

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and-

Docket No. CO-H-2000-201

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the State of New Jersey, Department of Corrections, did not violate N.J.S.A. 34:13A-5.4a(5) by implementing a dress code, including a "no-jeans" policy, for civilian staff. The State has a managerial prerogative to implement a dress code, justified by the special circumstances that are inherently presented by the administration of a correctional facility, including the need to maintain safety, security, and order, citing the Commission's decision in Department of Corrections and C.W.A., P.E.R.C. No. 97-145, 23 NJPER 388 (¶28176 1997). The Hearing Examiner further finds that the Department has a legitimate interest in presenting a professional atmosphere to the public it serves. Since the implementation of the dress code intimately and directly affects employee welfare, the Hearing Examiner recommends that the Commission order the State/Department of Corrections to negotiate, upon demand, regarding severable aspects of the implementation of the dress code and "no-jeans" policy.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, David Samson, Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Judiann Chartier, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 26, 2000, and by amendment on March 10, 2000, C.W.A., AFL-CIO ("C.W.A." or "Charging Party") filed an unfair practice charge against the State of New Jersey, Department of Corrections ("DOC" or "Respondent") with the Public Employment Relations Commission alleging that DOC violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). The charge alleged that on or about August 26, 1999, and January 12, 2000, the DOC promulgated dress codes prohibiting the wearing of jeans in the workplace except for employees assigned to

construction, horticulture, and farm operations; and on March 3, 2000, promulgated a dress code additionally prohibiting the wearing of jeans and sweat pants except for recreation staff when involved in direct supervision of the population during inmate recreational and staff physical training activities, without negotiating with C.W.A., all in violation of 5.4(a)5 of the Act.^{1/}

A Complaint and Notice of Hearing was issued on April 11, 2000. Respondent filed an Answer to the Complaint on April 19, 2000, denying having violated the Act and raising certain affirmative defenses. Hearings were held on May 8 and 9, 2001.^{2/} At the conclusion of the Charging Party's case, the Respondent moved to dismiss the complaint. I denied that motion. Post-hearing briefs were filed by August 6, 2001, closing the record.

Based upon the entire record, I make the following:

FINDINGS OF FACT

The parties stipulated facts 1 through 3.

(1) Prior to August 1, 1999, each prison facility in New Jersey under the authority of the Department of Corrections, without

^{1/} These provisions prohibit public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

^{2/} The Transcripts in this matter will be referred to as 1T (May 8) and 2T (May 9). "C" refers to the Commission exhibits received into evidence at the hearing. "CP" and "R" refer to Charging Party's and Respondent's exhibits, respectively.

negotiations, promulgated and implemented its own dress code policies covering civilian employees and visitors.

(2) Prior to August 1, 1999, dress code policies covering custody staff and inmates were promulgated and implemented State-wide without negotiations through the Department of Corrections' central office in Trenton.

(3) Prior to August 1, 1999 dress code policies at the various prison facilities were amended from time to time without negotiations.

(4) Prior to 1997, each institution within the Department of Corrections functioned as a separate appointing authority and issued its own internal operating procedures (2T19). After 1997, the Department became a single appointing authority (2T20).

(5) By memorandum dated August 31, 1999, Department of Corrections Chief of Staff Mary Ellen Bolton issued a department-wide policy prohibiting the wearing of jeans to work by civilian Department of Corrections personnel (the "no-jeans" policy). The department-wide policy was intended to apply to all employees, with exceptions for construction and horticultural workers (2T69). After the policy was issued, questions arose whether additional exemptions to the policy could be granted because of the nature of the work in other job classifications (2T69). Requests for exemptions were referred to the central administrative offices which then responded to the requests (2T69). Some specific exemptions were granted upon requests from facility administrators

affecting storekeepers who unloaded supplies from delivery trucks; transportation employees whose job duties included vehicle maintenance; welders; and vocational teachers (2T73-2T75, 2T69).

Jeffrey Burns has been the assistant commissioner for the Division of Operations in the Department of Corrections since October 2000 (2T66-2T67). Prior to the department-wide policy, there was a universal sense of appropriate attire for a correctional facility (2T70). There were policies and procedures in effect at the institutional level to ensure that employees would not come to work dressed in a manner that was provocative or would put them in danger in a correctional facility (2T68, 2T70-2T71; S-7). The primary issue concerning the wearing of jeans was that jeans were not considered appropriate professional attire (2T72). According to Burns, the permissible areas of exception were those that were discussed at senior staff meetings, but facility administrators had some discretion to evaluate requests for further exemptions within the overall goal that employees should dress as professionally as possible (2T76-2T77). There is no written procedure by which employees may request an exemption, but according to Burns, "employees know how to please supervisors and they know how to ask" should an exemption be desired (2T80).

(6) C.W.A. is an employee organization which is the majority representative for four collective negotiations units of employees in the Department of Corrections: administrative/clerical, professional, primary level supervisors, and higher level supervisors (1T8; J-1, J-2).

Donald Klein is the executive vice president of C.W.A. Local 1040 (1T14). His duties include functioning as a member of the negotiating team with the president of the local (1T17). The current collective agreement in effect between the parties is effective from July 1999 through June 30, 2003 (1T18, 1T22; J-1, J-2). Certain employees in titles represented by C.W.A. receive a clothing maintenance allowance pursuant to the applicable collective agreement (1T18, 1T22; J-1, J-2). None of the titles affected by the August 31, 1999 memo are entitled to a clothing allowance pursuant to the collective agreement (1T34).

Klein first learned about the implementation of the dress code policy at the Department of Corrections in December 1999 or the beginning of 2000 when various Local 1040 members called Klein and other representatives saying that a no-jeans policy had been implemented (1T23). C.W.A. did not get any notice of the policy to Klein's knowledge (1T23).

