

UNITED STATES OF AMERICA  
**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges  
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: March 29, 2004

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG  
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS  
JEFFERSON BARRACKS NATIONAL  
CEMETERY, ST. LOUIS, MISSOURI

Respondent

and

Case No. DE-CA-03-0429

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R14-116

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA  
**FEDERAL LABOR RELATIONS AUTHORITY**  
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DEPARTMENT OF VETERANS AFFAIRS JEFFERSON BARRACKS NATIONAL CEMETERY, ST. LOUIS MISSOURI  Respondent	
and  NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R14-116  Charging Party	Case No. DE-CA-03-0429

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **April 28, 2004**, and addressed to:

Office of Case Control  
Federal Labor Relations Authority  
1400 K Street, NW, 2<sup>nd</sup> Floor  
Washington, DC 20424-0001

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PAUL B. LANG  
Administrative Law Judge

Dated: March 29, 2004  
Washington, DC



UNITED STATES OF AMERICA  
**FEDERAL LABOR RELATIONS AUTHORITY**  
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DEPARTMENT OF VETERANS AFFAIRS JEFFERSON BARRACKS NATIONAL CEMETERY, ST. LOUIS, MISSOURI  Respondent	
and  NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCATION R14-116  Charging Party	Case No. DE-CA-03-0429

Sue T. Kilgore, Esquire  
Matthew Jarvinen, Esquire  
For the General Counsel

Kent E. Duncan, Esquire  
For the Respondent

Before: PAUL B. LANG  
Administrative Law Judge

**DECISION**

**Statement of the Case**

This Decision is based upon careful consideration of all of the evidence, the demeanor of witnesses and the post-hearing briefs submitted by the General Counsel, the Union and the Respondent.

This case arises out of an unfair labor practice charge which was filed on May 22, 2003, by the National Association of Government Employees, Local R14-116 (Union) against the Department of Veterans Affairs, Jefferson Barracks National Cemetery, St. Louis, Missouri (Respondent or JBNC). The Union filed an amended charge against the Respondent on August 18, 2003. On August 29, 2003, the Regional Director of the Denver Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of § 7116(a) (1) of the Federal Service Labor-Management Relations

Statute (Statute) by requiring its employees to wear uniform hats and prohibiting them from wearing union hats. It was also alleged that the Respondent committed an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute by implementing the change in uniform requirements without providing the Union with notice and an opportunity to bargain.

A hearing was held in St. Louis, Missouri on November 18, 2003.<sup>1</sup> The parties were present and were afforded the opportunity to be represented by counsel, to present evidence and to cross examine witnesses.<sup>2</sup> This Decision is based upon consideration of all of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the General Counsel and the Respondent.

### **Positions of the Parties**

#### The General Counsel

The General Counsel maintains that the Respondent had a long term and consistent practice of allowing wage grade employees<sup>3</sup> at JBNC to substitute personal headgear for uniform hats. On March 27, 2003, the Respondent unilaterally changed the past practice by requiring that employees wear only uniform hats which are embroidered with the JBNC logo. This action was taken by the Respondent without affording the Union advance notice or the opportunity to bargain as required by the Statute.

The General Counsel also maintains that the Respondent's action on March 27, 2003, was prompted by the Union's purchase of hats with Union markings, thereby constituting an unlawful attempt to coerce bargaining unit employees in the exercise of the rights assured by the Statute.

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The Respondent had previously submitted a motion for summary judgment which was denied.

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The record was held open until November 25, 2003, so as to allow for the submission of additional joint exhibits in the form of photographs of various hats that had been referred to by witnesses. On November 24, 2003, the parties submitted five photographs which were marked as Joint Exhibits 9 through 13 and a stipulation regarding Joint Exhibit 11.

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Unless otherwise stated the term "employees" will be used to refer to wage grade employees.

The General Counsel does not contest the proposition that a uniform is an appropriate means of maintaining proper decorum at the cemetery and that the uniform allows visitors, many of whom are elderly, to readily identify cemetery employees in the event that they require assistance such as in locating grave sites. However, the General Counsel contends that the Union hats do not detract from the purpose of the uniform and that the Union selected their design and appearance so as to be consistent with the overall appearance of the uniform. Furthermore, the General Counsel maintains that changes concerning the components of the uniforms are substantively negotiable in that they do not interfere with the Respondent's methods and means of performing work.

The General Counsel cites a number of cases in which the Authority has applied the "special circumstances" test whereby the interest of employees in demonstrating support for a union is balanced against the right of an agency to effectuate the purposes for which the uniform is intended. The General Counsel contends that no special circumstances exist in this case and that, accordingly, there is no justification for the Respondent's unilateral action in banning Union hats.

The General Counsel further contends that, in view of the absence of special circumstances, a *status quo ante* remedy is appropriate whereby the Respondent would be directed to rescind its prohibition against the wearing of Union hats by employees in the field.

#### The Respondent

The Respondent maintains that the requirement that its employees wear a uniform is an exercise of its management rights within the meaning of § 7106 of the Statute as well as of pertinent language both in the Master Agreement between the National Association of Government Employees and the Department of Veterans Affairs and in the Supplemental Agreement between the Respondent and the Union. The requirement of a uniform is necessary to the preservation of the decorum of the cemetery and to allow visitors to readily identify JBNC employees when seeking assistance.

The Respondent further maintains that the directive of March 27, 2003, was merely a reaffirmation of an existing policy requiring employees to wear uniforms while on duty. Any deviations from that policy did not constitute a binding past practice but were isolated incidents which were neither known nor condoned by Respondent's management representatives.

