ORAL ARGUMENT SCHEDULED FOR APRIL 12, 2011

No. 10-1299

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF THE AIR FORCE,
4th FIGHTER WING, SEYMOUR JOHNSON AIR FORCE BASE,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

ON PETITION FOR REVIEW OF A DECISION OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

ROSA M. KOPPEL
Solicitor

JOYCE G. FRIEDMAN
Attorney

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424
(202) 218-7999

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The National Association of Independent Labor, Local 7 ("NAIL" or "union"), and the U.S. Department of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base, North Carolina ("agency" or "Air Force") appeared below in the administrative proceeding before the Federal Labor Relations Authority ("FLRA" or "Authority"). In this court proceeding, Air Force is the petitioner, and the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision and Order in *National Association of Independent Labor, Local 7 and United States Department of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base, North Carolina,* Case No. O-NG-3061, issued on July 30, 2010, reported at 64 F.L.R.A. (No. 210) 1194.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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GLOSSARY

ACT	Association of Civilian Technicians
AFGE	American Federation of Government Employees
Agency	United States Department of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base, North Carolina
Air Force	United States Department of the Air Force
AFI	Air Force Instruction
ARTs	Air Reserve Technicians
App.	Appendix
Authority or FLRA	Federal Labor Relations Authority
CBA	collective bargaining agreement
DOD	Department of Defense
EEOC	Equal Employment Opportunity Commission
NAIL	National Association of Independent Labor
OPM	Office of Personnel Management
PB	Petitioner's Brief
SOP	Statement of Position
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
union	National Association of Independent Labor, Local 7

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ON PETITION FOR REVIEW OF A DECISION OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision under review in this case was issued by the Authority on July 30, 2010. The Authority's decision is published at 64 F.L.R.A. (No. 210) 1194. A copy of the decision is included in the Appendix ("App.") at 164-176. The

Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("Statute").[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUES

Whether the Court lacks jurisdiction under § 7123(c) of the Statute to consider the Air Force's sole argument, advanced for the first time in this Court, that the union's proposal is non-negotiable because it would require the agency to expend appropriated funds for a purpose not authorized by law.

Whether, assuming, *arguendo,* that the Court should consider the agency's new argument, the agency has demonstrated that the proposal requires a prohibited expenditure.

STATEMENT OF THE CASE

Course of Proceedings Below

This case arises as a negotiability proceeding under § 7117 of the Statute. On January 20, 2010, NAIL requested, in conformance with 5 C.F.R. § 2424.21, that the agency supply it with a written allegation of negotiability of eight proposals arising from the agency's requirement that civilian Air Reserve

[1] Pertinent statutory and regulatory provisions are set forth as an Addendum to this brief.

Technicians ("ARTs")[2] wear military uniforms during the performance of their civilian duties. App 17. On February 3, 2010, the agency advised the union that it did not consider six of the union's proposals to be negotiable. App. 27-28. On February 12, 2010, the union filed a petition for review with the Authority requesting a determination of the negotiability of the union's proposals. App. 9-16.

Following the agency's withdrawal of its allegation of non-negotiability with regard to one proposal and the union's withdrawal of three of its proposals, App. 106, the Authority took jurisdiction over the negotiability appeal regarding the remaining four proposals under § 7105(a)(2)(E) of the Statute.[3] App. 164. The Authority found that three of the union's remaining four proposals were outside the Air Force's duty to bargain. App. 169-172. However, the Authority found negotiable the union's proposal that the Air Force provide cleaning services for uniforms. App. 174-175. The agency now seeks review of the Authority's decision that the union's cleaning services proposal is negotiable.

[2] ARTs are federal civilian employees who must maintain membership in a military reserve unit as a condition of their employment. App. 165.

[3] Because the Authority found that the union failed to raise disputed issues of material fact, it denied the union's request for a hearing. App. 165.

STATEMENT OF THE FACTS

In response to Air Force Instruction ("AFI") 36-801, incorporating Change 1, dated August 6, 2007, which required ARTs to wear a military uniform while performing civilian duties (App. 30, 35), NAIL filed eight proposals.[4] App. 9, 11. One of the proposals over which NAIL sought to bargain was whether the Air Force should be responsible for uniform cleaning services. App. 16. In its petition before the Authority, the union stated that this proposal was intended as an appropriate arrangement. Also, the union contended that "[t]here is no statute that prohibits an [agency] from providing cleaning services for uniforms." *Id*.

