

**70 FLRA No. 82**

LABORERS INTERNATIONAL UNION OF  
NORTH AMERICA  
(Union)

and

UNITED STATES  
DEPARTMENT OF DEFENSE  
NATIONAL GUARD BUREAU  
NEVADA ARMY NATIONAL GUARD  
(Agency)

0-NG-3370

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DECISION AND ORDER  
ON A NEGOTIABILITY ISSUE

February 9, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member DuBester dissenting)

**I. Statement of the Case**

This matter is before the Authority on a negotiability appeal filed under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (Statute).<sup>1</sup> It concerns the negotiability of one multi-part proposal that would require the Agency to provide certain dual-status technicians (technicians) with military uniforms or, in the alternative, an \$800 annual allowance for such uniforms.

The parties dispute what portions of the proposal are before the Authority—namely, whether or not the portions that apply to enlisted technicians are at issue. The Union argues that the portions of the proposal at issue concern whether the Agency could provide: (1) officer or warrant officer technicians (collectively, officer technicians) with uniforms; and (2) an \$800 annual allowance to officer technicians or *enlisted* technicians if they do not receive a uniform. The Agency included with its statement of position (statement) a copy of a Federal Service Impasses Panel (Panel) settlement, and argues that the Panel settlement resolved the

issue of enlisted technician uniforms and allowances, and that the only remaining portion of the proposal involves whether or not the Agency can provide *officer* technicians with uniforms or, alternatively, allowances. We find that the Agency's argument is supported by the Panel settlement.

Turning to the negotiability of the proposal, we find that the wording of the proposal conflicts with the plain wording, and the Agency's reasonable interpretation, of 37 U.S.C. §§ 415-417, and thus is outside the duty to bargain. Accordingly, we dismiss the Union's petition.

**II. Background**

In order to be employed as a technician, an individual must first be an active member of a state's National Guard, or a member of the selected reserve of the U.S. Army, or the U.S. Air Force. Technicians are civilian employees of the Department of Defense; yet their employment is conditioned upon maintaining membership in a state's National Guard or the reserves. Further, they perform their technician duties while wearing "the uniform appropriate for the member's grade and component of the armed forces."<sup>2</sup>

The Authority has explained that "[t]he two worlds [technicians] simultaneously inhabit are understandably governed by very different rules of employee-employer relations. As members of the Guard, technicians are subject to military authority; as civilian employees, they are covered by the . . . [Statute], which permits them to bargain over conditions of their employment."<sup>3</sup>

This dispute arose out of negotiations over a collective-bargaining agreement (CBA) for a new bargaining unit. The proposal at issue is the only part of the CBA that has not been finalized. The rest of the CBA has been executed and has gone into effect. Before filing this petition, the Union submitted an identical proposal to the Panel, which ultimately resulted in a settlement agreement. The parties now dispute the impact of that agreement on the proposal's language.

After the Panel settlement, the Union filed a negotiability petition with the Authority. A post-petition conference (conference) was held, and

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<sup>2</sup> 32 U.S.C. § 709(b)(4).

<sup>3</sup> *NFFE, Local 1669*, 55 FLRA 63, 65 (1999) (*NFFE*) (quoting *NFFE, Local 1623 v. FLRA*, 852 F.2d 1349, 1350-51 (D.C. Cir. 1988)).

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<sup>1</sup> 5 U.S.C. § 7105(a)(2)(E).

the Agency filed a statement. The Union filed a brief response, stating that for the reasons outlined in its petition, the proposal is within the duty to bargain. There was no Agency reply.

### III. Proposal 1

#### A. Wording

3. The Agency shall provide employees (enlisted, **warrant officers, and officers**) with four (4) sets of their primary dual-status technician duty uniform and all accessories required for proper uniform wear IAW military regulations as follows:

a. Uniforms will be provided ready-to-wear to include emblem/patches/ribbons, nametags/tapes, insignia, etc. as required by regulations.

b. All other clothing accessories such as undershirts and socks, ties, gloves, shoes/boots, hats, etc. as required by regulations.

c. Cold and foul weather gear as provided in Section 11.3.