According to the Respondent, the reaffirmation of the uniform policy was not motivated by anti-union animus but was an effort to remind employees of the policy on uniforms in view of the fact that some employees were observed to be wearing nonuniform items of clothing. Employees were allowed to wear unobtrusive Union insignia on their uniforms both before and after the directive of March 27, 2003.

### **Summary of Evidence**

The Respondent is a unit of an "agency" as defined in § 7103(a)(3) of the Statute. The Union is an agent of the National Association of Government Employees (NAGE) which is a "labor organization" within the meaning of § 7103(a)(4) of the Statute. NAGE is the exclusive representative of a unit of the employees of the Department of Veterans Affairs (VA) which is appropriate for collective bargaining.

#### Collective Bargaining Agreements

At all times pertinent to this case NAGE and the VA were parties to a Master Agreement (Jt. Ex. 1) covering a bargaining unit which included employees assigned to the Respondent.<sup>4</sup> The Union and the Respondent were parties to a collective bargaining agreement (Jt. Ex. 2) covering all employees assigned to the Respondent with certain exceptions which are not pertinent to this case.

The Respondent is a national cemetery which is operated by the VA. Wage grade members of the bargaining unit are employed to perform such functions as groundskeeping and equipment maintenance.

Article 3 of the Master Agreement states, in pertinent part:

It is agreed and understood by the Employer and the Union that in the administration of all matters covered by this Agreement, officials and employees are governed by . . . published agency policies and regulations in existence at the time the Agreement is approved; and by subsequently published policies and regulations required by law. The fact that the local Union agrees to

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The Master Agreement originally went into effect on May 28, 1992, for a duration of three years. The Agreement provides for automatic renewals for additional three year periods unless either party serves written notice of its desire to renegotiate.

published facility policies in existence at the time the Agreement is approved does not preclude the Union from meeting and negotiating, to the extent required by law, upon request, on any facility policy in accordance with Article 11.

(Jt. Ex. 1 at 2)

Article 12 of the Master Agreement, entitled "Supplemental Agreements" allows for supplemental agreement negotiations between each facility and the local union on matters of local concern. Section 6 of Article 12 provides that, "Supplemental agreements must be approved pursuant to statute and will be subject to the provisions of the Master Agreement" (Jt. Ex. 1 at 9, 10).

Article 2 of the Supplemental Agreement states, in pertinent part:

In the administration of all matters covered by the Agreement, the Employer, the Union and employees are governed by existing and future laws and the regulations of appropriate authorities, including . . . published Veterans Administration or department policies and regulations in existence at the time of approval of this Agreement; and by subsequently published Veterans Administration policies and regulations required by law or by the regulations of appropriate authorities by the terms of any controlling agreement at a higher agency level.

(Jt. Ex. 2 at 1, 2)

Neither the Master Agreement nor the Supplemental Agreement specifically addresses the subject of uniforms.

#### The Respondent's Policy on Uniforms

On February 22, 1995, Ralph E. Church, Respondent's Cemetery Administrator, issued a memorandum entitled Policy Letter 95-15 to all employees with the stated purpose of setting forth standards and guidelines for issuing and maintaining work clothing (Jt. Ex. 4). The memorandum states that, "Permanent wage grade cemetery employees and year temporary employees are required to wear issued work clothing on the job." The memorandum further states that each employee will be issued long trousers, shirts, a jacket with liner and insulated coveralls. There is no mention of headgear.



On June 15, 1995, Jerry W. Bowen, the Director of the National Cemetery System of the VA, promulgated NCS Handbook 3010 which was entitled "Uniforms and Special Clothing for National Cemetery Employees" (Jt. Ex. 5). Section II-2 states, in pertinent part:

a. Wage Grade (WG) employees . . . will wear, while on duty, work clothing that is uniform in design and color. . . . To facilitate adherence, each WG employee will be issued . . . the following items: [trousers, shirts, jacket, safety shoes, coveralls]

Hat or cap, style suitable for prevailing weather conditions, e.g., baseball style, watch cap (1 each) . . . .

(Jt. Ex. 5 at II-2)5

In Bowen's transmittal memorandum he indicated that Chapter 28 of NCS M40-2, dated June 1, 1987 (Jt. Ex. 3) was rescinded. The 1987 directive also mandated the wearing of uniforms by employees but did not provide for the issuance of headgear.<sup>6</sup>

On September 30, 2002, Church issued a memorandum to all JBNC employees entitled "Occupational Health, Safety & Fire Protection Program - Policy Letter 02-06" (Jt. Ex. 6). The memorandum contains the following language:

(3) It is recommended that safety hat be worn on all field jobs, if safety hat not required on job. JBNC ball cap is to be worn if headdress is worn. It is important that employees have uniform dress apparel.

(4) In winter months, your own winter head wear may be worn in place of cap.

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The directive of June 15, 1995, also authorizes the procurement of "Arctic-type outer clothing", including headwear, by cemeteries where sub-zero temperatures are common in the winter. There is no evidence as to whether the Respondent falls within this category.

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The directive of June 1, 1987, required that the name of the cemetery appear above the left shirt pocket and that the VA seal patch be placed on the left sleeve (Jt. Ex. 3 at 28-2). The superseding directive of June 15, 1995, imposes no such requirements.

(Jt. Ex. 6 at 4)

On March 27, 2003<sup>7</sup>, George M. Webb, the Director of the VA Memorial Service Network (MSN) IV, of which the Respondent is a part, issued MSN IV Directive 3010 entitled "Uniforms and Special Clothing for National Cemetery Employees". The directive states, in pertinent part:

**1. PURPOSE:** The purpose of this directive is to ensure that employees within MSN IV who are required to wear uniforms do so appropriately.

