Nos. 99-1563 & 99-1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS NATIONAL GUARD,
by the Adjutant General of the State
of Arkansas, Major General Don C. Morrow,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The final decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") in *National Federation of Federal Employees, Local 1669 & U.S. Department of Defense, Arkansas Air National Guard, 188th Fighter Wing, Fort Smith, Arkansas*, 55 FLRA (No. 18) 63 (Jan. 8, 1999) (*Arkansas National Guard*), a copy of which is at FLRA's Addendum (Add.) A 1-6. The Authority exercised jurisdiction over the case pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. III 1997) (Statute).[1]

[1] Pertinent statutory and constitutional provisions are set forth in Addendum B to this brief.

This Court has jurisdiction over the petition for review and cross-application for enforcement of the Authority's final decision and order pursuant to section 7123(a) and (b) of the Statute. Petitioner Arkansas National Guard ("petitioner" or "Guard") filed its petition for review on March 8, 1999, within the 60-day time limit provided by section 7123(a) of the Statute.

STATEMENT OF THE ISSUES

I. Whether the Authority properly determined that the union's proposal, which requires the Guard to supply civilian technicians with "ready to wear" uniforms, is within the agency's duty to bargain under the Statute.

Pursuant to Eighth Circuit Rule 28A(f)(2) the most apposite cases are:

- *Association of Civilian Technicians, Arizona Army Chapter 61 & U.S. Dep't of Defense, Nat'l Guard Bureau, Arizona Nat'l Guard*, 48 FLRA 412 (1993)
- *National Fed'n of Fed. Employees, Local 1623 v. FLRA*, 852 F.2d 1349 (D.C. Cir. 1988)
- *National Fed'n of Fed. Employees, Local 1669 & U.S. Dep't of Defense, Ark. Air Nat'l Guard, 188th Fighter Wing, Fort Smith, Ark.*, 55 FLRA (No. 18) 63 (Jan. 8, 1999)
- *U.S. Dep't of Defense, Nat'l Guard Bureau, Alexandria, Va.*, 47 FLRA 1213 (1993)

The most apposite statutory provisions are:

- 5 U.S.C. § 7103(a)(14)(C)
- 5 U.S.C. § 7105(a)(2)(E)
- 5 U.S.C. § 7117

- National Guard Technicians Act, 32 U.S.C. § 709 (1994 & Supp. III 1997)
- 37 U.S.C. §§ 417-18 (1994 & Supp. III 1997)

II. Whether the Court has the statutory power to enforce Authority orders pertaining to the Guard.

Pursuant to Eighth Circuit Rule 28A(f)(2) the most apposite cases are:

- *State of Nebraska, Military Dep't, Office of the Adjutant General v. FLRA*, 705 F.2d 945 (8th Cir. 1983)
- *U.S. Dep't of Defense, Nat'l Guard Bureau, Rhode Island Nat'l Guard, R. I. v. FLRA*, 982 F.2d 577 (D.C. Cir. 1993)

The most apposite constitutional and statutory provisions are:

- 5 U.S.C. § 7123(b)
- Militia Clause of the Constitution, Art. I, § 8, cl.16

STATEMENT OF THE CASE

This case involves a bargaining dispute that arose during contract negotiations between petitioner and a union [2] that represents approximately 300 civilian technicians employed by the Guard. The union submitted to the Guard a bargaining proposal that relates to the military uniforms that civilian technicians are required to wear while performing their technician duties. The union's proposal would require the Guard to be responsible for attaching emblems to these uniforms. The Guard alleged that this proposal is nonnegotiable. The union appealed to the Authority for a determination regarding the negotiability of this proposal. 5 U.S.C. § 7105(a)(2)(E). The Authority determined that the proposal is negotiable and, accordingly, ordered the parties to bargain.

[2] When the case began, National Federation of Federal Employees Local 1669 (NFFE) represented the technicians in this case. Later, the Laborers International Union of North America Local 1669 replaced NFFE as the bargaining representative.