4. When an employee has difficulty or is unable to obtain the required military apparel through the Agency's supply system, the employee will notify their supervisor to request remedy. If the supervisor cannot get the affected employee the required uniforms, the supervisor will go through the supervisory chain of command to correct the uniform deficiency.

5. When all efforts to obtain the required uniform items have been exhausted by the employee and their supervisor, **the Agency will provide the employee with a monetary allowance not to exceed \$800 per year so that employees may comply with 32 USC § 709(b)(4).**<sup>4</sup>

#### B. Meaning

At the conference, the Union confirmed that "IAW" stands for "in accordance with."<sup>5</sup> The Union also confirmed that the proposal's reference to

"regulations" refers to Army Regulation 670-1.<sup>6</sup> The Union stated that the proposal's reference to "Section 11.3" refers to a section of the parties' CBA.<sup>7</sup>

The Union explained that under the proposal, the Agency will provide *all* Agency technicians, both enlisted and officers, with uniforms and accessories.<sup>8</sup> The Union further explained that when the Agency is not able to supply a uniform through its supply system, then the Agency will provide a monetary allowance of up to \$800 so that the enlisted or officer technician can buy his or her uniform or accessories.<sup>9</sup> At the conference, the Agency agreed with the Union's explanation of the operation and impact of the proposal.<sup>10</sup>

However, the parties dispute whether all of the wording in the proposal is actually at issue here. According to the Union, the Authority must address whether officer technicians can receive uniforms and whether *any* type of technician – enlisted or officer – may receive a monetary allowance for uniforms.<sup>11</sup> The Agency argues that only the portion of the proposal regarding provision of uniforms or allowances to *officer* technicians is in dispute (as emphasized above).<sup>12</sup> In its statement, the Agency asserts that the issue of whether enlisted technicians may receive a uniform or an \$800 annual allowance was resolved in the Panel settlement.<sup>13</sup> The Agency argues that the only remaining issue for the Authority to decide is whether it must negotiate to provide *officer* technicians with uniforms, or alternatively, \$800 allowances.<sup>14</sup>

The record supports the Agency's position. The Agency's allegation of nonnegotiability specifically addresses providing uniforms to officer technicians and does not address enlisted technicians.<sup>15</sup> Further, in the Panel settlement, the Union withdrew from the Panel proceeding the portion of the proposal providing uniforms or

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Statement at 8.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.*

<sup>15</sup> Pet., Attach. 1, Agency's Allegation of Nonnegotiability at 1-4.

<sup>4</sup> Record of Post-Petition Conference at 2.

<sup>5</sup> *Id.*

allowances to officer technicians.<sup>16</sup> The Panel settlement supports a conclusion that the Union intended to submit to the Authority, for a negotiability determination, only the portion of its proposal involving officer technicians. Accordingly, we find that the only portion of the proposal before us is the portion that concerns providing uniforms or an \$800 uniform allowance to the officer technicians.<sup>17</sup>

### C. Analysis and Conclusions

As relevant to the issue before the Authority, the Union argues that officer technicians should be provided with uniforms or, in the alternative, a uniform allowance in the amount of \$800 because they are required to wear a uniform as a condition of their civilian employment.<sup>18</sup> It further argues that Congress authorizes the expenditure of appropriated funds for uniforms or allowances;<sup>19</sup> that technicians are authorized to receive uniforms or an allowance under 5 U.S.C. § 5901, 10 U.S.C. § 1593, and 37 U.S.C. §§ 417-418 as long as the overall expenditure is not greater than the maximum amount permitted by law;<sup>20</sup> and that DOD Instruction 1400.25, Volume 591(4)(c) authorizes a uniform or allowance not to exceed \$800 per year.<sup>21</sup> In support, the Union cites *NFFE, Local 1669 (NFFE)*.<sup>22</sup>

The Agency argues that 5 U.S.C. § 5901 and 10 U.S.C. § 1593 do not apply to the officer technicians, as other statutes, notably 37 U.S.C. §§ 415-417, specifically address officer technicians'

uniforms and allowances.<sup>23</sup> It argues that the \$800 allowance proposed by the Union exceeds the amounts provided for in §§ 415-418.<sup>24</sup> It also argues that the proposal violates 31 U.S.C. §§ 1301 and 1341, as it would "require the expenditure of funds for which an appropriation has not been made," violating the Purpose Statute and the Anti-deficiency Act.<sup>25</sup> The Agency cites *U.S. Department of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base v. FLRA (Seymour Johnson)*<sup>26</sup> and *U.S. Department of the Navy, Naval Undersea Warfare Center Division, Newport, R.I. v. FLRA (Navy)*<sup>27</sup> for support.