**2. POLICY:** It is the policy of MSN IV that employees within MSN IV shall wear their prescribed uniforms correctly and at all times while performing their duties within the cemetery . . . .

**3. BACKGROUND:** On occasion, employees have not been wearing their prescribed uniforms, or have been wearing a combination of uniform items and personal apparel. Such behavior detracts from the professionalism of the cemetery staff, which in turn detracts from the MSN IV National Shrine image standard.

**4. RESPONSIBILITY:** Cemetery Directors and their subordinate supervisors are responsible for providing employees with uniforms. Employees are responsible for wearing their uniforms at all times while performing work in the cemetery. . . .

**5. PROCEDURES:** Cemetery Directors and their subordinate supervisors will ensure that all employees required to wear uniforms. . . . are provided with a complete uniform. . . . Outside insignia (e.g., union pins, veteran service organization (VSO) pins) may be worn on the uniform as long as they are small and inconspicuous and do not cover or otherwise obscure the emblem or name of the cemetery on the uniform. In addition, employees will not substitute personal apparel for any uniform item.

**6. REFERENCES:** NCS Handbook 3010, June 15, 1995.

(Jt. Ex. 7)

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All subsequently cited dates are in 2003 unless specifically stated to be otherwise.

The directive of March 27 was presented to Union representatives by Church at a Union/Management meeting on the same date. Church further stated that, as of March 28, all employees would be required to wear the standard uniform and that no Union hats would be allowed.

#### Respondent's Practice Prior to March 27

Gordon Spieckerman, a mechanic for the Respondent and the president of the Union, testified that he usually works indoors and goes into the field, *i.e.*, the grounds of the cemetery, "probably a couple times a week." He has worn a uniform at work since he was first employed in 1991. The headgear which he was most recently issued consists of a green mesh cap with the JBNC logo (Jt. Ex. 9) and a black JBNC cap (Jt. Ex. 11). The JBNC logo has changed since Spieckerman was originally hired but he has always had a cap which was issued by the Respondent.<sup>8</sup>

Spieckerman further testified that he wears a hat for only ten to twenty percent of the time when he is outdoors. He wore a cap with the John Deere logo for a short time and has also worn a hat with Union insignia. When the weather turns cold he wears one of several stocking caps which he either received as a gift or purchased himself. Spieckerman stated that, in the twelve years since he was hired, he has never tried to conceal his nonuniform hats. He sometimes works with supervisors and assumes that they must have seen the nonuniform hats, "especially in cold weather". Since the meeting on March 27 he has only worn the JBNC caps issued by the Respondent.

Spieckerman estimated that, prior to March 27 about 25 percent of the members of the bargaining unit (which consists of about 40 people) wore nonuniform hats. Such nonuniform headgear consisted of caps with the insignia of the various branches of the armed services, caps with a Vietnam logo, stocking caps in the winter, a leather pullover hood and a cloth which was tied around the employee's head.

Four or five days before the union/management meeting of March 27 Spieckerman was wearing a Union hat (Jt. Ex. 12) in the field when he was taken aside by Church and told that he could no longer wear it. Spieckerman asked Church if the matter could be negotiated. Church responded in the

Although Spieckerman testified that he had never before seen MSN Handbook 3010, he obviously knew that employees were required to wear uniforms.

affirmative which, according to Spieckerman, led to the meeting.<sup>9</sup>

Since the meeting Spieckerman has worn the green JBNC cap because he was told that he could no longer wear the black cap. He has also worn a stocking cap in cold weather.

On cross-examination Spieckerman acknowledged that he had never been told that he did not need to wear his uniform cap. He also stated that he has seen employees wearing Union pins on their JBNC caps. He is generally aware of NCS Handbook 3010 that was issued in 1995. He has worn a Levi jacket from time to time in cold weather; no action was taken by supervisors although the jacket was probably seen by all of them.

Thomas Brown is a caretaker for the Respondent and, as of the date of the hearing, had been the Union steward for grounds for about a year. He is outdoors for about six and a half hours on each work day. Brown was issued uniform items. He does not consider the hat to be part of the uniform issue because, "it was handed to us" and, unlike the other uniform items did not have to be returned when it was worn out. The hat could be thrown away upon receipt of a replacement.

Brown also testified that he always wears a hat when he is outdoors. He originally received a black JBNC hat but threw it away after he received a green JBNC winter hat. Brown further stated that he had received a Union hat after he became a Union steward but did not indicate whether or how often he wore it during working hours. He also wore a black hat commemorating the birthday of the Marine Corps, "probably a couple times a week." He sees his supervisor three or four times a day. Brown is certain that Church has seen him in a nonuniform hat because Church drives through the cemetery and sometimes comes around while Brown is on a break. Brown sees Church, "maybe a couple times a week." Prior to March 27 Brown was never told that he was not allowed to wear a nonuniform hat.

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The testimony of several witnesses suggests that union/management meetings were a regular occurrence. It is unclear whether the meeting of March 27 was called for the primary purpose of discussing the issue of nonuniform headgear. However, the minutes of the meeting (Jt. Ex. 8) indicate that the headgear issue was one of several which were discussed and that the headgear issue was not the first item on the agenda.

Church gave Brown a copy of the directive of March 27 at the meeting on that date and stated that employees would no longer be allowed to wear "those hats." Brown assumed that Church was referring to the Union hats since he (Brown) was wearing one at the time.

Since March 27 Brown has only worn a JBNC hat. During cold weather he wears a stocking cap with the JBNC hat over it. All other employees have worn JBNC hats since March 27 with the exception of Frank Millerman who wore a Vietnam hat for about a month before he was told to wear the uniform hat.

On cross-examination Brown indicated that no one had ever told him that he did not need to wear his uniform hat. He also acknowledged that he had worn a Union pin on his hat before he received the Union hat.