In response, the agency filed its "Statement of Position ("SOP")." App. 78-96. In the SOP, the agency argued that the proposal concerning the laundering of uniforms was "specifically provided for" by 10 U.S.C. § 1593 and 5 U.S.C. § 5901 as part of the statutory allowance for uniforms. Therefore, the agency argued that, under 5 U.S.C. § 7103(a)(14)(C), the proposal of cleaning services does not involve a "condition of employment," and thus is not negotiable. App. 92-94.

Alternatively, the agency argued that because it was the proposal's intent that the agency provide cleaning services whether an employee was provided with

[4] Previously, the ARTs in the bargaining unit at Seymour Johnson Air Force Base had, with minor exceptions, not been required to wear a military uniform while performing routine civilian duties. App. 11, 104.

a uniform allowance *or* a uniform, the proposal was inconsistent with 5 U.S.C. § 5901 and 10 U.S.C. § 1593. The agency explained that the proposal's intent "has the effect of requiring the agency to not only pay a uniform allowance but also to furnish uniforms in the form of cleaning services to those employees who also receive a uniform allowance." App. 94. The agency noted that such a proposal was inconsistent with FLRA precedent holding that 5 U.S.C. § 5901(a) prohibits an agency from providing both a uniform allowance and a uniform. *Id*.

In its response to the SOP, NAIL argued that its proposal for the agency to provide uniform cleaning services was an appropriate arrangement. NAIL also contended that its proposal was consistent with Authority precedent more recent than that upon which the agency relied, and that the SOP did not identify any decisions that overturned this more recent precedent. App. 108. The agency did not reply to the union's response.

The Authority's Decision[5]

The Authority determined that the union's proposal was within the agency's duty to bargain. App. 174-75. The Authority first rejected the agency's argument that the union's proposal was "specifically provided for by Federal statute" for

[5] The discussion, below, will not address the Authority's findings with regard to the union's three proposals not concerning the laundering of uniforms since these findings are not the subject of this petition for review.

purposes of § 7103(a)(14)(C) of the Statute. The Authority, citing to its precedent, found that if a matter mentioned in a Federal statute leaves no discretion to an agency, then the matter is "specifically provided for" by that statute, and, thus, is not negotiable. App. 174. However, the Authority explained that if the Federal statute leaves some discretion to the agency, that discretion "is subject to being exercised through negotiation." *Id*.

The Authority found that 5 U.S.C. § 5901 and 10 U.S.C. § 1593 provide agencies with discretion to bargain over uniform laundering services within the statutes' maximums for uniform allowances. App. 174-75. Thus, the Authority concluded that the proposal does not pertain to a matter "specifically provided for" by Federal statute within the meaning of § 7103(a)(14) that would preclude it from being the subject of negotiation. App. 175.

The Authority also rejected the agency's alternative argument that the proposal was inconsistent with law as contrary to the statutory prohibition against an employee receiving the dual benefit of a uniform and a uniform allowance. *Id*. The Authority found that the agency did not establish that providing uniform cleaning services was the equivalent of providing a uniform. Moreover, the Authority observed that the agency did not argue that providing cleaning services in addition to providing each employee with either a uniform or a uniform allowance would cost more than the statutory maximums. *Id*. The Authority,

accordingly, ordered the agency to negotiate concerning the union's proposal upon the union's request, or as otherwise agreed to by the parties. *Id*. An appeal to this Court followed.

STANDARD OF REVIEW

The standard of review of Authority decisions presupposes that the Authority's decision is properly before the Court. Here, because the sole argument that the agency presents to the Court was not first presented to the Authority, the Court is without jurisdiction to entertain the petitioner's appeal, and the appeal should be dismissed for lack of jurisdiction. *See* 5 U.S.C. § 7123(c); *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (a Court of Appeals is without jurisdiction to consider issues not raised before the Authority if the failure to do so is not excused by extraordinary circumstances). The rationale behind this rule is that Congress's intent was that the FLRA shall first review arguments arising under the Statute, "thereby bringing its expertise to bear on the resolution of those issues." *Id*.