While in the past the Authority has found that § 417 does not preclude an agency from providing uniforms,<sup>28</sup> due to subsequent court decisions, we now depart from that precedent. In *Seymour Johnson, Navy*, and *U.S. Department of the Air Force, Luke Air Force Base, Arizona v. FLRA (Luke)*,<sup>29</sup> the U.S. Court of Appeals for the D.C. Circuit has emphasized the deference the Authority owes to another agency's interpretation of a statute that that agency administers.

In *Seymour Johnson*, the D.C. Circuit, considering a proposal for cleaning technicians' uniforms, found that "whether as a matter of the plain text of the two uniform statutes, or the Air Force's permissible interpretation of any statutory ambiguity to which the FLRA must defer, the Air Force correctly maintains that the [u]nion's uniform cleaning proposal is non-negotiable because the statute the Department of Defense administers does not authorize such payment from appropriated funds."<sup>30</sup> The D.C. Circuit stated that the Authority owed deference to the Department of Defense's reasonable interpretations of the statutes it administers.<sup>31</sup> In *Navy*, the D.C. Circuit found that the Authority had erred when it ruled that the agency had a duty to bargain with unions before removing

<sup>16</sup> Statement, Attach. 1, Panel Settlement Agreement at 1. The text of the settlement agreement is set forth in the appendix to this decision.

<sup>17</sup> See *AFGE, Local 1513*, 36 FLRA 82, 83 (1990) ("Part 2424 of the Authority's regulations, which governs petitions for review of negotiability issues, contemplates that proposals that are the focus of a dispute must have been subject to a declaration of nonnegotiability by the agency involved prior to the union's filing a negotiability appeal with the Authority.").

<sup>18</sup> Pet., Attach. 2, Union's Position on Agency's Declaration of Nonnegotiability at 1-5.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.*

<sup>22</sup> 55 FLRA 63 (1999) (Authority found negotiable proposal that agency provide ready-to-wear uniforms and that the 1996 amendments to the Technicians Act clarified that §§ 417-418 applied to technicians' uniforms and uniform allowances, but that the sections did not impact bargaining over the proposal).

<sup>23</sup> Statement at 9-10; see also *id.* at 14 ("37 U.S.C. §§ 415-417 are the only provisions by which National Guard military technicians (dual status) who are officers may be compensated for the uniforms they are required to wear").

<sup>24</sup> *Id.* at 13.

<sup>25</sup> *Id.* at 14.

<sup>26</sup> 648 F.3d 841 (D.C. Cir. 2011).

<sup>27</sup> 665 F.3d 1339 (D.C. Cir. 2012).

<sup>28</sup> See, e.g., *Ass'n of Civilian Technicians, Evergreen & Rainier Chapters*, 57 FLRA 475, 482-83 (2001); *NFFE*, 55 FLRA at 64-65.

<sup>29</sup> 844 F.3d 957 (D.C. Cir. 2016).

<sup>30</sup> 648 F.3d at 848.

<sup>31</sup> *Id.* at 847-48.

bottled water, once tap water at the facility was found to no longer be unsafe to drink.<sup>32</sup> Looking to appropriations law, the court found that the Authority receives no deference “when it has endeavored to reconcile its organic [S]tatute with another statute—such as a federal appropriations statute—not within its area of expertise.”<sup>33</sup> More recently, the D.C. Circuit reiterated in *Luke* that it was not the role of the Authority or the courts to second guess the judgment of the Secretary of Defense on such matters.<sup>34</sup>