Klein has seen the August 31, 1999 memo which granted certain exceptions to the dress code, but is not aware of any process by which employees can request an exception (1T38). C.W.A. did not apply for exemptions to the policy on behalf of any employees (1T38). Klein has received approximately six reports through C.W.A. staff members of employees being sent home to change clothes after wearing jeans to work (1T40).

INDIVIDUAL DOC FACILITIES:

(7) Albert C. Wagner

The Albert C. Wagner Correctional Facility is located in

Bordentown (1T27, 1T72). Eric Iaquinta is employed as a senior ID officer at Albert C. Wagner (1T71). He is the only ID officer at Wagner (1T78). His job duties include doing all the fingerprinting, background checks for all staff, custody, inmates, and photos for releases and entry into the facility (1T73). Iaquinta also transports inmates to have blood drawn for DNA, takes fingerprints required for the State Police, and handles related paperwork (1T73). He has no daily contact with the general public (1T74).

Iaquinta fingerprints every staff member, every custody member (staff person who works with inmates in custody) and every inmate (1T73). He fingerprints from five to one hundred people every day (1T73-1T74). In order to fingerprint a person, Iaquinta applies each individual finger to ink and applies the finger to a piece of paper, doing this twice for each person (1T74). As a result of this process, the ink, as well as the surgical hand cleaner used to clean it up, gets transferred "all over" Iaquinta's shirt, pants and shoes (1T75, 1T80-1T81). The ink and hand cleaner do not wash out and "completely" ruin his clothing (1T75). Iaquinta has never requested or been provided with any protective clothing such as an apron, smock, or laboratory coat to use when performing fingerprinting duties (1T78, 1T81).

Prior to January 2000, Iaquinta typically wore a collared golf shirt of the type he wore at the time of his testimony, and jeans to work because the jeans "held up in the facility" (1T71,

1T79, 1T86).^{3/} The jeans hid ink stains that slacks did not (1T77, 1T80). Iaquina felt that stained slacks were inappropriate for work (1T77). After the policy prohibiting jeans was issued, Iaquina described his clothing as "almost disposable" because he had to purchase new clothing every month (1T76). Iaquina keeps pants and shirts as long as he feels they are presentable and then discards them (1T84-1T85). The day prior to his testimony, an inmate accidentally placed the inmate's ink-covered hands on the front of Iaquina's red, white and blue striped collared golf shirt (1T86). Iaquina pretreated and washed the shirt; it did not come clean and he has discarded it (1T85). Iaquina has "ruined" and discarded approximately five shirts, two pairs of pants and one pair of shoes between January and May 2001 (1T87-1T88). He has requested reimbursement for his ruined clothing from the Department of Corrections and been "laughed at" in response (1T89). He was not aware that he could apply for an exemption or waiver and was not so advised by C.W.A. (1T78, 1T90).

Iaquina was never sent home for wearing jeans to work (1T77). Prior to the implementation of the policy, he was unaware of any security or safety reasons against the wearing of jeans (1T78).

Iaquina has seen other employees in maintenance, horticulture or shop positions wearing jeans at the Wagner facility

^{3/} The witness was wearing a sage green polo shirt and khaki pants.

since January 2000, but to his knowledge, these exceptions have not been put in writing (1T78).

(8) South Woods State Prison

South Woods State Prison (also known as Southern Woods) is located in Bridgeton (1T45-1T46). It is a large facility spread out over 100 acres (1T45-1T46).

The dress code policy for Southern Woods has been in effect since its opening in May 1997 (CP-2; 2T57). The dress code was amended to prohibit the wearing of thong sandals meant for beach wear ("flip-flops") (2T57-2T58). Jeans without holes were formerly permitted but not commonly worn (2T59). The policy was amended to prohibit jeans after the issuance of the department-wide memorandum prohibiting jeans (2T59). Under the policy, only maintenance staff and occasionally instructors are now permitted to wear jeans (2T59).

William Johnson is employed as a teacher two at South Woods (1T45). He started work at South Woods in May 1998 and runs the inmate literacy program (1T46, 1T48). Johnson's hours of work are from 8:00 a.m. to 11:00 a.m. and from 12:30 p.m. to approximately 3:20 p.m. (1T46). He works one on one with inmates for approximately six hours a day and has no contact with the public (1T47). Johnson is confined to a wheelchair (1T46).

Johnson is assigned to Facility One at South Woods (1T45). In order to reach his classroom from the parking lot, he must travel "a good distance" in his wheelchair. In the morning Johnson passes

through an area where he may be exposed to substances including the chemicals used by inmates on work detail to scrub blacktop, discarded cigarette butts, spit, floor wax or salt (1T46, 1T61, 1T65). Substances from the environment are picked up on the wheels of the chair causing stains on Johnson's pants (1T61, 1T65).

When Johnson started work at South Woods, he would wear khaki pants and jeans (1T47). Due to the environment and his need for a wheelchair, Johnson's pants "take a beating" (1T60). He found jeans more durable because they are heavier, denser and repel things much more easily than cotton pants (1T48, 1T68). He rotates his pants and needs at least ten pairs for work (1T60). Johnson has never attempted to wear any type of protective covering over his clothing; he believes he should be in an environment where he can "motor in and motor out", in reasonable accommodation of his need for a wheelchair (1T66).

Prior to January 2000, Johnson was unfamiliar with any dress code prohibiting jeans (1T47). William Stanley Nunn is the administrator at South Woods (2T57; CP-2). Nunn issued a memo in 1997 prohibiting, among other things, torn, ragged jeans, and tattered clothing (CP-2; 1T48). Johnson was aware of that memo.

Johnson was not aware, however, of any policy prohibiting jeans until a memorandum was issued by Chief of Staff Bolton (CP-3; 1T50, 1T53). He was never told not to wear jeans to work (1T50). He and other teachers were confused about whether the policy would apply at South Woods and waited for guidance from the administration (1T50).

