ARBITRATION DECISION NO.:
474

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Rehabilitation
and Correction

DATE OF ARBITRATION:
September 25, 1992

DATE OF DECISION:
November 18, 1992

GRIEVANT:
Del Evans

OCB GRIEVANCE NO.:
27-01-(92-05-22)-0036-01-03

ARBITRATOR:
Nels E. Nelson

FOR THE UNION:
Butch Wylie, Advocate
Donald Conley,
Second Chair

FOR THE EMPLOYER:
Gregory Trout,
Chief Counsel
Lou Kitchen, Assistant
Chief, Special Projects, OCB

KEY WORDS:
Grooming Policy
Election of Remedy
Hair Length
Wearing of Earrings
Religious
    Discrimination
Sex Discrimination

ARTICLES:
Article 2 - Non-
Discrimination
    §2.01-Non-
Discrimination

Article 5 0 Management Rights
Article 25 - Grievance Procedure
§25.01-Process
Article 43 - Duration
§43.01-Duration of Agreement
Article 44 - Miscellaneous
§44.03-Work Rules

FACTS:

The Department of Rehabilitation and Correction adopted a grooming policy which, among other restrictions, established a maximum hair length for male corrections officers (CO's) and prohibited them from wearing earrings. The State notified the Union on August 9, 1991 of the proposed rule change and provided the Union with a draft copy of the policy. DRC and Union representatives met and discussed the new policy on August 28, 1991. When several bargaining unit members were disciplined for failure to comply with the new policy, the Union sought an injunction in the Court of Common Pleas to suspend its implementation. Judge Reece held that only uniformed employees expressing a sincerely held religious belief which requires them to have long hair were exempt from the new grooming policy. He granted an injunction staying the implementation of the policy until it was arbitrated.

UNION'S POSITION:

The arbitrator had the authority to hear the dispute. The Union did not forfeit its right to pursue the disagreement to arbitration; the court injunction was only a temporary means of relief until the dispute could be permanently settled via binding arbitration. Likewise, the Union did not have to specifically cite religious discrimination as a basis for the grievance. By citing Article 2.01, the State was sufficiently made aware of the nature of the claim. Finally, DRC stipulated that the issue was properly before the Arbitrator.

DRC violated Article 44.03 and ORC 4117.08(A) by adopting a new grooming policy, which unfairly discriminated against uniformed, male employees and by refusing to allow the Union an opportunity to engage in meaningful, formal negotiation. The State acted in bad faith: it was unwilling to give serious consideration to the Union suggestions or to attempt a compromise on the new policy. The State failed to demonstrate any relationship between a legitimate state objective and the new grooming policy and failed to prove that long hair hinders male CO's in performing their duties. State witnesses testified that prior to the enactment of the new policy there had been no grooming-related problems at corrections institutions. These witnesses also stated that having employees wear their hair under their hats had been sufficient under the old grooming policy.

DRC conceded and stipulated that long hair was a legitimate and sincere religious belief for Native Americans; therefore there was no need for further proof. The new policy forced Native Americans, and others similarly situated, to choose between their religions and their jobs. The Union urged the Arbitrator to strike the discriminatory and unreasonable portions of the new policy.

EMPLOYER'S POSITION:

Pursuant to Article 25.01, the Union forfeited its right to arbitrate by electing to seek a judicial remedy. The State was not bound to formally negotiate the new policy under Article 44.03 nor ORC 4117.08(A). The State argued that ORC 4117.08(D) authorized the State to determine work rules and that employee appearance was a "standard of service" within the discretion of Article 5. Moreover, if the Contract did require formal negotiations on the subject, the dispute would be properly resolved before SERB, not an arbitrator. Alternatively, the State asserted that the Article 44.03 only required that the Union receive notice of proposed rule change and have an opportunity to discuss it. DRC and Union representatives met and discussed the new policy on August 28, 1991. The State even incorporated many of the Union suggestions

into the final draft of the new policy. Therefore, the State maintained that it fully complied with the Contract.