Franklin Millerman, Jr. is a caretaker for Respondent. He testified that he spends his entire work day outdoors. His supervisor is Larry Kemp. Although Millerman currently wears his JBNC hat, he used to wear a black cap with a Vietnam War emblem and insignia representing the various branches of the armed forces (Jt. Ex. 13); he had worn that cap every day for more than two years. He knows that his supervisor saw the nonuniform headgear because he sees the supervisor "constantly" throughout the day when he is in the field. He also sees his supervisor when he is in the lunchroom because the foremen's offices are adjacent to the lunchroom.

Millerman further testified that other supervisors have seen him in his Vietnam hat because he sees them frequently. When asked how often he sees Church, Millerman stated that Church makes an annual tour of the cemetery and also goes around once or twice a day. However, Millerman did not describe a specific encounter with Church. According to Millerman, other employees have worn nonuniform headgear, usually baseball-type caps with various insignia such as for sports teams. Employees also wear headgear such as stocking caps in cold weather. Millerman stated that he was never specifically told that he could wear a nonuniform hat in cold weather, but he was told that he should keep warm any way that he could.

About four to six months prior to the hearing Millerman was told by his supervisor that he could no longer wear his Vietnam hat, but was required to wear a uniform hat from then on.

On cross examination Millerman testified that he was never told that he could substitute his own headgear for the JBNC hat other than in cold weather. He also acknowledged that other employees wore uniform as well as nonuniform headgear and that he wore a JBNC hat occasionally. Although Millerman never wore a Union pin, he has seen other employees wearing Union pins on their JBNC hats. He was under the impression that this was allowed.

Samuel Scott is a caretaker for Respondent; his supervisor is Larry Kemp. Scott also serves as secretary of the Union. He spends his entire workday outdoors. Scott described the issuance of a green JBNC summer hat and a black JBNC winter hat. Employees later received green winter hats to replace the black ones. Scott has worn various types of hats while at work. He has worn a stocking cap in winter, a Vietnam and a black Purple Heart hat, a Union hat and the JBNC hat which was issued to him. All of these were baseball type caps with the exception of the stocking cap. He was never told that he could not wear any of them until after the union/management meeting of March 27. At that meeting Church said that employees would no longer be allowed to wear the Union hats and that the policy was not negotiable because it came from Webb who was Church's superior. About two weeks before the hearing he was issued a new JBNC hat which replaced the black one.

Scott further testified that he had never seen a uniform policy and was never told that he had to wear any uniform items. However, according to Scott, "We just assumed that since it's issued to us we wear it" (Tr. 79).<sup>10</sup>

Scott was never specifically told that he should wear his uniform hat other than on Memorial Day at which time there was a parade and a ceremony.

Scott also stated that Kemp and other supervisors had to have seen him wearing a nonuniform hat. Scott sometimes works in Interments where a different supervisor would see him. All supervisors make the rounds in the cemetery once or twice a day. The foremen are Ron Orr, Interment Foreman; Larry Kemp, Grounds Foreman and Dennis Womack, Maintenance Foreman. (Scott considers the foremen to be part of management.) According to Scott, Church would see him three or four times a week when Church would come in through the employees' and vendors' gate. (On cross-examination Scott agreed that those contacts with Church occurred prior to the

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Scott also stated, in response to my questioning, that the Respondent does not order a "uniform of the day". For example, employees are allowed to wear long or short sleeved uniform shirts at their discretion.

start of the work day.) Scott also testified that eight or nine employees, out of a total of about 45, regularly wore nonuniform hats.

Scott began keeping a log of the headgear worn by employees (GC Ex. 2) after the Union purchased the hats. He testified that he did so because of "friction" between the Union and Church. The entries reflect Scott's observations of employees in the lunchroom at 7:30 a.m. when the foremen distribute work assignments.

In response to my questioning, Scott stated that the log entries are only of employees who were observed to be wearing nonuniform headgear; the others were wearing JBNC hats (Tr. 101). During cross-examination Scott also acknowledged that the log entries were made prior to the commencement of the day's work (Tr. 95). The following is a summary of the data contained in the log:

December 9, 2002: 8 stocking caps or sweatshirts with hoods, 3 Vietnam hats.

January 30, 2003: 5 stocking caps, 2 Vietnam hats, 1 plain baseball cap, 1 Union hat.

January 31, 2003: 4 stocking caps or a sweatshirt with a hood, 2 Vietnam hats, 1 Union hat.

February 3, 2003: 1 stocking cap, 1 black scarf, 1 "cameo" hat, 2 Vietnam hats, 1 Union hat.

March 28, 2003: 2 Vietnam hats.

March 31, 2003: 1 Vietnam hat.

April 1, 2003: 1 Vietnam hat.

April 2, 2003: 1 Vietnam hat, entry stating, "Mike Crawford - Talked to Church wearing white skull hat."

April 3, 4, 7 through 10 and 15, 2003: 1 Vietnam hat each day.<sup>11</sup>

April 18, 21 and 22, 2003: The word "Same".

Church has been the Director of JBNC since 1989. JBNC covers 330 acres. It averages 20 interments a day. Church

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The entry for April 17, 2003, also reads, "Vince - Red StL Cardinals hat."

testified that NCS Handbook 3010 sets forth a uniform policy for the entire National Cemetery Administration. During his tenure as Director, Church has never departed from the provisions of the national uniform policy other than to provide employees with better quality boots. When he first came to JBNC, each employee was provided with a polyester cap with a JBNC decal. Church replaced the polyester cap with summer and winter caps with embroidered insignia. Church also testified that he has never allowed employees to deviate from the uniform policy other than in the winter when they are allowed to wear personal stocking caps. Prior to March 27, 2003, he instructed supervisors to send employees with nonuniform hats back to the locker room to get hats that had been issued. He specifically recalled seeing Millerman with a Vietnam hat and instructed Kemp to take corrective action.