On or around March 15, 2000, Johnson arrived for work wearing jeans and was not permitted to enter the compound (1T51). He was told by his supervisor, David Metlo, Supervisor of Education, that he was dressed inappropriately and he was sent home to change (IT51). Johnson had to purchase two pairs of pants before he could return to work, and ordered additional pairs (1T60). He did not sign a leave slip when he was sent home, but was charged a day of annual leave (1T60). Prior to being told not to wear jeans to work, Johnson was unaware of any safety or security issues related to the wearing of jeans to work (1T62).

The 1997 dress code for staff was revised several times by Nunn in 2000 (1T52; CP-3). Exceptions included employees working in horticulture, shops, maintenance department, institutional warehouse, and vocational education classes (1T52, 1T54). Women were permitted to wear denim jumpers (1T53). Johnson was among those for whom jeans remained prohibited (1T53).

Johnson requested an exemption from the prohibition on jeans as a reasonable accommodation due to his exposure to chemicals which caused stains on his pants and poor wear (1T55). He wrote to Nunn on three occasions but felt "ignored" (1T55, 1T68). Johnson also wrote to Commissioner Terhune explaining the dress code situation at South Woods and describing the problems he was having (CP-4; IT56). He received responses from members of the commissioner's staff (CP-5; 1T58). Johnson also filed a complaint with the Equal Employment Opportunity Commission (1T69). Johnson

felt the response by the commissioner's office did not properly address Johnson's needs as a wheelchair user (1T70, 1T69).

Corrections officers at South Woods wear dark blue uniforms and inmates wear khaki shirts and khaki pants (1T63). The pants Johnson now wears to work are identical in color to those worn by the inmates (1T62). The inmates jokingly call Johnson's khaki pants his "inmate pants" (1T62).

(9) Riverfront State Prison

Riverfront State Prison is located in Camden (1T26). Evelyn Davis is employed as an executive assistant at Riverfront State Prison and has been employed there for nine years (1T117). She previously worked at the Department of Corrections Essex House halfway house for female offenders (1T117).

There is a dress code at Riverfront (1T117). Inmates are required to wear a khaki uniform at all times; custody staff, food service staff and medical staff wear uniforms (1T117-1T118). There is also a dress code for visitors at Riverfront (1T122). In Davis' nine years of employment at Riverfront there has always been a dress code for civilian staff as well (1T118, 1T119; S-3). The restrictions included a prohibition on t-shirts, jeans, shorts, culottes, spandex pants, tightly fitted or revealing clothing, and restrictions on the length of skirts/dresses (1T121; S-3). Approximately two or three years ago, Davis had to enforce the dress code by asking one of the female classification personnel to go home and change from an inappropriate outfit (1T119). The employee was

wearing a jean skirt with a wide split in front (1T119, 1T120-1T121). The employee's responsibilities as a classification officer included bringing files from the file room into the secured perimeter of the institution for classification meetings and having contact with other staff and the inmate population (1T120). The inmate population at Riverfront is exclusively male (1T121). The jean skirt was not considered professional attire for contact with male inmates inside the secured perimeter (1T121).

(10) Edna Mahan Correctional Facility for Women

Edna Mahan Correctional Facility for Women is located in Clinton. It is the only state correctional facility for women (1T143, 1T146). William Hauck is the assistant superintendent at Edna Mahan which has maximum, medium and full minimum custody and had a population of 1172 inmates on the day of hearing (1T146).^{4/} Hauck's responsibilities include administrative responsibility for 950 full minimum custody female offenders. He is also the administrative superintendent of all privatized vendors (medical, dental, substance abuse, alcohol, psychology), the supervisor of the education and recreation departments and the residential release coordinator (1T144). He performs the duties and responsibilities of Administrator Charlotte Blackwell, his immediate supervisor, in her absence (1T144, 1T147, 1T150).

^{4/} The stenographic notes for the afternoon portion of the hearing on May 8, 2001, containing the conclusion of William Hauck's testimony, were lost and therefore not transcribed. None of the missing testimony is material to the findings of fact or conclusions of law I reach herein.

Dress codes are in effect at Edna Mahan as follows: (1) Male and female correctional officers wear department-regulated, State-regulated uniforms. Class A (winter) uniforms are long sleeved shirts and ties with a protective vest, a uniform standard undershirt, and correctional officer shoes with black or blue socks (1T145, 1T146). (2) Civilian medical and food workers wear white uniforms (1T145, 1T146). Regular civilian staff are required to dress in professional attire "to ensure the safety and security of the institution as a whole" (1T145). Blue jeans are not permitted (1T145). (3) Vendors or employees of the privatized departments are also required to abide by the civilian dress code (1T145). (4) Visitors are not permitted to wear t-shirts or gang-related or provocative clothing, or anything that would jeopardize security in the visiting hall (1T147).

The dress code is intended to promote a professional atmosphere in the work environment (1T153). Due to the way that the facility is constructed, the staff is in very close proximity to the inmates and inmates sometimes comment on the way the staff is dressed; for example, if Hauck is dressed in black tie for a formal event, an inmate may comment that he looks nice that day (1T153).

Inmates at Edna Mahan wear khaki uniforms (1T152). One of the reasons for the dress code is to tell inmates from civilians. During Hauck's first week at Edna Mahan in 1994, when inmates were formerly permitted to wear civilian clothes or personal property, he was talking to an inmate who did not have her identification

displayed. The inmate was dressed so "nicely" that Hauck mistook her for a teacher or social worker (1T152).

A department head meeting was held on April 28, 1998 at which the administrator advised staff members concerning appropriate attire (S-4; 1T147). Designer jeans with cuts or holes, tight fitting jeans, or jeans which sagged low in the back were considered "inappropriate" (1T148). Jeans were of specific concern rather than slacks or khakis because inmates were making comments to staff members about them (1T149). After the same concerns were raised again at a meeting on March 22, 1999, Administrator Blackwell banned the wearing of jeans and shorts (S-4; 1T150).