Assuming that the Authority's decision is somehow properly before the Court, the Court's review is "narrow." *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); *Overseas Educ. Ass'n, Inc. v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988).

With regard to a negotiability decision like the one under review in this case, such a "decision will be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted). "Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). Courts "also owe deference to the FLRA's interpretation of [a] union's proposal." *Nat'l Treasury Employees Union v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994).

This case involves the Authority's interpretation of its own organic Statute as it relates to other federal laws, specifically 5 U.S.C. § 5901 and 10 U.S.C. § 1593. When the Authority interprets other statutes, although it is not entitled to deference, *Department of the Navy, Military Sealift Command*, 836 F.2d 1409, 1410 (3rd Cir. 1988), the Authority's interpretation should be followed to the extent the reasoning is "sound." *Ass'n of Civilian Technicians, Tex. Lone Star Chapter v. FLRA*, 250 F.3d 778, 782 (D.C. Cir. 2001) (*quoting Dep't of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988)).

Here, the Authority's interpretation of the union's proposal is owed deference because it is a reasonable interpretation. And the Authority's

interpretation of the two uniform statutes as related to the agency's arguments, below, was sound.[6] Thus, assuming that the Court has jurisdiction over this appeal, the agency's petition for review should be denied because the Authority's decision is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

SUMMARY OF ARGUMENT

Under § 7123(c) of the Statute, this Court is without jurisdiction to entertain the sole argument of the agency, *i.e.*, that the union's proposal for uniform cleaning services is non-negotiable because it would require the Air Force to expend appropriated funds for a purpose not authorized by law. Not only did the agency fail to raise this argument to the Authority, but it is at odds with its principal argument that it did make below, *i.e.*, that, under FLRA precedent and legislative history, the cleaning of uniforms is specifically provided for by federal statute as part of the uniform allowance and cannot be negotiable as a condition of employment under § 7103(a)(14)(C).

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[6] The agency argues that the FLRA owes deference to its new interpretation of the Federal uniform statutes that cleaning services are not a permissible expenditure of funds. Petitioner's Brief ("PB") at 10-12 and n.1. However, the Air Force did not proffer this interpretation to the Authority, so this issue of deference was not before the Authority, and, therefore, cannot be before the Court. *See EEOC*, 476 U.S. at 23.

Also, the agency's new argument is not comparable or consistent with the agency's alternative argument before the Authority. The agency argued to the Authority that uniform cleaning services are the equivalent of having the agency furnish a uniform, and negotiations over such a proposal would illegally inure to the employees' dual benefit of having a uniform allowance and a uniform furnished. However, the agency now argues that neither the Federal statutes' provisions for a uniform nor uniform allowance authorizes the expenditure of funds for the provision of cleaning services related to the uniform. Having failed to make this objection before the Authority, the agency cannot do so here.

The agency has not demonstrated that the Authority's decision, addressing the arguments presented by the agency, was unreasonable or unsound. The Authority's decision applied the appropriate legal standard in finding that the uniform cleaning proposal was negotiable because the Federal uniform statutes left some discretion over the proposed matter. Thus, the Authority reasonably found that cleaning services are not specifically provided for by Federal statute for purposes of 5 U.S.C. § 7103(a)(14)(C).

Even assuming, *arguendo*, that the Court should consider the agency's new argument, the agency has failed to show that the proposal requires a prohibited expenditure. Although the agency urges that the legislative history shows that cleaning allowances were not to be part of uniform appropriations, it only offers an

ambiguity on this subject. More relevant, the plain words of the statute do not prohibit such an expenditure. And it is clear that Congress knows how to exempt an item from the coverage of a statute and did not elect to do so here. Finally, under the "necessary expense" doctrine, the agency does not show that cleaning expenses for uniforms are not reasonably related to the uniform statutes. Thus, the agency has not shown that the uniform statutes, allotting $400 for uniform expenses, preclude negotiations for uniform cleaning services under the statutory maximums.

Therefore, the petition for review should be dismissed for lack of jurisdiction. Alternatively, the petition for review should be denied on the merits.