The Agency argues that §§ 415-417 specifically address uniforms and allowances for officer technicians, and thus control over the more general coverage of §§ 5901 and 1593.<sup>35</sup> Further, the Agency argues that Congress intended §§ 415-417 to “be the sole method for compensating” officer technicians for their technician uniforms.<sup>36</sup> The Agency argues that § 417 only permits an allowance or monetary reimbursement to officer technicians for uniforms, and does not allow the Agency to actually provide them with uniforms. The Agency contrasts § 417’s language with § 418’s language pertaining to *enlisted* technicians.<sup>37</sup> Section 418 describes “the quantity and kind of clothing to be furnished annually” to an enlisted member and “the amount of a cash allowance to be paid to such a member if clothing is not so furnished to him.”<sup>38</sup> The Agency argues that the Union’s proposal “conflate[s] §§ 415-417 with § 418 by predicating the payment of any allowance on the failure of the Agency to provide uniforms to . . . [officer] technicians.”<sup>39</sup>

Section 415 provides for an initial allowance of not more than \$400.<sup>40</sup> Section 416 provides for additional allowances of not more than \$200 when reserve officers enter active duty for more than ninety days.<sup>41</sup> Both sections also specify the timing and order of when and under what circumstances officer technicians will receive allowances. And § 417 provides:

- (a) Subject to standards, policies, and procedures prescribed by the

Secretary of Defense, the Secretary of each military department may prescribe regulations that he considers necessary to carry out sections 415(a)-(c) and 416 of this title within his department. The Secretary of Homeland Security, with the concurrence of the Secretary of the Navy, may prescribe regulations that he considers necessary to carry out those sections for the Coast Guard when it is not operating as a service in the Navy. As far as practicable, regulations for all reserve components shall be uniform.

(b) Under regulations approved by the Secretary of Defense, or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, and subject to section 415(a)-(c) or 416 of this title, a reserve officer of an armed force who has received a uniform and equipment allowance under section 415(a)-(c) or 416 of this title, may, if a different uniform is required, be paid a uniform and equipment reimbursement upon transfer to, or appointment in, another reserve component.

(c) For the purposes of sections 415(a)-(c) and 416 of this title and subsections (a) and (b), an officer may count only that duty for which he is required to wear a uniform.

(d)(1) For purposes of sections 415 and 416 of this title, a period for which an officer of an armed force, while employed as a National Guard technician, is required to wear a uniform under section 709(b) of title 32 shall be treated as a period of active duty (other than for training).

(2) *A uniform allowance may not be paid, and uniforms may not be furnished, to an officer under section 1593 of title 10 or section 5901 of title 5 for a period of employment referred to in paragraph (1) for which an officer*

<sup>32</sup> 665 F.3d at 1351.

<sup>33</sup> *Id.* at 1348.

<sup>34</sup> 844 F.3d at 961-64.

<sup>35</sup> Statement at 9.

<sup>36</sup> *Id.* at 10.

<sup>37</sup> *Id.* at 12-13.

<sup>38</sup> 37 U.S.C. § 418(a).

<sup>39</sup> Statement at 13.

<sup>40</sup> 37 U.S.C. § 415(a).

<sup>41</sup> *Id.* § 416(a).

*is paid a uniform allowance under section 415 or 416 of this title.*<sup>42</sup>

We agree that the Agency's interpretation of §§ 415-417 – that the Agency is not permitted to provide officer technicians with uniforms or, alternatively, an \$800 allowance – comports with their plain language. Consistent with the D.C. Circuit's reasoning in *Seymour Johnson*, we find that the proposal conflicts with §§ 415-417 and is outside the duty to bargain.<sup>43</sup> As discussed above, §§ 415-417 specifically provide for how officer technicians will receive their uniforms or allowances for uniforms, including the timing of when they can be reimbursed and the amount of reimbursement. Those statutory sections are incompatible with the Union's proposal, which calls for a series of four uniforms or, alternatively, an allowance not to exceed \$800 annually.

Because we have found that the proposal conflicts with §§ 415-417, it is unnecessary to address the Agency's other arguments.<sup>44</sup>

#### IV. Order

We dismiss the petition.

#### APPENDIX

May 10, 2017

Case No. 17 FSIP 21

Settlement Agreement

The Parties agree to the following:

1. In regards to the proposal that officers and warrant officers being eligible to receive uniform items or monetary allowance, the Union withdraws its proposal.