On January 31, 2000, Administrator Blackwell passed along Chief Bolton's directive given at a senior staff meeting that jeans would be prohibited except for construction, horticulture or farm operations (S-4; 1T150). The maintenance workers are sometimes required to crawl underneath the housing unit to work on the sewer and plumbing systems; the store room clerks unload shipments as they come in (1T151). Blackwell appealed to Burns, the assistant commissioner of the Division of Operations, for a waiver to permit the maintenance department and storeroom clerks to wear blue jeans, which was granted (1T151).

(11) Bayside State Prison

Bayside State Prison is located in Leesburg (2T6). Judy Gentolini has been an administrative assistant at Bayside State Prison for about three years (2T6). She has worked directly for

Administrator Scott Faunce for the last ten or eleven years (2T6, 2T22, 2T23). Gentolini also functions as an office manager, as litigation liaison to the attorney general's office, and as a supervisor of the secretarial staff (2T6). She has worked at Bayside for approximately eighteen years and is probably a member of C.W.A. (2T22). There has been a dress code in effect in various forms the entire time Gentolini has been employed at Bayside (2T8).

There are dress codes at Bayside for custody employees, inmates and visitors (2T20). The dress codes are applicable both inside and outside the secured perimeter of the facility; inmates can be in either place (2T34). Custody staff wear blue to distinguish them and to represent security (2T21). There is a dress code to prevent any visitors from coming into the secured perimeter dressed provocatively, which may cause disruption (2T21). Visitors may include vendors and outside maintenance (2T28). Attorneys visiting clients are cautioned against wearing excessive jewelry for security reasons (2T28). Inmate visitors dress in khaki to distinguish them from civilian visitors or personnel (2T22).

The dress codes are intended to portray a professional image to inmates and the public (2T35). When interviewing prospective new secretarial hires and promotional candidates, Gentolini would advise them that professional attire such as blouses and skirt or dress slacks was expected in the workplace and that casual attire was not permitted (2T10).

Prior to January 26, 2000, there was no formal policy at Bayside prohibiting the wearing of jeans (2T12). Employees performing maintenance, automotive, or farm work, or acting as vocational instructors might wear jeans (2T13, 2T31, 2T36). Two or three job titles have been granted exemptions from the no-jeans policy (2T35). Some civilians might request permission to wear jeans on a particular day if doing a physical task such as the inventory of records (2T13).

The administrator has reminded staff of the dress code at departmental staff meetings (2T7, 2T8-2T9, 2T13, 2T90; S-5). Gentolini recalled that the dress code was amended from time to time, as styles changed or if someone wore something that produced negative attention (2T14). For example, shoes without a strap in back such as sandals or "flip-flops" were prohibited after concern was raised that they posed a safety hazard because in an emergency, it could be difficult to run while wearing them (2T15). By memorandum dated January 28, 2000, Administrator Faunce forwarded the memorandum on dress code dated January 26, 2000 from Chief of Staff Bolton (2T12).

Gentolini recalled two incidents involving civilian staff violating the dress code (2T16). In or around 1994 or 1995, Gentolini worked for the Associate Administrator Lee Williams (2T16). Williams observed a female assistant department head working in a classification area where there was heavy inmate traffic. The assistant department head was wearing a double

breasted suit with a culotte or skort which was higher than the middle thigh. Gentolini was "shocked" and inmates were looking at the employee (2T17). Williams told the employee behind closed doors that her clothing was inappropriate attire in a department working around inmates and that she would have to go home to change. The employee was embarrassed, and went home but did not return that day (2T18). There was no evidence the employee was disciplined or docked (2T30).

In 1997, Gary Snyder, an assistant superintendent from Southern State, prison was assigned to work temporarily at Bayside (2T17). Snyder arrived for an orientation meeting with Bayside's administrator wearing a polo shirt, sweat pants and socks, sneakers and a baseball cap (2T18, 2T30). The administrator asked Snyder if he had come in on his day off and Snyder replied that he was working. The administrator immediately told Snyder that a shirt and tie was required for work at Bayside (2T19).

According to Gentolini, if an employee wore jeans to work, depending upon various factors including the style of the jeans, and the employee's work location, the employee might be spoken to, cautioned, or sent home to change. The employee would not be disciplined (2T32).

(12) Northern State Prison

Northern State Prison is located in Newark. Andrea Kitchen has been employed as an assistant superintendent at Northern State prison for six months (2T38). She has been employed at Northern State for over fourteen years, since its opening (2T39).

An institutional dress code policy has been in effect at Northern State since September 6, 1988 (S-6; 2T40). The policy indicated that only dress jeans (thinner, pleated, and of the various colors in style at the time) were permissible (2T40). Between 1988 and 1999, jeans were worn only by canteen and maintenance staff (2T41). There is a dress code for visitors, staff and inmates at Northern State (2T44).

Upon hire, new staff attend a one week orientation during which appropriate dress and conduct is discussed (2T42). While working as a director of social services, Kitchen had occasion to issue a "letter of conference" proceeding to a "letter of counsel" to a female employee who came to work dressed in see-through and other inappropriate clothing on several occasions (2T43). No one at Northern State was ever sent home for wearing jeans to Kitchen's knowledge because "jeans were not a problem" at Northern State (2T43, 2T45-2T46). An exception was made for staff to wear jeans to work in the event of inclement weather and to change clothing upon arrival at work (2T50).