ARGUMENT

I. THE COURT LACKS JURISDICTION UNDER 5 U.S.C. § 7123(c) TO CONSIDER THE AGENCY'S NEW AND ONLY ARGUMENT THAT THE UNION'S PROPOSAL IS NON-NEGOTIABLE BECAUSE IT WOULD REQUIRE THE AGENCY TO EXPEND APPROPRIATED FUNDS FOR A PURPOSE NOT AUTHORIZED BY LAW.

Section 7123(c) of the Statute precludes judicial consideration of arguments or theories that a party raises for the first time in review proceedings, but that were not presented to the Authority. As this Court has stated, the Court's "jurisdiction to review the Authority's decisions does not extend to an "objection that has not been urged before the Authority." *Am. Fed'n of State, Cnty. & Mun. Employees*

Capital Area Council 26 v. FLRA, 395 F.3d 443, 451-52 (D.C. Cir. 2005), *citing* 5 U.S.C. § 7123(c)[7] and *EEOC*, 476 U.S. at 23. The Supreme Court explained that, in promulgating § 7123(c), Congress intended that the FLRA should be the first to analyze issues arising under the Statute, "thereby bringing its expertise to bear on the resolution of those issues." *EEOC*, 476 U.S. at 23.

D.C. Circuit precedent demonstrates that a party may not avoid dismissal under § 7123(c) even if the party claims that the argument was implicitly raised below. As the D.C. Circuit ruled in another negotiability case: "The union raises two other arguments in support of [its proposal]. Having failed to raise them before the [Authority], however, it cannot prevail with them here." *Patent Office Professional Assoc. v. FLRA*, 47 F.3d 1217, 1223 (D.C. Cir. 1995); *see also United States Dep't of Commerce, NOAA, Nat'l Weather Svc. v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993) (rejecting contention that arguments were "implicitly raised" below). Notable, in this connection, is a case where the Authority found a cash-reimbursement proposal non-negotiable based on its rejection of the union's sole argument that the proposal was a permissible expenditure because the reimbursement would not be financed with appropriated funds; the court refused to entertain the union's new argument that the governing statute would allow the use

[7] Section 7123(c) provides: "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."

of appropriated money for reimbursement. *Am. Fed'n of Gov't Employees, Local 1647 v. FLRA ("AFGE")*, 388 F.3d 405, 408, n.2 (3rd Cir. 2004). Citing to § 7123(c) of the Statute, the court observed, "Because that was not the union's position before the Authority, we decline to allow the union to switch horses for this appeal." *Id.*[8]

Similarly to *AFGE*, the agency here is attempting to "switch horses" for this appeal and argue, for the first time, that the union's proposal is non-negotiable because it would require the Air Force to expend appropriated funds for a purpose not authorized by law. This argument is markedly different from the agency's principal argument before the Authority. In that argument, the Air Force urged the Authority to find that, under FLRA precedent and "through legislative history," the cleaning of uniforms is "specifically provided for by federal statute" (*i.e.*, 5 U.S.C. § 5901 and 10 U.S.C. § 1593) as part of the statutes' uniform-allowance provision, and is therefore not a "condition of employment" that is negotiable under § 7103(a)(14)(C) of the Statute. *See* App. 93-94. The agency's new argument before the Court, that cleaning services are excluded from these statutes, is not

[8] *See also NTEU v. FLRA*, 414 F.3d 50, 59 n.5 (D.C. Cir. 2005) (where petitioner's argument before the Court was not reflected in the record before the Authority, the Court considered the argument waived under § 7123(c), and cautioned counsel against leading the Court astray in the future).

only at odds with its argument made to the Authority, but any argument relating to § 7103(a)(14)(C) of the Statute is conspicuously absent from the agency's brief.[9]

Nor can the agency's alternative argument before the Authority be equated with its new argument before the Court. The agency alternatively argued to the Authority that even assuming the union's proposal is not specifically provided for by federal statute, it is inconsistent with 10 U.S.C. § 1593 and 5 U.S.C. § 5901 because, as the agency explained, cleaning services are equivalent to having a uniform furnished, and employees also receiving a uniform allowance would have an illegal dual benefit. *See* App. 94. The agency now argues that "[n]either alternative[, the provision of a uniform or the provision of a uniform allowance,] authorizes the expenditure of funds for the provision of services related to the uniform." Petitioner's Brief ("PB") at 7; *see also* PB at 15-17. However, this argument was not made before the Authority; rather, contrary to this argument, the agency contended to the Authority that uniform laundering services were encompassed in the Federal statutes as part of the "uniform allowance," or alternatively, were to be interpreted as being equivalent to the furnishing of the uniform, itself. App. 93-94.