2. In regards to the proposal that employees receive an \$800 monetary allowance in lieu of receiving uniform items, the Parties agree to the following:

5. *Notification provided IAW with paragraph 4 (above) shall be in writing, and shall include the types and quantities of uniform items requested, and the date on which they were ordered. If an employee's uniform deficiency is not resolved within ninety (90) days of their providing written notification to their supervisor, the employee may file a grievance IAW Section 12.6, Phase 3, the Adjutant General Review.*

6. *In order to minimize delays with the acquisition of uniform items, the Agency will provide a standardized form that allows employees to submit requests for uniform items, and provides a record of what items were ordered and when an order was submitted.*

For the Union

/s/

Ben Banchs

Chief Negotiator

LIUNA Local 1776

For the Agency

/s/

MAJ Scott F. Katherman

Chief Negotiator

Nevada Army National Guard

<sup>42</sup> *Id.* § 417 (emphasis added).

<sup>43</sup> 648 F.3d at 842, 846-48.

<sup>44</sup> See *NTEU*, 70 FLRA 100, 105 (2016); see generally *NTEU*, 66 FLRA 584, 586 (2012) (citing *AFGE, Local 221*, 64 FLRA 1153, 1161 (2010); *Nat'l Weather Serv. Emps. Org., Branch 9-10*, 61 FLRA 779, 782 (2006) (if one part of the proposal is outside the duty to bargain, the entire proposal is outside the duty to bargain)). Here, the Union did not request to sever its proposal. Pet. at 6.

**Member DuBester, dissenting:**

I would find that the proposal is negotiable. The majority's decision to find the proposal non-negotiable rests on a misapplication of law.

While the majority correctly points out that 37 U.S.C. §§ 415-417 allows the Agency to provide uniform allowances for officer technicians, it incorrectly holds that these regulations specifically preclude bargaining over the proposal. Nothing in the wording of §§ 415-417 conflicts with bargaining over the proposal. The uniform allowances prescribed in §§ 415-416 – an initial allowance up to \$400, and additional allowances up to \$200 – are a *statutory floor, not a ceiling*. In other words, the wording of these regulations does not prohibit the Agency from bargaining over a uniform allowance up to \$800, and is silent on the supply of uniforms.

Moreover, § 417(d)(2) only restricts the Agency from paying a uniform allowance or providing a uniform *under 10 U.S.C. § 1593 or 5 U.S.C. § 5901* (laws which provide for either uniforms or a uniform allowance) if the Agency already pays a uniform allowance under §§ 415-416. But nothing in the wording of § 417(d)(2) restricts the Agency from agreeing to provide a uniform or a uniform allowance *under a collective-bargaining agreement*.<sup>1</sup> This is in line with Authority precedent holding that “[t]he . . . language of section[] 417 [discussing uniforms for officers] . . . does not reveal any inconsistency between the terms or the structure of [this] section[] and collective bargaining over this proposal. There is no indication that Congress specifically intended that th[is section] would affect collective bargaining over this matter.”<sup>2</sup>

Therefore, nothing in the wording of §§ 415-417 renders bargaining over providing a uniform or uniform allowance to the employees in this case inconsistent with these regulations.

In addition, that §§ 415-417 prescribe uniform allowances for officer technicians does not demonstrate that the proposal concerns an area of

discretion under those statutory provisions that is prohibited from bargaining. In this vein, the Authority has held that where the governing statutes leave the agency discretion, “that discretion is subject to being exercised through negotiation.”<sup>3</sup>

<sup>1</sup> *Ass'n of Civilian Technicians, Evergreen & Rainier Chapters*, 57 FLRA 475, 482-83 (2001) (finding 37 U.S.C. §§ 415-16 does not preclude bargaining over a proposal addressing uniforms and allowances); *NFFE, Local 1669*, 55 FLRA 63, 65-67 (1999) (*NFFE*) (finding negotiable a proposal that the agency provide National Guard technicians uniforms because nothing in the wording of 37 U.S.C. § 417 conflicts with the proposal).

<sup>2</sup> *NFFE*, 55 FLRA at 65 (finding negotiable a proposal that the agency provide National Guard technicians uniforms).

<sup>3</sup> *NAIL, Local 7*, 64 FLRA 1194, 1200 (2010).