While working as a program development specialist prior to becoming assistant superintendent, Kitchen saw some social workers wearing jeans, but is not sure of the circumstances or if there was inclement weather or not (2T46, 2T45-2T48). An exception was also made for classification staff to wear jeans or durable pants when rearranging files in the file room (2T51). A senior clerk typist whom Kitchen saw wearing jeans was working in the file room that day

(2T49). If Kitchen inquired why an employee was wearing jeans and received an inappropriate explanation in response, she would ask the employee's supervisor to handle the situation; if the explanation was acceptable, she would not look any further into the situation (2T54). Kitchen has never been required to approach an employee's supervisor (2T55).

(13) Stabilization and Reintegration Program

The Stabilization and Reintegration Program of the Department of Corrections is located on the grounds of the New Lisbon Developmental Center (1T113).

Melissa Matthews is employed as a school social worker in the Stabilization and Reintegration Program ("SRP"). The SRP is commonly known as the "boot camp". Matthews has worked at the boot camp since its inception in February 1997 (1T99). Boot camp inmates are nonviolent male offenders between the ages of 18 and 30, charged with a second or third degree, non-drug charge, and who are eligible for parole within one year of graduation from the program (1T100, 1T106). The boot-camp is a military based program designed to give inmates a chance to change their attitude, develop positive behaviors, and make up for their "mistake" by completing the program and starting a new life (1T107-1T108, 1T109). There are 120 to 130 inmates in the program (1T110). Matthews is in charge of the social services aftercare, ensuring that the inmates after-parole needs are met (1T99, 1T110-1T111).

A typical day at boot camp begins at 5:00 a.m. Inmates, who are called cadets, get up for physical training with officers, march to breakfast and back; go to school or work; participate in substance abuse programming and group counseling; and go to bed by 9:00 p.m. (1T101, 1T108). Cadets are required to conduct themselves with military bearing (sitting and standing with hands at knees in military fashion, requesting permission to speak or leave the room, responding formally to directives, i.e. "yes, ma'am," "no, sir,").

The training schedule for the boot camp includes a dress code for cadets and staff (S-1; 1T102). Cadets have three outfits: sweat clothes and thermal underwear for physical training, a uniform with brown creased slacks, military style black belts, and a long or short-sleeved (depending upon the season) khaki button-down shirt with two breast pockets, a military style black belt and black shoes or boots for classes or programming, and the same outfit in gray with a tie for work or on weekends (1T102-1T103, 1T109, 1T110). The dress code is intended to teach or convey the belief that a professional-looking person leads to a professional attitude and that a certain standard of dress will be expected of the cadets upon their release (1T115). Therefore, the cadets' appearance is important to their rehabilitation (1T115). The dress code for staff sets the tone for the cadets to follow (1T115-1T116).

The boot camp has approximately 15 civilian staff (1T114). Civilian staff are told in the interview phase that professional dress will be expected in the position, including no jeans or sweat

clothing other than during physical training (1T100, 1T105). After hire, staff undergo a two-week training period during which they are required to wear slacks and a button down shirt (1T100, 1T107). Women must pull their hair back and are not permitted to wear makeup; men must have a haircut of a specific length and are not permitted to have facial hair in accordance with military grooming standards (1T100, 1T110). After the conclusion of the training program, staff adhere to the same dress code as in training, except that women are permitted to wear skirts or dresses, heels, and makeup (1T102). Jeans, t-shirts, spandex, and shorts are prohibited (1T102). Neither Matthews nor any other boot camp employee was personally affected by the issuance of the no-jeans policy in August 1999 because jeans had never been worn at the boot camp (1T112).

Non-civilian staff includes custody officers known as drill instructors (1T114). Drill instructors wear blue uniform pants tucked into high boots, a long or short sleeved shirt with a tie, and "Smokey the Bear" hats (1T114). Since Matthews has been employed, she is aware that two employees have been spoken to for failing to wear socks; the employees were not disciplined and never did it again (1T104).

Cadets are permitted visitors once a month who are sent a packet including a dress code by mail (1T103). Visitors are generally required to dress appropriately for the facility and specifically may not wear shorts above the knee, tank tops, see-through clothing, or skirts shorter than what the administration

deems an appropriate length (1T103). Matthews and other staff deal directly with visiting families four Saturdays a month (1T112).

ANALYSIS

Since the parties have already stipulated that the dress code was not negotiated between them, the simple issue presented herein is whether the implementation of a dress code for civilian staff at a correctional facility is mandatorily negotiable, or a managerial prerogative. If it is not a managerial prerogative, I must determine whether there was a past practice concerning dress code which was unlawfully changed by Chief Bolton's memorandum of August 31, 1999.

For the following reasons, I find that the Department of Corrections had a managerial prerogative to enact a dress code for the civilian staff in its prison facilities, including a policy prohibiting the wearing of jeans, but is obligated to negotiate concerning the financial and procedural impact of its policy.

In Local 195, IFPTE v. State, 88 N.J. 393 (1982) ("Local 195"), our Supreme Court adopted a three-part test for making negotiability determinations. The Court stated:

...a subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of

governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. Id. at 404-405.

The Department of Corrections argues that the establishment and enforcement of a dress code policy, whether on a facility-by-facility or department-wide basis, has always been an exercise of managerial prerogative by the Department of Corrections; that within the context of operating a secured facility, a dress code is a necessary device to facilitate the delivery of services to inmates; and that there are no Department of Personnel rules, regulations or statutes that specifically mandate a code of dress for DOC civilian employees and thereby preempt the creation and implementation of a dress code by the DOC. The Department further argues that the establishment of the dress code, including the no-jeans policy, represents a legitimate exercise of business judgment in the furtherance of the Department's mission to maintain safety, security and order in the custody, care, discipline, training and treatment of its inmates. Moreover, the DOC has exercised its managerial prerogative to determine that the atmosphere of the workplace is enhanced by requiring civilian staff to wear professional clothing, excluding jeans, when conducting DOC activities; the dress code, with its prohibition of jeans and other restrictions, therefore represents the combination of security and safety concerns and a business judgment that each prison should

operate in a professional atmosphere conducive to rehabilitation. The Department argues that requiring it to negotiate with C.W.A. over the decision to adopt or amend a dress code would interfere with the Department's ability to regulate the prison's environment for discipline, order and rehabilitation and could compromise the security of the facility. The State, therefore, requests that the Complaint be dismissed.