The grooming policy was reasonable and similar to the grooming policies of other agencies in Ohio and other states. The State noted that comparable policies were upheld as constitutional in several state and federal court decisions. Further, the State insisted that a conservative and consistent appearance was necessary to control the inmate population and maintain a professional image and that the policy was not intended to be discriminatory. In support of this argument the State emphasized that the policy made no reference to race, creed, religion or national origin. Finally, the State argued that enforcing a religious exception to the grooming policy would be too difficult for employees to prove or the State to enforce.

ARBITRATOR'S OPINION:

The State had no duty to negotiate the new policy. Under Article 44.03 of the Contract, the State was only required to notify the Union of the change and give the Union an opportunity to discuss it. The Arbitrator concluded that the State complied with the mandates of Article 44.03. Further, the Arbitrator held that the State's policy was reasonable and that the State articulated an understandable rationale for its rules, especially in light of the requirements of the job. The Arbitrator was persuaded by the State's ability to cite several other agencies (e.g., the Ohio State Highway Patrol) which had adopted even more restrictive grooming policies than the one presently at issue. Similarly persuasive were the many court decisions cited in support of the State's position.

The Arbitrator concluded that the differences in the grooming requirements for men and women did not constitute sex discrimination in violation of Article 2.01. Likewise, the policy did not discriminate against any one religion since the policy's restrictions could be uniformly applied to employees of any race, creed, religion or national origin. Finally, the Union failed to prove that the beliefs of Native Americans require long hair. In fact, the Union's key witness, a Native American, conceded that he maintained a short hairstyle during his military career.

AWARD:

The grievance was denied in its entirety.

TEXT OF THE OPINION:

ARBITRATION DECISION

November 18, 1992

In the Matter of:

Ohio Civil Service Employees Association, AFSCME, Local 11

and

State of Ohio, Department of Rehabilitation and Correction

Case No.
27-01-(5/22/92)-36-01-03
Grooming Policy

APPEARANCES

For the Union:
Butch Wylie, Advocate
Donald Conley, Second Chair

Del Evans, Grievant
Joe Ragaglia, Arbitration Clerk
Ira Mault, Corrections
Officer, SOCF
Kirk Lowe, Corrections
Officer, SOCF

For the Department:
Gregory Trout, Chief Counsel
Lou Kitchen, Assistant Chief,
Special Projects, OCB
Joe Shaver, Labor Relations Chief
Bill Dallman, Warden,
Lebanon Correctional Facility
Ron Edwards, Warden,
Ross Correctional Facility

Arbitrator:
Nels E. Nelson

BACKGROUND

The instant case Involves a dress and grooming policy adopted by the Department of Rehabilitation and Correction. The process of developing the policy began on January 11, 1990 when Thomas J. Stickrath, the North Regional Director, and Reginald A. Wilkinson, the South Regional Director, appointed a committee to make recommendations regarding the standardization of practices that deal with uniforms. On August 9, 1991 Joseph B. Shaver, the chief of labor relations for the department, sent a copy of a draft of the policy to Paul Goldberg, the executive director of OCSEA/AFSCME, and asked for input. A labor-management committee meeting was held on August 28, 1991 at which time the policy was discussed in detail and the union's concerns and suggestions were noted by Shaver. On January 8, 1992 Stickrath directed that a final draft be put together.

On March 24, 1992 Shaver announced that the dress and grooming policy would be issued in the near future. A brief discussion of the implementation of the policy took place. On April 4, 1992 Shaver sent a copy of the new employee grooming policy to Goldberg. Shaver indicated that the policy would be effective June 1, 1992.

On May 22, 1992 a grievance was filed by Del Evans, the South Regional Director for the union, on behalf of the union. It charges that the department had promulgated the new policy without formal negotiations and that the policy sets different standards for males and females and for uniformed and non-uniformed personnel. The grievance alleges that the department's action violated Sections 2.01, 43.00, and 44.03 of the collective bargaining agreement. It requests that "the work rule be withdrawn."

The policy was put into effect as scheduled on June 1, 1992. When a number of employees were disciplined under the policy, the union sought an injunction in the Court of Common Pleas in Franklin County halting the implementation of the policy. The action resulted in an order signed by Judge Guy L. Reece II. He stated that employees were bound by the policy "except those uniformed members expressing a sincerely held religious belief that requires them to have long hair and that the Department of Rehabilitation and Correction will not question that religious belief." Judge Reece indicated that the order would expire upon an arbitration decision on the policy. A number of employees filed affidavits claiming that their religious beliefs required them to have long hair.