On or about March 23 Church first saw employees in the field wearing the Union hat. He approached Spieckerman and told him that it was not allowed. Church had been aware that the Union had purchased the hats and had seen employees wearing them during off-duty time. That practice did not present a problem.

On March 26 Church sent an e-mail to Webb on the subject of uniforms (Resp. Ex. 1) which reads as follows:

I HAVE NOTICED THREE OR FOUR WG EMPLOYEES WEARING BLACK BALL CAPS WITH NAGE LOGO. I SPOKE WITH THE LOCAL UNION PRESIDENT AND HE SAID IT WAS AUTHORIZED BY SOME COURT DECISION TEN YEARS AGO, BUT HE DID NOT PROVIDE ANYTHING TO SUPPORT HIS POSITION. WE HAVE NOT ALLOWED OTHER TYPES OF LOGOS TO BE WORN AND IT IS MY DECISION NOT TO ALLOW NAGE LOGO BALL CAPS.

IF YOU WOULD PROVIDE YOUR OPINION IT WOULD BE GREATLY APPRECIATE [*sic*] AS I INTEND TO BRING THIS UP AT NEXT UNION/MANAGEMENT MEETING.

Church testified that he specifically mentioned the Union hats in the e-mail because they were the only nonuniform hats that he had seen in the field.

Webb did not reply to the e-mail either orally or in writing. However, he did issue the directive of March 27.

Church gave the directive to the Union representatives at the union/management meeting on March 27 at which time he stated that employees would not be allowed to wear Union hats. According to Church, he specifically mentioned the



Union hats because that was the only open issue with regard to the wearing of uniforms. Church recalls the meeting as being calm and that there were no complaints or protests concerning the directive.<sup>12</sup>

Church acknowledged that he had seen Millerman wearing his Vietnam hat and believes that this occurred prior to March 27. He had also seen employees wearing Union hats before the start of the work day. This presented no problem because the uniform requirements applied only to employees in the field.<sup>13</sup>

During the course of cross-examination counsel for the General Counsel confronted Church with an affidavit that he had given in support of the Respondent's motion for summary judgment. Although the affidavit did not allude to the relaxation of the uniform requirements during cold weather, it was generally consistent with Church's testimony at the hearing.

On redirect examination Church testified that he had never seen an employee other than Millerman wearing a nonuniform hat while in the field. He reiterated that he had directed Millerman's supervisor to correct the problem.

Webb testified that there is a national policy on uniforms for employees and that the directive of March 27 was intended to merely reiterate that policy. He further stated that he was considering the directive when he received the e-mail from Church regarding the wearing of Union hats in the field. He telephoned Church and informed him that he would be issuing the directive. The directive was later distributed in the usual manner to all cemeteries in MSN IV.

Webb further testified that he has visited each of the cemeteries in MSN IV once or twice a year since February of

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It has been stipulated that the Union did not request bargaining on the subject of uniform hats subsequent to the March 27 meeting.

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On cross-examination Church stated that, as he understood the Respondent's policy on uniforms, employees were required to wear the JBNC hat other than in cold weather. He further stated that employees were not allowed to go bareheaded in the field. According to Church, Ronald Orr, the Interment Foreman, gave each employee a blue stocking cap for Christmas; all employees wore the cap during cold weather although they were not required to do so.

2001 when MSN IV was created.<sup>14</sup> Each of his visits to JBNC have lasted for two or three days and always include a tour of the cemetery and often a meeting with employees. He sometimes makes unannounced visits to cemeteries. He begins such a visit with a tour of the cemetery after which he meets with the Director and discusses what he has seen. In the course of between seven to ten visits to JBNC he has never seen employees working in the field without their uniform hats.

On cross-examination Webb acknowledged that he did not know when he would have issued the directive if the incident of Union hats at JBNC had not arisen. It was that incident which prompted him to issue the directive when he did.

Janice Klahs is the Assistant Cemetery Director for the Respondent. She indicated her familiarity with policies regarding the wearing of uniforms and further testified that JBNC employees have always been required to wear uniforms, including hats. She has never observed employees wearing nonuniform headgear. According to Klahs employees are allowed to wear either a watch cap (*i.e.*, a stocking cap) or the JBNC hat during the winter; the watch cap is now an issued item. She has never seen an employee wearing a Union hat and had never even seen a Union hat prior to the hearing. Klahs usually types the minutes of union/management meetings. She typed the minutes of the meeting of March 27 (Jt. Ex. 8) and confirmed the accuracy of the language regarding Union hats. She recalled a discussion between Church and Spieckerman to the effect that the directive on uniforms was a reiteration of existing policy.

Klahs testified that she frequently makes tours of the cemetery in the course of her duties. Prior to March 27 she had never seen an employee who was not wearing the proper uniform.

Ronald Orr, the Interment Foreman for Respondent, testified that he has been employed by the Respondent for 14 years during which time employees have always been required to wear uniforms, including hats. At one time JBNC employees were issued a green hat for the summer and a black hat for the winter. The black hat was eventually exchanged for a green winter hat. Employees supervised by Orr sometimes wear helmets around heavy equipment, but otherwise wear uniform hats. He has allowed employees to wear their own headgear in cold weather. Orr stated that he has only

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According to Webb, MSN IV consists of 26 national cemeteries as well as ten "soldiers' lots", three Confederate monuments and a monument in Terre Haute, Indiana.

seen one of his employees wearing headgear other than the uniform hat or winter headgear. The employee was Ronald Decker who was wearing a Vietnam hat.<sup>15</sup> When Orr told him that the hat was not authorized Decker stated that his head was too big for the uniform hat. The Respondent thereupon ordered two specially made uniform hats. This occurred prior to March of 2003.