C.W.A. argues that the record reflects that the ban on jeans was unrelated to any safety or security concern of the Department, but solely represented Chief of Staff Mary Ellen Bolton's desire for prison employees to present a professional appearance. It further argues that the Department's desire for the employees to appear professional is not "a significant governmental policy" of the magnitude contemplated in the scope of negotiations analysis to justify the finding of a managerial prerogative.

Citing the Local 195 test for determining whether a subject is negotiable, C.W.A. argues that the no-jeans policy indisputably intimately and directly affects the work of its members, and is therefore a mandatorily negotiable term and condition of employment. C.W.A. highlights testimony by employees Bill Johnson and Eric Iaquina, describing how, in response to the no-jeans policy, they were forced to buy and replace new clothing, and found it difficult to keep clean. Of course, that calls into question the financial impact of the State's decision.

While the Commission has not previously addressed the specific issue of dress code for civilian employees within the secured perimeter of a correctional facility, the Commission has addressed the issue in other contexts. The Commission has held that the determination of a daily police uniform is not mandatorily negotiable unless related to the health or safety of police officers. See Township of Nutley, P.E.R.C. No. 88-90, 14 NJPER 254 (¶19095 1988); Borough of Maywood, P.E.R.C. No. 87-133, 13 NJPER 354 (¶18144 1987); Borough of Butler, P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987); City of Trenton, P.E.R.C. No. 79-56, 5 NJPER 112 (¶10065 1979); recon. den. P.E.R.C. No. 79-95, 5 NJPER 235 (¶10131 1979), aff'd in part, rev'd in part NJPER Supp. 2d 84 (65 App. Div. 1980).

The Commission considered the negotiability of a dress code for teachers in Egg Harbor Tp. Board of Education, P.E.R.C. No. 86-84, 12 NJPER 99 (¶17038 1985). The Egg Harbor Education Association filed a grievance alleging the Board failed to negotiate the adoption and content of a dress code for teachers. The dress code stated the expectation that the attire of all employees should be neat and clean and set forth dresses, skirts with blouses and/or sweaters, pantsuits and slacks with blouses and or sweaters and acceptable attire for female personnel; and suits with shirt and tie, leisure suits with or without ties, slacks with shirt and tie with or without jacket or sweater, and slacks with turtleneck shirts/sweater and jacket as acceptable attire for male personnel.

The dress code further provided that the superintendent or building superintendent could relax the dress code where appropriate or necessary. Industrial arts teachers were exempt from wearing ties when teaching shop classes, and physical education instructors were exempted from the dress code and permitted to wear apparel which had been approved as appropriate by the building's principal.

After finding that no statute or regulation preempted negotiations over a dress code for teachers, the Commission analyzed whether the Board was obligated to negotiate concerning the dress code using the Local 195 balancing test. The Commission found that the adoption of a dress code intimately and directly affects teachers' work and welfare, finding:

A dress code affects employee comfort, convenience and self-expression. A dress code may require employees to incur expenses buying and maintaining required articles of clothing. A dress code may also require employees to spend a greater amount of nonworking time in meeting appearance requirements. See, e.g., Bay Diner, 250 NLRB No. 29, 104 LRRM 1407 (1980); Town of Dracut, Case No. MUP-3699 (Mass. Labor Relations Comm., May 28, 1980); Enfield Bd. of Ed., Case No. TPP-4026, Dec. No. 1609 (Conn. State Bd. of Labor Relations 1978); Norfolk Ed. Assn., Case No. 40 Neb. Ct. of Indus. Relations (Oct. 5, 1971); County of Putnam, 18 N.Y. PERB @4526 (ALJ opinion, 1985).

The Commission next considered the school board's interests in adopting a dress code and found them to be substantial: "a dress code may help...create an atmosphere of respect for teachers within a dignified environment conducive of discipline and learning."

Carlstadt Teachers Assn. v. Bd/Ed of the Borough of Carlstadt, 80

S.L.D. 366, aff'd 80 St. Bd. 371, aff'd App. Div., Docket No. A-1469-80-T4, March 26, 1982 (unpublished opinion), slip opinion at 4. A dress code might further bear "...a relationship to the furtherance of educational goals in that teachers are undeniably role models to their pupils." Carlstadt, slip opinion at 5.

Balancing the interests of school boards and teachers, and taking Carlstadt into account, the Commission held that requiring collective negotiations over a school board's decision to adopt a dress code would significantly interfere with its ability to regulate the educational climate. The Commission therefore restrained arbitration of the Association's grievance. However, since a dress code has such a direct effect upon employee welfare, the Commission held that permitting collective negotiations over aspects of a dress code's implementation, such as procedural and enforcement issues, which were severable from the decision to adopt the code would not significantly interfere with the determination of educational policy. City of Elizabeth v. Elizabeth Fire Officers Assn., 198 N.J. Super. 382 (App. Div. 1985).

The Commission recently addressed the wearing of union paraphernalia, specifically t-shirts, by civilian employees within the inner perimeter of a correctional facility where inmates are secured, in another case involving these parties, New Jersey Department of Corrections and C.W.A., P.E.R.C. No. 97-145, 23 NJPER 388 (¶28176 1997). In that case, C.W.A. filed an unfair practice charge alleging the Department violated the Act when it prohibited

employees represented by C.W.A. from wearing t-shirts stating "Don't Privatize, Just Manage Wise" within the inner perimeter of correctional facilities on a particular day. Id. at 389. A Hearing Examiner found that the ban was not motivated by hostility towards union activity and concluded that the employer had a legitimate and substantial basis for a ban because it was reasonably related to the need to maintain order and discipline within prisons. Ibid.