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[9] Contrary to the agency's characterization of the issue before the Authority as whether the "Agency can be required to bargain under 5 U.S.C. § 7103(a)(14)(C)," (App. 94), the agency now seeks to recharacterize this case as a "spending authorization case" where the issue is whether any statutory provision authorizes the proposed spending. PB at 14.

The agency also argues that its position on this issue has been "consistent and longstanding." PB at 11. However, one has only to look at the record (*e.g.*, App. 28, 92-94) before the Authority in this case to understand, as discussed above, that the agency does not have a consistent position, and its argument regarding its position on appropriation expenditures for cleaning services was not made to the Authority. The agency further contends that Department of Defense ("DOD") Instruction 1338.18, para. 5.7.9 (1998) commands that uniform allowances are not to cover cleaning services. PB at 12; PB Addendum at 21. However, as discussed above, not only did the agency not present this argument to the Authority, but the DOD Instruction was never submitted to the Authority, and is not properly before the Court. *See EEOC*, 476 U.S. at 23.[10] Thus, this Court does not have jurisdiction to entertain the agency's sole argument, and for this reason, the appeal must be dismissed. *Id*.

II. ASSUMING, *ARGUENDO*, THAT THE COURT SHOULD CONSIDER THE AGENCY'S NEW ARGUMENT, THE AGENCY HAS NOT DEMONSTRATED THAT THE PROPOSAL REQUIRES A PROHIBITED EXPENDITURE.

The Authority's decision, addressing the arguments presented by the agency, reasonably found that the proposal was negotiable because cleaning services are

[10] The agency also inexplicably attaches to its brief a copy of 5 U.S.C. § 1503 (concerning inquiries as to missing persons) in its addendum at 1. That provision is unrelated to the issue in this case.

not specifically provided for by Federal statute for purposes of 5 U.S.C. § 7103(a)(14)(C). The Authority, relying on its relevant precedent, found that insofar as a Federal statute leaves the agency with some discretion over a proposed matter, that discretion is subject to being exercised through negotiation; thus, when the agency has some discretion over the proposed matter, it is not "specifically provided for" by the Federal statute. *See* App. 174-75. Here, because the agency did not assert that the proposal would require the agency to expend funds beyond the uniform statutes' maximums, the Authority found that the agency had some discretion to bargain, and the proposal was thus not specifically provided for by Federal statute within the meaning of § 7103(a)(14)(C). Because it applied this appropriate standard, the Authority's decision was reasonable and in accordance with law. *See IAMAW, Franklin Lodge No. 2135, & Int'l Plate Printers, Die Stampers & Engravers Union of No. Am., Locals Nos. 2, 24 & 32, & Graphic Commc'ns Int'l Union, Local No. 285, & Int'l Ass'n of Siderographers, Wash. Ass'n*, 50 FLRA 577, 681 (1995), *enforced sub nom. U.S. Dep't of the Treasury, Bureau of Engraving & Printing v. FLRA*, 88 F.3d 1279 (D.C. Cir. 1996) (explaining the discretion standard). Nevertheless, rather than explaining why the Authority's rejection of the agency's arguments before it was not in accordance with law, the agency now argues that the Authority's decision should be reversed based on an argument that the agency did not make before the Authority. For this

reason, the petition for review should be denied because the Authority's decision was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. *See* 5 U.S.C. § 7123(c). *Cf. Ass'n of Civilian Technicians ("ACT") v. FLRA*, 269 F.3d 1112, 1117 (D.C. Cir. 2001), *citing Fort Steward Schools v. FLRA*, 495 U.S. 641, 651-52 (1990) (Agency decisions must generally be affirmed on the grounds stated in them).

Although the Authority has not had the opportunity to consider the agency's argument that the proposal is not negotiable because it would constitute an expenditure from appropriated funds not authorized by law, it appears that the agency has nonetheless not demonstrated that the proposal requires a prohibited expenditure. In analyzing such an argument, certain legal principles apply.