The Arbitrator was notified of his appointment to hear the dispute on an expedited basis on August 18, 1992. A lengthy hearing was conducted on September 25, 1992. Post-hearing briefs were received on October 28, 1992.

ISSUES

The issues as agreed to by the parties are as follows:

1. What duty did the Department have to bargain over its proposed Employee Grooming Code with the Union:

a) a duty to formally negotiate, pursuant to section 4117.08(A) of the revised code? or
b) a duty to notify the Union prior to implementation of the Grooming Code and afford them the opportunity to discuss the matter, pursuant to Article 44.03 of the agreement.

2. Did the Department fulfill its duty as determined in Issue 1? If not, what shall the remedy be?

3. Is the Department's Grooming Code reasonable, as required in Article 44.03? Specific reference is had to Grooming Code Sections:

V(2)(a) Male employees' hair shall be evenly cut and neatly groomed. Hair must be cut in such a style that it does not cover the entire ears on the sides and is collar length or shorter in the back.
V(3)(g) Females may wear post-type stud earrings. Male employees may not wear earrings.
V(3)(i) Jewelry that is lost or damaged during the performance of duties can only be reimbursed up to $200.00. Therefore, jewelry of a higher value should not be worn.
V(4) (Makeup may be worn only by female personnel in moderation).
V(5) Fingernails will be reasonable In length and not interfere with performance of duties. (Female employees may wear nail polish but it must be of one color and uniformly applied to all fingernails. Male employees may wear only clear polish).

If not, what shall the remedy be?

4. Is the Department's Grooming Code sexually discriminatory as prohibited by Article 2.01 of the contract?

If so, what shall the remedy be?

5. Does the Department's Grooming Code result in discrimination on the basis of race, creed, religion and national origin as prohibited by Article 2.01 of the contract?

If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - NON-DISCRIMINATION

2.01 - Non-Discrimination
Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation ...

*** * ***

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the

Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08(C), Numbers 1-9.

* * *

ARTICLE 25 - GRIEVANCE PROCEDURE

25.01 - Process

* * *

...An employee who elects to pursue any claim through a judicial or administrative procedure shall thereafter be precluded from processing the same claim as a grievance hereunder. This restriction does not preclude, however, pursuing a claim which has been heard in the grievance and arbitration procedure, in another forum, subject only to the State's right to file a motion for deferral.

* * *

ARTICLE 43 DURATION

43.01 - Duration of Agreement

* * *

...All rights and duties of both parties are specifically expressed in this Agreement. This Agreement concludes the collective bargaining for its term, subject only to a desire by both parties to agree mutually to amend or supplement it at any time...

ARTICLE 44 - MISCELLANEOUS

* * *

44.03 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

UNION POSITION

The union rejects the department's contention that the instant dispute is not arbitrable. It maintains that the election of remedies in Section 25.01 does not bar arbitration. First, it notes that the contract states that an "employee" must elect a remedy but points out that Evans, who filed the grievance, is not an employee of the state. Second, the union contends that it went to court to seek injunctive relief to restrain the department from disciplining employees for the length of their hair based upon religious beliefs only until an Arbitrator ruled.

The union also disputes the department's challenge to arbitrability based on the assertion that religious discrimination was not mentioned in the grievance. It contends that the grievance is brief and simply puts the employer on notice of the nature of the claims being made. The union points out that it cited Section 2.01 which prohibits discrimination based upon religion. It notes that one of the issues stipulated to by the

department is whether the grooming code results in discrimination on the basis of religion.

The union rejects the argument that if the grooming policy is a mandatory subject for bargaining, the instant dispute should be before the State Employment Relations Board rather than the Arbitrator. It states, however, that the facts as they were developed at the hearing do not indicate that the policy is a mandatory subject for bargaining. The union further claims that the department stipulated that the issue is properly before the Arbitrator.

The union charges that the department violated Section 44.03 of the collective bargaining agreement which requires the department to provide it with the opportunity to discuss a new work rule before it is implemented. It asserts that the department simply went through the motions in meeting with the union and allegedly soliciting its opinion regarding the grooming policy. The union points out that Evans and Butch Wylie, a union staff representative, testified that Shaver stated that the union could give suggestions and that the state would consider them but that it would not make changes regarding hair length and earrings. It emphasizes that by making it clear that union input would not be considered, It was receiving only notification of the new policy rather than the opportunity to discuss the policy as required by the contract.