In adopting the hearing examiner's recommendations, the Commission noted precedents of the National Labor Relations Board allowing an employer to promulgate and enforce a rule prohibiting the wearing of union emblems only where the prohibition is necessary because of "special circumstances." Such circumstances include the need to maintain production and discipline and to ensure safety. Id., citing Floridan Hotel of Tampa, 137 NLRB 1484, 50 LRRM 1433 (1962), enf'd as mod., 318 F.2d 545 (5th Cir. 1963); accord Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451, 455 (¶14196 1983). See generally Hardin, The Developing Labor Law at 96 (3d ed. 1992). The Commission concluded that special circumstances justified the employer's prohibition of the union t-shirts within the secured perimeter, saying:

We do not believe, however, that the "special circumstances" approach is materially different from asking whether a ban has a legitimate and substantial operational justification since both approaches focus on the operational need for a ban.

* * *

The prison officials charged with ensuring inmate discipline and prison safety made a good faith and reasonable judgment that the prohibition was necessary to prevent possible disturbances among

the inmates within the inner perimeter. We agree with the Hearing Examiner (H.E. at 18-19) that the employer was not required to show past disturbances or await future disturbances. Nor was it required to prove that permitting employees to wear the T-shirt would necessarily have upset the inmates and caused disturbances. It suffices to demonstrate, as the employer has, that prison officials reasonably feared that such disturbances could occur and required a prohibition.

23 NJPER at 389.

I now also examine the negotiability of dress codes in private and public sector case law which is relevant to this issue.

Public sector precedent in neighboring jurisdictions appears split on this issue. The New York Public Employment Relations Board (NYPERB) has held that a dress code is mandatorily negotiable because the impact on employees outweighs the employer's interest in having professional appearance. In County of Putnam, an administrative law judge of NY PERB found:

Dress codes and grooming regulations impact directly upon employees' terms and conditions of employment. Expenditures previously unnecessary will be required to effect the necessary neat and tidy appearance and for the purchase, cleaning, repair, and replacement of the required articles of clothing. The employees' comfort and convenience are also affected by the implementation of the dress code. As the code is continuously applicable, employees will be more uncomfortable, for example, during the heat of the spring and summer. Compliance with the code will also intrude into the employees' nonworking hours to a greater extent than before. The time necessarily spent in creating a neat and coordinated wardrobe and personal appearance will surely exceed that required when the dress code and grooming regulations were not in effect.

County of Putnam, 18 PERB 4565 (1985).^{5/}

However, in PSSU, Local 668 of SEIU, AFL-CIO v. Pennsylvania Labor Relations Board, 32 PPER ¶32017 (2000), 763 A.2d 560 (Pa. 2000), the Commonwealth Court of Pennsylvania affirmed an order of the Pennsylvania Labor Relations Board holding a written dress code policy unilaterally instituted by the employer not a mandatory subject of collective bargaining. 763 A.2d at 561. The employer, the Luzerne County Assistance office (CAO) issued a series of memoranda instructing employees to wear "clothing appropriate to the office setting" and explaining in detail that certain clothing

^{5/} See also County of Suffolk, 20 NYSER ¶4539, 1987 NYSER (LRP) LEXIS 3034 (1987) (employer argued that dress code barring water department laboratory personnel from wearing jeans, sneakers or other sports attire was necessary to assure that employees who have public contact maintain a professional demeanor and image; union argued that because of nature of work including gathering and analyzing water samples from public and private wells, employee's clothing was frequently dirtied and often ruined; balancing the employer's interest of maintaining a professional image where the employees have contact with the public against the employees' increased costs for maintenance and replacement of clothing, ALJ found the employee's interests predominated, and found the dress code to be a mandatory subject of bargaining); See also In the Matter of Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, and State of New York (Department of Taxation and Finance), 30 NYSER ¶3028, 1997 NYSER (LRP) LEXIS 396 (where administrator unilaterally issued memorandum prohibited the wearing of jeans and provided that employees wearing jeans to work would be counseled and sent home on their own time to change; and employer had only a general office attire dress policy not specifically prohibiting the wearing of denim blue jeans to work, and employees had previously regularly worn jeans, NY PERB held that an office attire policy, not involving uniformed and/or para-military personnel, is a mandatory subject of negotiation).

was considered inappropriate for a business atmosphere, because CAO was an "office which provides a service and is open to the general public." Id. at 561. The PLRB concluded that the employer's unilateral implementation of a dress code policy was not an unfair labor practice in violation of the Pennsylvania Act. Id. at 562. On appeal, PSSU argued that a restrictive dress code impacts on the interests of the employees, specifically their interests in freedom of choice of attire, physical comfort as well as implicating discipline for violations of the policy. Id. at 562.

The Commonwealth Court of Pennsylvania noted the record evidence that clients of CAO relied on caseworkers to be professional and conduct themselves in an appropriate manner; that the CAO wanted to instill confidence in its clients that the clients were receiving professional social services; that the CAO was concerned that its employees would send a negative message to community service agencies and the community in general if its employees were dressed in halter tops, tight, revealing clothes or cutoff jeans; and that CAO employees conducted workshops where they instructed clients regarding grooming, appearance and appropriate dress for the workplace. The Court concluded that based upon the employer's substantial interest in providing professional services to the public, the Board properly found that a dress code, which outlined specific minimum standards of appropriate attire, was appropriately within the employer's managerial prerogative and not subject to collective bargaining. Id. at 564.

