus Group meeting on April 24, 1995. In response, Mr. Menez agreed to allow

one dress down day per month ... provided, and as long as, all employees dress in professional attire at all other times and provided that the CinRO Focus Group provides a suitable framework of what constitutes professional business attire on non-dress down days as well as what constitutes suitable office attire on the “dress down” day...[Employer's Exhibit 2].

However, perhaps unfortunately, this was not pursued and the matter was eventually dropped.

Nothing presented at the hearing indicated that the prohibition against blue jeans was subsequently changed, or that any “dress down” day was ever implemented. On the contrary, the evidence clearly supports the continued existence and enforcement of the ban on blue jeans.

Employer's Exhibit 3 is a memorialization of a discussion on August 15, 1996, with an employee who wore blue jeans and a tee shirt to work. He was advised that his attire was

considered inappropriate, and the employee agreed not to come to work dressed similarly again. This apparently resolved the matter, which was not pursued by the Union.

The next incidents involving inappropriate attire for which evidence was presented occurred in the weeks leading up to the event that triggered the instant grievance. The fact that the Grievant wore blue jeans only on the last day of the week and for four weeks in a row might lead one to speculate that he was informally pursuing his own “casual Friday” policy. In fact, Ms. Fultz testified that when he came to work on November 18<sup>th</sup>, he announced “I’m dressed casually.” His actions indicate that he did not just happen to randomly wear blue jeans one day. He seems to have set out to test or challenge an established policy that he deemed “ridiculous.”

Within a workforce covered by a collective bargaining agreement, the unilateral imposition or revision of a dress code by the Employer will usually be considered a change in conditions of employment subject to bargaining. However, that is simply not the situation in the case at bar. The weight of the credible evidence submitted clearly indicates that employees have never been permitted to wear blue jeans while at work. The Grievant, having been put on notice, knowingly violated this prohibition, and the Employer’s response was justified and reasonable. Therefore, the grievance must be denied.

While Article 16, Section 6 requires that our decision be confined to the interpretation and application of the provisions of the contract, we feel obligated to make a further comment. It is the recommendation of this Arbitrator that local representatives of the Union and Employer meet, formulate, and disseminate mutually acceptable and detailed regulations as to what constitutes “appropriate business attire,” and consider establishing a “dress down” day. While this recommendation should not be considered in any way binding, we urge the parties to give the matter serious consideration.

*Pursuant to the foregoing, the undersigned Arbitrator makes the following*

**AWARD**

For all of the foregoing reasons, the within grievance, submitted to the Arbitrator for decision and designated by the Parties as ARBN-ESBA-05-06-031, and by the Federal Mediation and Conciliation Service as Case Number 060621-04001-A, is denied and dismissed in its entirety.

Upon request by either party, the undersigned shall retain jurisdiction for any and all disputes involving this matter within a period not to exceed ninety (90) days from the date of this award, unless they mutually agree otherwise.

DATED: Bloomington, Indiana  
February 20, 2007

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Roy Francis  
*FMCS Arbitrator*