The union maintains that the department's conduct did not demonstrate good faith. It claims that Section 44.03 of the contract would be meaningless unless it were subject to the good faith requirement. The union indicates that good faith is one of the most important axioms of labor-management relations. It asserts that the department's failure to meet the standard at the August 20, 1992 meeting and any time after that time, reflects the breakdown in the relationship between the department and the union.

The union argues that the department violated the requirement of Section 44.03 that work rules be reasonable. It cites Arbitrator Berman In Snap on Tools Corp., 87 LA 785, 789 who stated that "a rule is reasonable if it uses appropriate means to accomplish a legitimate objective." The union also relies upon Schien Body and Equipment Co., Inc., 69 LA 930, 936-37 where Arbitrator Roberts states that "to a certain extent, the determination of the reasonableness of a rule or regulation involves the balancing of interest with the Company's legitimate business requirements to be considered on one side of the scale and the employee's right to exercise personal freedoms free from unnecessary interference on the other side of the scale."

The union asserts that the department's only front-line witnesses -- William Dallman, the Warden of the Lebanon Correctional Institution, and Donald Edwards, the Warden of the Ross Correctional Institution -- failed to produce any link between a legitimate objective and the grooming policy. It notes that Edwards testified that he has had 100% success in correcting grooming problems by reasoning with employees but that the policy would help because he could "hammer" on employees rather than having to reason with them. The union states that discipline is supposed to be corrective rather than punitive and that "hammering" on employees is not a legitimate objective. It claims that Dallman testified that there were few grooming problems at his institution and that there is no problem if an employee puts his hair up under his hat so that he appears to be in compliance with the policy. The union notes that while Dallman expressed concerns about inmates sending homosexual signals through hair length and grooming, he conceded that it is not a problem with corrections officers. It asserts that Edwards and Dallman simply offered their opinions in favor of the policy but that their opinions are rooted in the norms of the 1950's rather than the 1990's.

The union contends that long hair has religious significance for Native Americans. It points out that Ira Mault, a Native American, testified that there is a legitimate and sincere religious belief regarding long hair among Native Americans. The union claims that his testimony was so convincing that the department conceded the issue so that it did not have to call further witnesses in support of the religious significance of long hair for Native Americans. It stresses that Native American corrections officers should not have to choose between their religion and their job.

The union argues that long hair does not prevent a corrections officer from performing his job. It points out that Corrections Officer Kirk Lowe, who is a Native American, has had long hair most of his life and had long hair when he was hired. The union emphasizes that Lowe has received many commendations in his 14 1/2 years of service including being selected Corrections Officer of the Year in 1988. It emphasizes that if the policy stands, Lowe will be terminated.

The union maintains that past practice can be used as a measure of reasonableness. It notes that in the

past the department has hired employees with long hair and has allowed employees to have long hair. The union claims that it is not reasonable that long hair is suddenly a dischargeable offense.

The union complains that the policy also discriminates on the basis of sex. It contends that the policy unnecessarily sets forth different standards for male and female employees doing the same job. The union maintains that Section 2.01 of the collective bargaining agreement bans both sexual and religious discrimination.

The union asks the Arbitrator to eliminate the parts of the policy that are discriminatory and unreasonable. It maintains that the simplest solution is to eliminate the few sentences that place more restrictive limits on men than women. The union claims that this will do no violence to the overall grooming policy. It stresses that to allow the department to determine the sincerity of an employee's religious beliefs regarding his hair would create "a veritable nightmare of controversy."

DEPARTMENT POSITION

The department argues that the union elected to pursue a judicial remedy and forfeited the right to arbitrate the instant grievance. It points out that on June 12, 1992 the union filed a motion for a preliminary injunction to stop the implementation of the grooming policy. The department maintains that the result was that the implementation was restricted where a religious belief regarding long hair was properly documented. It notes that Section 25.01 of the collective bargaining agreement states that an employee who pursues his or her claim through a judicial proceeding cannot process the same case as a grievance.

