

Becker #1

BEFORE UMPIRE LAWSON E. BECKER

In the Matter of the Arbitration Between:

UNION

-and-

EMPLOYER

OPINION OF THE UMPIRE

ISSUE

On the basis of discussions with both parties at the hearing, the Umpire has determined that the issue presented is whether the issuance of the August 26, 1975 Addendum ("The Addendum") to Bulletin #15 was a violation of Article IV, Management Rights of the current union contract. By oral stipulation, the parties agreed that Article IV distinguishes between a rule of conduct and a rule of safety and that if the Addendum is a true rule of safety, the Employer had the absolute discretionary right to issue the Addendum and to enforce it. The question is thus presented as to whether the Addendum is a rule of conduct or a rule of safety.

FACTS

Sometime prior to August 26, 1975, Captain Employee 1, the Grievant, commenced wearing a single small earring. Objections to the earring were made to Grievant by one or more superior officers and oral discussions took place. In these oral discussions, apparently no claim was made that an earring might involve a safety hazard, and Grievant concluded from this that the objections of the superior officer or officers were based solely upon personal prejudices. The

matter was not settled by oral discussion, and accordingly, on August 26, 1975, Deputy Chief Person 1 issued an inter-departmental letter to Grievant directing that he would not wear an earring of any sort while on duty. This letter expressed the belief that the wearing of an earring on duty, in the opinion of the Deputy Fire Chief, might cause a serious morale problem and a personal hazard. This letter apparently was the first reference to safety.

On receipt of the letter, the Grievant ceased wearing the earring and on the same day (August 26, 1975) submitted a written grievance. The grievance points out that there was at that time no code or regulation which prohibited the wearing of an earring.

Immediately thereafter, and again on the same date (August 26), the Addendum was issued. The Addendum is worded entirely as a safety rule, and is limited to the wearing of earrings while on duty. It specifically excludes off-duty matters and does not cover any other form of jewelry or metal objects.

Testimony introduced by the Employer was to the effect that the Employer physician had been consulted prior to the issuance of the Addendum and that it was his opinion that the wearing of earrings constituted a hazard. Testimony by Captain Employee 1 indicated that he had contacted a personal physician and was advised that his earring did not constitute a hazard. The Employer also introduced into evidence a newsletter dated November-December 1975 from the "Fire Fighters Training Council", which quoted a recommendation from Maryland Training Academy Supervisor, Person 2. The recommendation was to the effect that the wearing of earrings by fire fighters could be a very dangerous practice, specifying that long dangling types could prevent proper sealing of face masks and could get snagged and tear the ear lobe. It further suggested that if the ear became exposed to extreme heat in a fire situation, the heat conducted by the material could result in a serious burn.

From time to time, the Employer has issued rules of conduct as well as safety rules and these rules are in written form and were examined by the Umpire. The publications indicated that while the vast majority of existing rules have or could have some reference to safety, there are some rules which are purely a matter of conduct and which could not conceivably be related to safety.

ARGUMENTS AND DISCUSSIONS

It is the Employer's position that the Addendum is a safety rule, that the motivation (such as personal prejudices) for the issuance of a safety rule is of no consequence, and that the degree or amount of hazard involved is of no consequence. The Employer's position further is that any degree of risk can be prohibited by a safety rule unless there are countermanding reasons based on the performance of the job or the possibility of greater risk to the individual. The Employer concedes that there are other more serious risks existing which have not as yet been prohibited by the Employer, but it is the Employer's claim that the failure to prohibit more serious risks is not a prerequisite to the prohibition of a less serious risk.

The Union's position is that the true reason for the Addendum was the personal prejudices of the superior officers, that the use of a "safety" rule was a dishonest subterfuge to satisfy those personal prejudices, that there is in fact no hazard involved in the instant case and that if the Employer can issue a safety rule in lieu of a conduct rule, Section 2 of Article IV will have no real meaning.

The Umpire believes that in view of the circumstances under which the grievance evolved, the Grievant was justified in forming his belief that the true reason for the rule was the personal prejudice of his superior officers. The Umpire, however, does not believe that the motivation for the rule is material, if, in fact, an element of safety exists. Accordingly, the

Umpire makes no determination of whether or not the rule was motivated by personal prejudices. The Umpire cannot avoid the conclusion that the wearing of an earring by a fire fighter while on duty presents a hazard, and hence, a matter of safety, even though in this case, that hazard is trivial. Obviously, a larger or longer earring could constitute a substantial hazard, and the Umpire has no authority to determine the degree of a hazard or the point at which a minor hazard becomes a substantial hazard. This must be a matter to be left to future negotiations between the parties.

It is concluded that the failure of the Employer to prohibit concededly more serious hazards does not prohibit the Employer from prohibiting less serious hazards under Article IV. It seems probable that the failure of the Employer to deal with the more serious hazards (such as finger jewelry, necklaces, etc.) was due to the fact that any such prohibition might generate substantial emotional objections from many members of the department, whereas the prohibition of earrings would not be expected to generate such wide-spread objections. Again, however, the Umpire concludes that the motivation of the Employer is not material, so long as some actual element of safety exists.

The Union is justifiably concerned that most rule changes which have been, or which might be issued by the Employer, could be based upon an element of safety. The Umpire finds this to be true, but has no authority to add anything to the wording of Article IV, which might reduce this concern. It is pointed out, however, that Section 2 of Article IV is not wholly without effect, for there clearly are some situations that could not conceivably be covered by a safety rule and would have to be covered by a conduct rule.

The Union further is concerned with a statement by the Employer that even if this particular rule had been handled as a conduct rule, the result would have been the same, since

after negotiations with the Union, the Employer could, nevertheless, have issued the rule, and that as issued, it would have to be sustained under the authority of the U. S. Supreme Court decision in Kelley v Johnson, 11 EPD, ¶ 10,788. While this statement is not material to this case, and while no issue involving the statement is presented, the Umpire has doubts as to whether or not the Kelley case can be so construed. That case involved a rule as to hair length for county police officers promulgated with respect to officers who were not covered by any bargaining contract. It is not clear what the decision might have been had there been a bargaining contract to construe as in the instant situation.

AWARD

The August 26, 1975 Addendum to Bulletin #15 was validly issued by the Employer as a safety rule under the provisions of Article IV, Management Rights, of the current bargaining contract. Grievance denied.

Pursuant to the provisions of Article VIII, Section 5, the fees of the Umpire will be charged to Union.

LAWSON E. BECKER

Dated: September 9, 1976