Orr further testified that, although he attended the union/management meeting of March 27, he has no recollection of a discussion of uniforms. He does remember receiving a copy of Webb's directive and did not consider it to be a change from the existing policy.

On cross-examination Orr testified that the work day begins at 7:30 a.m. when employees come to Orr's office to receive their daily assignments. Although employees usually wear the clothing which they will wear in the field, Orr occasionally has to remind them to change.

At some time after the assignments have been made Orr goes into the field to check on the progress of work. Orr also confirmed that he had purchased stocking caps for all employees, including those who did not report to him. Most employees stopped wearing the black uniform hats several years ago, but a few might have been wearing them more recently. Orr acknowledged that the black uniform hats are similar in appearance to the Union hats, except for the different embroidery.

On redirect-examination Orr stated that he has allowed employees to wear Union pins on their uniform hats. He has never been told that this practice is prohibited.

Dennis Womack has been the Maintenance Foreman for the Respondent for about ten years. Womack confirmed that he has always worn a full uniform including a hat. He is aware that employees are allowed to wear their own stocking caps in cold weather. He has also seen employees wearing Union pins on their uniform hats and considers this to be allowed by the Respondent's uniform policy.

On cross-examination Womack testified that, at the meeting of March 27, Church stated that Union hats would not be allowed and that only the JBNC hat was to be worn. He has seen employees wearing the Union hat in the lunch room but never in the field.

Larry Kemp has been the Grounds Foreman for the Respondent since April of 1999 and has worked at the cemetery for about eleven years. Kemp testified that he was issued a full uniform, including a hat, and that items are replaced as they wear out. Employees are required to wear a complete uniform other than in cold weather when they are allowed to wear their own stocking caps.

Kemp sees his employees every day, both in the morning and during the lunch break. He saw an employee with a Vietnam hat one morning about two winters ago and took corrective action. He also stated that he does not pay attention to employees' headgear in the morning because he is concentrating on giving out work assignments.

Kemp also testified that he does not pay much attention to what his employees are wearing in the field because he is concerned with the work. He probably would not have noticed a black hat with something other than a JBNC insignia. Kemp recalled seeing an employee wearing a "doo rag"; he questioned the employee and was told that he had lost his hat. Kemp thereupon issued him a replacement.

### **Findings of Fact**

Based upon full consideration of all of the testimony and documentary evidence, I make the following findings of fact:

1. The Respondent is a unit of an agency as defined by § 7103(a)(3) of the Statute.

2. The Union is an agent of a labor organization as defined by § 7103(a)(4) of the Statute and is the representative of a unit of Respondent's employees which is appropriate for collective bargaining.

3. Since 1995 the Respondent and its employees have been bound by a national policy of the VA whereby wage grade employees of the Respondent were required to wear issued uniforms while on duty. The uniform for wage grade employees includes one or more hats.

This finding is based on the language of NCS Handbook 3010 (Jt. Ex. 5) as well as the testimony of all of the witnesses.

4. Each of Respondent's wage grade employees were issued two baseball type caps with the JBNC logo embroidered on the front. One green cap, which included a mesh panel, was designed for warm weather (Jt. Ex. 9). The second cap

had no mesh panel and was made of heavier material; that cap was designed for colder weather and was known as the "winter hat". Employees were originally issued black winter hats (Jt. Ex. 11)<sup>16</sup> which were replaced by green hats (Jt. Ex. 10) so as to more closely match the other uniform items which were also green.

As shown in the Summary of Evidence, these facts were confirmed by numerous witnesses.

5. Respondent's wage grade employees were not required to wear uniform hats during cold weather.

While there was some inconsistency of testimony as to the type of headgear that was allowed during cold weather, it is undisputed that employees were not required to wear JBNC headgear at such times.

6. Wage grade employees were allowed to wear nonuniform hats before beginning their outdoor work and during lunch time.

This finding arises out of the unrebutted testimony of Church.

7. Employees were allowed to wear Union pins on their uniform hats.

This was confirmed by numerous witnesses and has not been contested by the General Counsel.

8. Prior to March 27 a minority of wage grade employees occasionally wore nonuniform hats while working in the field.

Each of the witnesses for the General Counsel indicated that some employees wore nonuniform hats although none of them were specific as to the numbers of employees involved or the frequency of noncompliance with the Respondent's uniform policy. Spieckerman estimated that 25 percent of the employees wore nonuniform headgear, but it is significant to note that this estimate included stocking caps during cold weather. All of the entries in Scott's log (GC Ex. 2) prior to March 27 were for selected nonconsecutive dates in December, January and February, all of which were months in which cold weather would be

common.<sup>17</sup> Even on those dates, the highest number of employees observed to be wearing nonuniform hats was 11 out of an approximate total of 45 on December 29, 2002. Millerman was the only employee who consistently failed to comply with the uniform policy by wearing his Vietnam hat (Jt. Ex. 13). It is also significant to note that Scott's entries were made before the employees began their work in the field. In view of those factors, I find that Scott's log is unpersuasive in showing that there was widespread noncompliance with the Respondent's uniform policy or that such noncompliance was routinely tolerated by the Respondent.

9. Employees are occasionally approached by visitors to the cemetery, many of whom are elderly, for assistance including directions to grave sites.

This finding is uncontested.