The department rejects the union's argument that it was required to "formally" negotiate the grooming policy under Section 4117.08(A) of the Ohio Revised Code which requires bargaining over terms and conditions of employment. It contends that the policy more appropriately is controlled by subsection C which indicates management's right to "determine matters of inherent managerial policy...such as standards of service" and to "effectively manage the work force" unless otherwise agreed. The department also cites Article 5 of the contract which states that it reserves the right "to manage and operate its facilities and programs."

The department asserts that the appearance of an employee is a "standard of service." It maintains that to be otherwise, the union would have to argue that a female employee's choice to wear see-through clothing or a male employee's choice to wear lipstick and rouge is a term and condition of employment. The department claims that if such were the case, it would be hard to Imagine any standard of service that is within management's discretion.

The department maintains that the union "shoots itself in the foot" when it argues that the department had a duty to formally negotiate the grooming policy. It points out that if it had a duty to bargain, the issue of whether it violated such a duty is for the State Employment Relations Board. The department notes that Section 4117.12 of the Ohio Revised Code defines the process and is the exclusive remedy. It emphasizes that the Arbitrator's authority is limited to disputes over the implementation of the collective bargaining agreement and that he has no authority regarding an alleged breach of a statutory duty.

The department contends that there was no refusal to bargain. It notes that "refuse" means to decline to accept or submit to. The department maintains that the union never requested that the policy be bargained so that there could not have been a refusal to bargain.

The department claims that the union's demand to bargain over the grooming policy is foreclosed by Section 43.01 of the contract which states that the collective bargaining agreement concludes bargaining subject only to mutual agreement to supplement or amend the agreement. It points out that a draft of the policy was distributed in August, 1991 and the collective bargaining agreement was not signed until March 2, 1992 but the issue was never raised in negotiations. The department claims that by this action the union waived the right to participate in the development and implementation of the policy and that it has no obligation to further accommodate the belated concern of the union.

The department contends that if the grooming policy is not held to be a standard of service, Section 44.03 sets forth its obligations to the union. It indicates that Section 44.03 requires the department to notify the union in advance of the implementation of any work rule and to give the union the opportunity to discuss the

work rule. The department stresses that the grievance describes the grooming policy as a "work rule" and that Evans conceded that the policy is a "work rule."

The department asserts that it met its obligations under Section 44.03. It notes that it gave the union a draft of the policy nine months prior to its implementation and met with the union to discuss its concerns with the policy. The department emphasizes that many of the union's concerns were incorporated in the re-draft of the policy. It indicates that another meeting was held with the union three months prior to the effective date of the policy.

The department contends that several areas of the union's petition should not be considered by the Arbitrator. It states that the union presented no witnesses regarding male employees wearing earrings, lipstick, rouge, eye liner, or colored nail polish or employees being restricted to receiving $200 in reimbursement for jewelry that is lost or damaged. The department maintains that in the absence of any employee willing to publicly testify against these restrictions, the union's demand that they be eliminated should not be considered.

The department claims that its policy is clearly reasonable. It indicates that its policy is congruent with the policy of the Ohio Highway Patrol and other state corrections agencies. The department submitted policies or sections of policies from California, Florida, Michigan, New York, and Pennsylvania.

The department contends that the policy is necessary. It claims that a "conservative and united appearance" is necessary to control "a disgruntled, manipulative and potentially violent inmate population, bent on extracting concessions and advantages from the staff." The department asserts that staff "with a liberal or non-conformist appearance invite undesirable scrutiny, manipulation and pressure from inmates seeking to extract favors, contraband and other inappropriate advantage." It also maintains that the grooming policy creates a professional appearance in the public's mind.

The department asserts that the standards do not require an extreme "military-like" appearance. It maintains that the requirement that a male's hair not extend below the top of his shirt and not cover his ears is clearly reasonable. The department contends that it is even more unnecessary to address provisions of the policy intended to prevent "a transvestite appearance." It indicates that such appearance influences inmates, other staff, and the public and would hold the department up to ridicule.