It is well established that all expenditures of appropriated funds must be authorized by Congress. *See* 31 U.S.C. § 1301(a)*; see also OPM v. Richmond*, 496 U.S. 414, 416 (1990). The Authority has consistently held, and this Court has agreed, that bargaining proposals that require the expenditure of funds in a manner not authorized by law are inconsistent with law and therefore outside an agency's obligation to bargain under § 7117(a)(1) of the Statute. *See, e.g., United Power Trades Org.*, 48 F.L.R.A. 291, 292 (1993), *aff'd mem.*, No. 93-70827 (9th Cir. May 23, 1995); *ACT v. FLRA*, 269 F.3d at 1116.

However, as the Authority recognized, 31 U.S.C. § 1301(a) does not require that every item of expenditure be specified in an appropriations act. To require an explicit appropriation for every expense would be clearly impractical given the levels of generality Congress uses to provide funding for government agencies and operations. *See Customs Serv.*, Comp. Gen. Decision B-270,446 (Feb. 11, 1997). Instead, the Comptroller General has developed the "necessary expense" doctrine which requires that expenditures of appropriated funds "make a direct contribution to carrying out either a specific appropriation or authorized agency function for which more general appropriations are available." *Id.* Put another way, expenditures must be reasonably necessary to carrying out an agency's authorized functions. *Internal Revenue Serv.*, 71 Comp. Gen. 527, 528 (1992).[11]

Here, the agency's argument is based on the faulty premise that silence in the uniform statutes regarding cleaning services compels a conclusion that such expenditures are prohibited. PB at 7, 14, 18. However, if a statute is silent with

[11] The Comptroller General is required to "investigate all matters related to the receipt, disbursement, and use of public money." 31 U.S.C. § 712(1). In performing this role, the Comptroller General is authorized to give agencies guidance concerning the allowable expenditure of appropriated funds. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 101 n.11 (1983) (citing 31 U.S.C. § 3529). Although decisions of the Comptroller General are not binding as precedent on either the Authority or this Court, this Court considers the "assessment of the [Comptroller General] as an expert opinion, which [the Court] should prudently consider . . . ." *ACT v. FLRA*, 269 F.3d at 1116.

respect to a specific issue, ambiguity is normally created and the silence "does not resolve [the issue]" or compel a conclusion in this case that expenditures for cleaning services are prohibited. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

The legislative history cited by the petitioner (PB at 18-20) also does not resolve the issue of whether uniform appropriations in the uniform statutes would prohibit funding for cleaning services. Although the legislative history of 5 U.S.C. § 5901 indicates that the Conference Committee report deleted proposed Senate's language that associated uniform allowances with the "upkeep of uniforms," *see* Conf. Rep. No. 2665, 83rd Cong., 1954 U.S.C.C.A.N. 3861, 3875, the legislative history offers no explanation for this deletion.[12] Consequently, the intent of Congress remains unknown. Although the intent may have been to prohibit the appropriated allowance for uniforms from covering cleaning expenses, an equally likely intent may have been that Congress may have wanted a cleaning allowance to be at the discretion of the agency and not to require it in the words of the statute. Most importantly, however, the plain words of the uniform statutes, themselves, do not prohibit such an expenditure. And, it is axiomatic that if Congress intends to exempt an item from the coverage of a statute, it knows how to do so. *See Delalat*

[12] Although the agency cites to a line of cases wherein the Authority erroneously read the legislative history, these cases are no longer relied upon by the Authority. See PB at 18-19; App. 174.

v. Dep't of the Air Force, 557 F.3d 1342, 1344 (Fed. Cir. 2009). Thus, the petitioner's citation to legislative history does not help its position.

Finally, the agency cannot escape the "necessary expense" doctrine. The agency does not demonstrate that cleaning expenses for uniforms are not reasonably related to the uniform statutes requiring that civilian employees who are obliged to wear uniforms be given a uniform or a uniform allowance. *See, e.g.*, *ACT v. FLRA*, 370 F.3d 1214, 1221 (D.C. Cir. 2004) (the "necessary expense" doctrine requires that an expenditure be reasonably necessary or reasonably related to carrying out an authorized function); United States General Accounting Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, 4-19 to 4-22 (3rd ed. 2004). Therefore, the agency has not demonstrated that the uniform statutes prohibit expenditures for the cleaning of uniforms under the statutory maximums allotted for uniform allowances.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction. Alternatively, the petition for review should be denied on the merits.