10. Respondent's management representatives did not consistently fail to enforce Respondent's uniform policy.

This is the most strongly contested factual issue. The witnesses for the General Counsel have indicated or suggested that nonuniform hats were worn with impunity in the field prior to March 27. The Respondent's witnesses stated that they rarely encountered noncompliance and always took corrective action when they did. Considering the evidence as a whole, it is more likely than not that Respondent's representatives ignored at least some instances of noncompliance. However, as stated above, the evidence is unclear as to how often such instances occurred. Even if it were assumed that supervisors saw and impliedly condoned the actions of each of the employees named in Scott's log entries prior to March 27, those entries were for winter months during which cold weather (and a relaxation of the requirement of wearing uniform hats) was common.<sup>18</sup>

In view of the lack of specificity of the evidence submitted by the General Counsel I find that he has failed to carry his burden of proof on this issue as required by § 2423.32 of the Rules and Regulations of the Authority.

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Although there was no evidence as to the weather on those dates, this conclusion is within the scope of official notice, *Union Electric Co. v. F.E.R.C.*, 890 F.2d 1193, 1202 (D.C. Cir. 1989).

<sup>18</sup>

Scott did not explain how he chose the dates for his log entries.

11. The Respondent's action of March 27 did not have the effect of discouraging or penalizing Union activity.

The General Counsel's position on this issue is based solely on the undisputed fact that Webb's directive of March 27 and Church's statement at the union/management meeting were caused by the observation of certain employees who were wearing Union hats while in the field. There was no evidence of anti-union animus by the Respondent, nor was there any evidence that the Respondent's action of March 27 had a coercive effect on members of the bargaining unit. In addition, it is undisputed that employees were allowed to wear Union pins on their uniform hats.

### **Discussion and Analysis**

#### There Was No Past Practice of Allowing the Wearing of Nonuniform Hats

In order to find the existence of a past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other, *United States Patent & Trademark Office*, 57 FLRA 185, 191 (2001). The General Counsel has failed to prove at least two of the elements of such a showing.

Laying aside the issue of the duration of Respondent's practice, there is insufficient evidence that the wearing of nonuniform hats was allowed on a consistent basis. Viewing the evidence in a light most favorable to the General Counsel and the Union, the most that can be said is that some supervisors occasionally allowed some employees to wear their own headgear in the field other than in cold weather. The frequency of such incidents is a matter of conjecture. The Authority has held that such *ad hoc* actions by supervisors are insufficient to establish a past practice, *U.S. Department of Labor, Office of Workers' Compensation Programs, Boston, Massachusetts*, 56 FLRA 598, 603 (2000).

Secondly, even if the national uniform policy had been consistently ignored by the Respondent, that would have been insufficient to establish a past practice in the absence of evidence that the departure from the policy was either known or condoned by management officials at the national, or even the network, level, *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 17 FLRA 1011, 1021, (1985) (SSA). The General Counsel failed to rebut the testimony of Webb to the effect that he had never seen any of Respondent's employees wearing nonuniform hats. Webb's testimony suggests that his periodic tours of JBNC

were such that he might not have noticed employees wearing nonuniform hats, especially if they were wearing dark colored baseball caps which, from a distance, could have been mistaken for the green or black uniform hats issued by JBNC.<sup>19</sup> When Webb was informed by Church on March 26 that employees were wearing nonuniform hats he took prompt action in the form of the directive of March 27. There is no evidence that Webb or any other VA management representative above the level of Church knew of the departure from the uniform policy prior to March 26.

The Respondent Did Not Change Conditions of Employment on March 27 and Had No Duty to Bargain

As stated above, the Respondent's uniform policy has been in existence since 1995 and there was no binding past practice to the contrary. Webb's directive of March 27 was no more than a reiteration of that policy. Such reiteration does not constitute a change in conditions of employment, SSA, 17 FLRA at 1020. Since the Respondent's action on March 27 did not change a condition of employment it was under no duty to bargain, *United States Department of the Air Force, 6<sup>th</sup> Support Group, MacDill Air Force Base, Florida*, 55 FLRA 146, 152 (1999).

The Respondent's Uniform Policy is an Exercise of Management Rights Under § 7106 of the Statute

The issue of whether the Respondent's uniform policy is substantively negotiable is to some extent moot in view of my conclusion that the Respondent's actions of March 27 did not cause a change in conditions of employment such as to trigger any obligation to bargain. Nevertheless, a resolution of the issue is necessary to the proper application of the balancing test.

The General Counsel has cited a number of cases in which the Authority has held that certain proposals regarding uniforms are negotiable.<sup>20</sup> The General Counsel correctly asserts that the test of negotiability is whether the proposed change interferes with the agency's purpose of requiring uniforms, which, in this case, is to ensure that employees are identifiable and to maintain decorum in the

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Spieckerman testified that the Union had selected its hats so as to be generally similar in appearance to those issued by the Respondent.

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The Respondent does not dispute the proposition that matters involving uniforms affect conditions of employment.



cemetery. That principle is succinctly stated in *United States Department of Justice, Immigration and Naturalization Service, Washington, DC, 31 FLRA 145 (1988) (INS)*, a case cited by the General Counsel. In that case the Authority stated that:

Proposed additions or modifications to a uniform which are incompatible with the mission-related purposes for which an agency requires the wearing of uniforms are nonnegotiable because they interfere with management's rights under section 7106(b) (1).