The department argues that the limit on jewelry valuation has a rational basis. It notes that employees must be prepared to restrain inmates which often results In damage to clothing and personal effects. The department states that it wants to compensate employees whose property is damaged but believes that it is only reasonable that an employee not wear expensive clothing and jewelry. It points out that other states limit the value of clothing and jewelry and Indicates that some of the limits are lower than its limits.

The department rejects the union's contention that the grooming policy involves discrimination in violation of the U.S. Constitution and Section 2.01 of the collective bargaining agreement. It points out that the policy makes no reference to race, creed, religion, and national origin. The department states that any discriminatory impact occurs only by the operation of the establishment of a uniform standard of appearance. It asserts that the establishment of a uniform standard of appearance has been repeatedly upheld in state and federal courts as not violative of the U.S. Constitution. It cites Goldman v. Weinberger, 106 SCt. 1310 (1986); Kelley v. Johnson, 96 SCt. 1440 (1976); Marshall v. District of Columbia, 559 F2d 726 (1977); Rathert v. Village of Peotone, 903 F2d 510 (1990); Lowman v. Davies, 704 F2d 1044 (1983); and Barker v. Taft Broadcasting Company, 539 F2d 400 (1977).

The department indicates that the Ohio Civil Rights Commission has ruled that different requirements for hair length for men and women in the department does not violate Section 4112 of the ORC or Title VII of the Civil Rights Act. It points out that in Fink v. State of Ohio, Department of Rehabilitation and Correction, 71051192 (19032) 051292; 22A 92 4584 the Commission held that sex-based distinctions are not discriminatory and that it has no jurisdiction to entertain such a complaint.

The department contends that the Arbitrator must take into account standards of our society and expectations regarding its professional criminal justice agencies. It states that the department "should not be forced to the forefront of social experimentation." The department asserts that its policy is "a healthy reflection of the greater values of society as a whole."

The department maintains that there are risks in creating religious exceptions to the grooming policy. It

asserts that virtually any deeply-held personal belief could be characterized as "religious" which would nullify the policy. The department believes that the task of documenting religious beliefs would be complex and repugnant to the employee and the department. It claims that "a religious-based exception would ultimately be a bastardized solution which would please no one."

The department states that it is not forbidding anyone from any religious practice. It points out that employment is a matter of choice but that when an employee enters an institution he or she must make certain concessions for the sake of security and professionalism. The department claims that the nature of prison work is known to employees who apply for such work and that they should expect the attendant restrictions.

ANALYSIS

The first issue is the extent of the department's obligation to the union with respect to the adoption of the grooming policy. The union contends that the department had a duty to bargain under Section 4117.08(A) of the Ohio Revised Code. The department maintains that it had no duty to bargain but was required by Section 44.03 of the collective bargaining agreement to notify the union prior to the adoption of the policy and to allow the union the opportunity to discuss the policy.

The Arbitrator agrees with the department. He believes that it is widely recognized that an employer has the right to adopt and enforce reasonable work rules not in conflict with the collective bargaining agreement. Furthermore, Section 44.03 of the contract recognizes the right of the department to make new work rules when it requires notice prior to the implementation of a new work rule and an opportunity to discuss new work rules. The obligations of the department are those set forth in Section 44.03 of the contract.

The second issue is whether the department met its obligations under Section 44.03. The Arbitrator believes that the department complied with Section 44.03. It notified the union on August 9, 1991 about the new policy and provided a copy of the draft of the policy. Department representatives met with the union on August 28, 1991 to discuss the policy and carefully noted the union's suggestions and concerns. The final version of the policy incorporated a number of the union's suggestions.

The third issue is whether the grooming policy meets the requirement of Section 44.03 that work rules be "reasonable." The union challenged five aspects of the policy. They are:

V(2)(a) Male employees' hair shall be evenly cut and neatly groomed. Hair must be cut in such a style that it does not cover the entire ears on the sides and is collar length or shorter in the back.

V(3)(g) Females may wear post-type stud earrings. Male employees may not wear earrings.

V(3)(i) Jewelry that is lost or damaged during the performance of duties can only be reimbursed up to $200.00. Therefore, jewelry of a higher value should not be worn.

V(4) (Make-up may be worn only by female personnel in moderation).

V(5) Fingernails will be reasonable in length and not interfere with performance of duties. (Female employees may wear nail polish, but it must be of one color and uniformly applied to all fingernails. Male employees may wear only clear nail polish).