Respectfully submitted,

/s/ Rosa M. Koppel
ROSA M. KOPPEL
Solicitor

/s/ Joyce G. Friedman
JOYCE G. FRIEDMAN
Attorney

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424-0001
(202) 218-7906

February 22, 2011

D.C.Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Circuit Rule 32(a), I hereby certify that this brief is double spaced (except for extended quotations, headings, and footnotes) and is proportionately spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 4,495 words excluding exempt material.

/s/ Joyce G. Friedman
Joyce G. Friedman
Counsel for the Respondent

CERTIFICATE OF SERVICE

I certify that the Brief for the Federal Labor Relations Authority has been filed with the Court and served this day, by way of the ECF filing system upon the following:

Robert D. Kamenshine, Esquire
William Kanter, Esquire
Civil Division, Room 7213
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

/s/ Joyce G. Friedman
Joyce G. Friedman
Attorney for the Respondent

February 22, 2011

Relevant Statutory Provisions

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5 U.S.C. § 5901. Uniform allowances

(a) There is authorized to be appropriated annually to each agency of the Government of the United States, including a government owned corporation, and of the government of the District of Columbia, on a showing of necessity or desirability, such sums as may be necessary to carry out this subchapter. The head of the agency concerned, out of funds made available by the appropriation, shall—

(1) furnish to each of these employees a uniform at a cost not to exceed $400 a year (or such higher maximum amount as the Office of Personnel Management may establish under section 5902); or

(2) pay to each of these employees an allowance for a uniform not to exceed $400 a year (or such higher maximum amount as the Office of Personnel Management may establish under setion 5902).

The allowance may be paid only at the times and in the amounts authorized by the regulations prescribed under section 5903 of this title. When the agency pays direct to the uniform vendor, the head of the agency may deduct a service charge of not more than 4 percent.

5 U.S.C. § 7103. Definitions; application

(a) For the purpose of this chapter—

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
(B) relating to the classification of any position; or
(C) to the extent such matters are specifically provided for by Federal statute

5 U.S.C. § 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

5 U.S.C. § 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which

issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall— (A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

5 U.S.C. § 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record.

The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed.
The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

10 U.S.C. § 1593. Uniform allowance: civilian employees

(a) Allowance authorized.--(1) The Secretary of Defense may pay an allowance to each civilian employee of the Department of Defense who is required by law or regulation to wear a prescribed uniform in the performance of official duties.

(2) In lieu of providing an allowance under paragraph (1), the Secretary may provide a uniform to a civilian employee referred to in such paragraph.

(3) This subsection shall not apply with respect to a civilian employee of the Defense Intelligence Agency who is entitled to an allowance under section 1622 of this title.

(b) Amount of allowance.--Notwithstanding section 5901(a) of title 5, the amount of an allowance paid, and the cost of uniforms provided, under subsection (a) to a civilian employee may not exceed $400 per year (or such higher maximum amount as the Secretary of Defense may by regulation prescribe).

(c) Treatment of allowance.--An allowance paid, or uniform provided, under subsection (a) shall be treated in the same manner as is provided in section 5901(c) of title 5 for an allowance paid under that section.

(d) Use of appropriated funds for allowance.--Amounts appropriated annually to the Department of Defense for the pay of civilian employees may be used for uniforms, or for allowance for uniforms, as authorized by this section and section 5901 of title 5.

31 U.S.C. § 1301. Application

(a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

(b) The reappropriation and diversion of the unexpended balance of an appropriation for a purpose other than that for which the appropriation originally was made shall be construed and accounted for as a new appropriation. The unexpended balance shall be reduced by the amount to be diverted.

(c) An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation--

(1) is for rivers and harbors, lighthouses, public buildings, or the pay of the Navy and Marine Corps; or

(2) expressly provides that it is available after the fiscal year covered by the law in which it appears.

(d) A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made.