(*Id.* at 153)

In *INS* the Authority found that a proposal to allow employees to wear green jeans rather than uniform trousers was negotiable. The Authority based its conclusion on the fact that the wearing of green jeans was a past practice and that the agency had not shown that the practice had interfered with its mission of promoting respect for and cooperation with its agents. The holding in *INS* is distinguishable because there is no past practice in the instant case. Furthermore, the union in *INS* was, in effect, proposing that green jeans be made an optional uniform item, but was not seeking to eliminate an agency insignia on the uniform. In this case, the Union is attempting to substitute a nonuniform item, its own hats with Union insignia, for the headgear issued by the Respondent with the JBNC insignia. The other cases cited by the General Counsel are similarly distinguishable. The negotiable proposals in those involved such matters as protective clothing, the number of uniform items to be provided, changes to the uniform and the allowance of time to change clothes.

It is true that there is no evidence that members of the public had difficulty identifying employees with nonuniform hats. However, the absence of such evidence is of little consequence in view of the fact that the majority of employees wore JBNC hats. Therefore, visitors could easily have bypassed employees with nonuniform headgear and addressed their concerns to employees who were in the prescribed uniforms.

The issue of decorum in the cemetery is a more difficult one because it is largely subjective. In addition, the Respondent's uniform policy was flexible inasmuch as employees could wear long or short sleeved shirts and jackets at their discretion as well as their own headgear in cold weather. Those factors notwithstanding, there is a logical nexus between the Respondent's enforcement of its uniform

policy, such as it is, and the maintenance of an appropriate atmosphere in the cemetery.

In summary, I have concluded that there is, in the language of *INS*, a "direct and integral relationship" between the Respondent's uniform policy and its legitimate goals. Furthermore, the requirement that employees wear the prescribed uniform is, as the General Counsel asserts, a means of performing work. Therefore, the Respondent's uniform policy, as reaffirmed on March 27, is a valid exercise of management rights under § 7106 of the Statute.

#### The Respondent's Action on March 27 Did Not Have a Coercive Effect on Its Employees

In *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994) the Authority adopted an objective standard in deciding whether an employer's actions have the coercive effect which is prohibited by § 7116(a)(1) of the Statute. While the employer's motive may be relevant to the assessment of the effect of its actions, motive itself is not determinative of the ultimate issue of a coercive effect.

The timing of the Respondent's actions, which were admittedly precipitated by the appearance of Union hats in the field, raises the question of its motivation. However, there is no other evidence to support the proposition that the Respondent was attempting to undercut the Union. Furthermore, there is nothing to indicate that employees felt that the Respondent had an anti-union animus.

There may be situations in which the nature of the employer's action, in itself, supports an inference of a coercive effect without further evidence. This is not such a situation, especially in view of the fact that the Respondent has allowed employees to wear Union pins on their uniform hats. While the allowance of the Union pins does not foreclose an inquiry into whether the Respondent's uniform policy is coercive, it is relevant to an evaluation of the policy as a whole.

The General Counsel has cited a number of cases illustrating the so called "special circumstances" test in which employers attempted to prohibit employees from wearing any union insignia.<sup>21</sup> The test has been applied in cases such as *U.S. Department of Justice, Immigration and*

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There is no evidence that the Union has ever attempted to introduce Union insignia onto portions of the uniform other than hats.

*Naturalization Service, Border Patrol, El Paso, Texas*, 38 FLRA 1256, 1267 (1991) (*INS*). The General Counsel has correctly stated that the special circumstances test involves a case-by-case balancing process in which the right of employees to wear union insignia, which is a protected activity under § 7102 of the Statute, is weighed against the management rights of agencies under § 7106 of the Statute.

It is significant to note that the General Counsel does not contest the legitimacy of the Respondent's stated purposes for requiring adherence to its uniform policy. Rather, the position of the General Counsel is that the Respondent has not struck the correct balance between protected activity and management rights and that the JBNC hat is not necessary to the accomplishment of the Respondent's purposes. The simple response to this argument is that, in evaluating whether an agency's actions are violative of the protected rights of employees, the Authority will not substitute its own judgment for that of management. See, *U.S. Department of the Air Force, 315<sup>th</sup> Airlift Wing, Charleston Air Force Base, South Carolina*, 56 FLRA 927,931 (2000).

In the cases cited by the General Counsel the Authority has upheld the right of employees to affix union insignia on uniform items, such as by lapel pins and pocket protectors. Those cases are distinguishable from the situation in the instant case in that the Union seeks to completely eliminate a uniform item, *i.e.*, the hat, and substitute a nonuniform item with its own insignia. The Respondent, on the other hand, has accommodated the Union's legitimate rights under the Statute by allowing the wearing of Union pins on uniform hats so long as they do not obscure the JBNC insignia or otherwise detract from the legitimate purpose of the uniform, which is to identify cemetery employees to visitors and to maintain the appropriate atmosphere at the cemetery.

After having considered all of the relevant evidence, I have concluded that the Respondent's interest in the enforcement of its uniform policy (which allows employees to wear Union insignia) is a special circumstance which outweighs the interest of the Union in substituting its own hat for the hats issued by the Respondent.

This Decision should not be construed as prohibiting the Union from bargaining, to the extent allowed by the Statute, over other aspects of the Respondent's uniform policy. In accordance with the holdings of the Authority in *INS* and related cases, my findings and conclusions are applicable only to the circumstances of this case.

For the foregoing reasons I have concluded that the Respondent did not commit an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute by reiterating its uniform policy on March 27 without affording the Union advance notice and the opportunity to bargain. I have also concluded that the Respondent did not commit an unfair labor practice in violation of § 7116(a)(1) of the Statute by prohibiting bargaining unit employees from wearing Union hats instead of uniform hats while working in the field.

Accordingly, I recommend that the Authority adopt the following Order:

**ORDER**

It is hereby ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, March 29, 2004

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PAUL B. LANG  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. DE-CA-03-0429, were sent to the following parties:

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Dated: March 29, 2004  
Washington, DC