The Arbitrator believes that the policy is reasonable. First, the department presented an understandable rationale for Its rules. It argued that a conservative and uniform appearance is useful in controlling inmates and that a different appearance invites attention from inmates. The department also stated that the policy creates a professional appearance In the public's perception. It further maintained that the limit on the value of jewelry is entirely reasonable given the requirements of the job. Although some individuals might dispute these arguments, they indicate that the policy is not arbitrary or capricious in the sense that it was adopted without any basis other than the prejudices of those responsible for the policy.

Second, the evidence indicates that other agencies and states have adopted similar policies. The Ohio Highway Patrol has similar standards except that the requirement regarding the length of a male officer's hair is more strict. The departments of corrections in California, Florida, Michigan, New York, and Pennsylvania have policies that are similar to those at issue in the instant case. The union noted only two states with

different policies. In Illinois uniformed employees can have hair of any length provided that it is clean and neat and does not interfere with wearing a uniform hat, cap, or helmet. The Wisconsin administrative directive allows earrings that do not extend lower than the ear lobe and makes no mention of hair length.

Third, a number of Federal Circuit Court and the U.S. Supreme Court decisions which were submitted by the department support the conclusion that the grooming policy is reasonable. For example, in Kelley v. Johnson, 96 SCt 1440 (1976) the U.S. Supreme Court upheld grooming standards for a police department which prohibited hair from touching the collar or ear lobe. In Lowman v. Davies, 704 F2d 1044 (1983) the Eighth Circuit Court upheld a policy prohibiting park naturalists from having hair below the collar or ear lobe. In Rathert v. Village of Peotone, 903 F2d 510 (1990) the Seventh Circuit Court rejected a challenge to a policy forbidding police officers from wearing earrings or ear studs while off duty.

The fourth issue is whether the grooming policy violates Section 2.01 of the collective bargaining agreement which prohibits discrimination based upon sex. The Arbitrator believes that it does not. It is clear that there are many distinctions based upon sex but not every one of those distinctions constitutes sex discrimination. This principle is well established. The courts have held that differences in grooming requirements for males and females do not violate Title VII of the Civil Rights Act. This is reflected in Fink v. State of Ohio, Department of Rehabilitation and Correction, 71051192 (19032) 051292; 22A92 4584 where the Ohio Civil Rights Commission rejected a complaint over the department's different requirements for hair length between males and females.

The final issue is whether the grooming policy results in discrimination based upon race, creed, religion, or national origin as prohibited by Section 2.01 of the collective bargaining agreement. The union position is that the limitation on the length of hair contained in the grooming policy results in discrimination because it is contrary to the beliefs of Native Americans. Ira Mault, who is of Cherokee descent, testified that short hair conflicts with his cultural and religious convictions and that one's hair is supposed to touch the ground when sitting on the ground. Kirk Lowe, who testified that he was told by his father when he was twelve years old that he was descended from the Cherokees of Eastern Kentucky, stated that to honor the creator one must have hair that touches the ground.

The Arbitrator does not believe that the grooming policy violates Section 2.01. First, the nature of the policy does not appear to be consistent with the union's charge of discrimination. The grooming policy contains restrictions which are uniform in application with respect to race, creed, religion, and national origin. The policy is reasonable in that it is based upon the legitimate interests and needs of the department. Furthermore, there is no evidence of any intent to discriminate.

Second, the Arbitrator does not believe that the testimony presented by the union established that the beliefs of Native Americans requires long hair. Neither Mault nor Lowe had hair that even began to approach the length that they testified their beliefs required. Mault acknowledged that while he was in the U.S. Marines, he had short hair. A copy of a picture of Lowe when he was hired indicates that his hair was shorter at that time than at the time of the hearing and, perhaps, was in compliance with the new grooming code. These facts create some doubt in the Arbitrator's mind about what the beliefs of Native Americans really are with respect to the length of one's hair and make it inappropriate to conclude that the new grooming policy conflicts with the beliefs of Native Americans and constitutes discrimination under Section 2.01 of the contract.

AWARD

The grievance is denied in its entirety.

Nels E. Nelson
Arbitrator

November 18, 1992
Russell Township

Geauga County, Ohio