It is clear from the above-cited authority that employers in both the private and public sector may have a legitimate interest in matters of regulating employees' appearance. The Commission has previously found dress code to be a managerial prerogative in certain contexts, i.e. with regard to uniformed police personnel (see City of Trenton, et al., supra), in school districts (see Egg Harbor, supra) and within the secured perimeter of Department of Corrections facilities (see Department of Corrections and C.W.A., supra). In Department of Corrections and C.W.A., a previous case involving these parties, the Commission held that the employer's regulation of employee attire (the prohibition of union t-shirts on a particular day) was justified by special circumstances, which the Commission noted was not "materially different from asking whether a ban has a legitimate and substantial operational justification since both approaches focus on the operational need for a ban." 23 NJPER at 389.

The same rationale extends to the dress code here for civilian employees of the Department, because of the State's special concerns in regulating its institutional environment. A correctional facility is a highly regulated environment where the need for security is paramount. The record here reflects that there are dress codes in place for custodial staff, inmates, and visitors. There are even different dress codes in place for different categories of inmates. The dress code for the staff in the boot camp also sets an example for the inmates to follow. Some

dress codes may be adjusted based upon the weather, but it is evident that the Department established these dress codes, representing a great degree of regulation of individual appearance, to maintain safety, security and order, as well as to facilitate the identification of inmates and non-inmates. A correctional facility is a place where discipline and order must be maintained. William Hauck's testimony illustrates the Department's need to expect professional dress, appearance, and behavior from its employees to provide a behavioral model for the inmates. Moreover, the Department has a legitimate interest in presenting a professional atmosphere to the public it serves.

Based upon a review of all of the cases discussed, I find that although the implementation of the dress code including the "no-jeans policy" intimately and directly affected the work and welfare of the affected civilian employees of the Department, the State has a managerial prerogative to implement a dress code for its civilian staff, including a no-jeans policy, which is justified by the special circumstances that are inherently presented by the administration of a correctional facility, as explained by the Commission in the previous case. Additionally, I find that the Department's prerogative is justified by a legitimate and substantial operational justification, so that the concept of dress codes, which already apply to virtually every category of individual who enters the Department's correctional facility, should be extended to apply to civilian staff to meet the same objectives,

including but not limited to the maintenance of safety, security and order; to facilitate the identification of inmates, to provide a behavioral model for the inmates, and to present a professional atmosphere to the public. I further find that requiring the Department to negotiate concerning implementing a dress code would significantly interfere with the determination of governmental policy. As the Commission previously noted in Department of Corrections and C.W.A., the employer should not be required to wait until an incident occurs which might have been avoided by the imposition of a civilian dress code in order to prove that "special circumstances" exist.

I find that the Department's interest in regulating the prison environment substantially outweighs the effect of a dress code upon the work and welfare of public employees. The "no-jeans policy" is not an unreasonable way to effectuate its prerogative. That policy is narrowly tailored and provides for reasonable exceptions.

C.W.A. argues that the "hands-off" approach employed by DOC concerning the grant of exemptions to the no-jeans policy -- as illustrated by the "free reign" given to local administrators to issue exemptions, the lack of written guidelines for employees who might seek exemptions, and the testimony of Assistant Commissioner Burns that employees seeking exemptions "know how to please supervisors and they know how to ask," illustrates that the issue is ripe for negotiations and such negotiations will not interfere with

the determination of significant governmental policy. The employees who testified to not having been exempted from the no-jeans policy, Johnson and Iaquina, have daily contact with inmates. As such, they are part of the population which the no-jeans policy seeks to regulate. I find that the employer has the discretion to determine which categories of work will receive exemptions as part of the exercise of its prerogative. Moreover, the issue of whether Johnson should be granted an exemption from the dress code to accommodate his need for a wheelchair may be appropriately resolved in another forum.

Impact of the No-Jeans Policy

Finally, C.W.A argues that even if the Department is found to have a managerial prerogative to issue a no-jeans policy, it should be required to negotiate the impact that policy has on mandatory terms and conditions of employment, citing Piscataway Tp. Ed. Assn. v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263 (App. Div. 1998) certif. denied 156 N.J. 385 (1999) and Board of Ed. of Woodstown-Pilesgrove Reg, School Dist. v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. 582 (1980). Such negotiations might include discussion of whether affected C.W.A. members may be entitled to a clothing allowance as are members in other C.W.A. bargaining units, the process for obtaining an exemption, and under which circumstances the wearing of jeans can be grounds for discipline.

The record shows that there is presently no disciplinary policy for infractions of the dress code and, although there was

some testimony that employees were sent home to change, and possibly charged time after wearing jeans to work, no employees had apparently been disciplined for violations of the dress code prior to the dates of hearing. In Egg Harbor, the Commission held that since a dress code has such a direct effect upon employee welfare, permitting collective negotiations over aspects of a dress code's implementation which were severable from the decision to adopt the code would not significantly interfere with the determination of educational policy. Egg Harbor, City of Elizabeth v. Elizabeth Fire Officers Assn. Since I have found that the implementation of the dress code intimately and directly affected employee welfare, I further find that negotiations concerning severable matters such as the financial and procedural implications of the policy, would not significantly interfere with the Department's determination of governmental policy. I therefore recommend that the Commission order the State/Department of Corrections to negotiate, upon demand, regarding severable aspects of the impact of the implementation of the dress code and "no-jeans" policy.

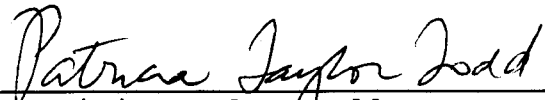
Accordingly, based upon the above findings and analysis I make the following:

CONCLUSION OF LAW

The State of New Jersey, Department of Corrections, did not violate the Act when it implemented a department-wide "no-jeans" policy for civilian staff in its facility effective August 31, 1999.

RECOMMENDATION

I recommend the Complaint be dismissed.



Patricia Taylor Todd
Hearing Examiner

DATED: March 8, 2002.
Trenton, New Jersey