STATEMENT OF THE FACTS[3]

I. Background

A. The National Guard and Civilian Technicians

The union is the exclusive representative of certain National Guard civilian technicians employed by the Arkansas National Guard. The National Guard serves both the state in which the Guard unit is located and the federal government. *See U.S. Dep't of Defense, Nat'l Guard Bureau, Rhode Island Nat'l Guard, R.I. v. FLRA*, 982 F.2d 577, 578 (D.C. Cir. 1993) (*DOD v. FLRA*). Because the National Guard is not a full-time active force, it employs "civilian 'technicians' to perform administrative, clerical, and technical tasks." *Id.* Guard technicians generally must become and remain military members of the National Guard unit in which they are employed and must maintain the military rank specified for their technician positions. *See* National Guard Technicians Act, 32 U.S.C. § 709 (Technicians Act); *State of Nebraska,*

[3] In its brief (Brief of Petitioner (Br.) at *xii*), petitioner incorrectly states that "[t]here is no record." Pursuant to Federal Rule of Appellate Procedure 17(b)(1)(B), the Authority has served and filed a Certified List of documents that "comprises the complete record of proceedings" in the case under review in this Court. Certified List of the Federal Labor Relations Authority, dated March 30, 1999, at 1. Petitioner includes some of these record documents in its Appendix. The Authority notes, however, that the following documents, which petitioner includes in its Appendix, are not part of the record and, therefore, are not properly part of the petitioner's Appendix (App.): Statutes (App. 4-18); Regulations (App. 19-46); *DOD & ACT*, Case No. WA-RP-70070 (App. 47-64); Cross-Application for Enforcement of an Order (App. 78-80); and Response and Answer to Cross-Application for Enforcement (App. 81-84). The last two documents are pleadings that have been presented to the Court in this case but are not part of the record because they were not filed with the Authority.

Military Dep't, Office of the Adjutant General v. FLRA, 705 F.2d 945, 946 (8th Cir. 1983) (*Nebraska Guard*).

The federal employment status of these technicians is governed both by the Technicians Act[4] and by the civil service laws found in title 5 of the U.S. Code. Technicians are included in the general definition of "employee" found at 5 U.S.C. § 2105 and are, therefore, subject to those provisions unless otherwise specifically excluded. *See* 5 U.S.C. § 2105(a)(1)(F). Thus, civilians technicians are a "hybrid class" -- federal civilian employees who work in a military environment and under the immediate control of state officers. *Nebraska Guard*, 705 F.2d at 951.

"[T]he responsibilities and duties of these employees . . . correspond directly to those of other civilian employees," notwithstanding the fact that they arise in a military context. *New Jersey Air Nat'l Guard v. FLRA*, 677 F.2d 276, 279 (3d Cir. 1982) (*New Jersey Guard*). As relevant to this case, civilian technicians -- federal employees--have responsibilities and duties that arise under the Statute. Specifically, the Guard's civilian technicians are "entitled to engage in collective bargaining regarding certain subjects." *DOD v. FLRA*, 982 F.2d at 578. *See also Nebraska Guard*, 705 F.2d at 952.

B. Labor-Management Relations Statutory Scheme

[4] Prior to enactment of the Technicians Act, National Guard technicians were exclusively employees of their respective states, although their salaries were paid with federal funds. H.R. Rep. No. 1823, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News (House Report No. 1823) 3318, 3319. The Technicians Act converted these technicians to federal civilian employee status. *Id.* at 3320.

The Statute governs labor-management relations in the federal service. Under the Statute, the FLRA's responsibilities include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representation election matters, and resolving exceptions to arbitration awards. *See* 5 U.S.C. § 7105(a); *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies. The Authority is further empowered to take such actions as are necessary and appropriate to effectively administer the Statute's provisions. *See* 5 U.S.C. § 7105(a)(2)(I); *BATF*, 464 U.S. at 92-93.

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *See BATF*, 464 U.S. at 92-93; *American Fed'n of Gov't Employees, Local 3748 v. FLRA*, 797 F.2d 612, 613 (8th Cir. 1986). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97. The Authority is "responsible for implementing the Statute through the exercise of broad adjudicatory, policymaking, and rulemaking powers." *National Fed'n of Fed. Employees, Local 1309 v. Department of the Interior*, 119 S. Ct. 1003, 1006 (1999) (*Department of the Interior*).

Under the Statute, the Authority makes determinations as to whether particular bargaining proposals are within an agency's duty to bargain. *See* 5 U.S.C. § 7105(a)(2)(E); *Department of the Interior*, 119 S. Ct. at 1010. A proposal may be outside an agency's duty to bargain for several reasons. As relevant to this case, a proposal that is inconsistent with a federal law is not within an

agency's duty to bargain. *See* 5 U.S.C. § 7117; *American Fed'n of Gov't Employees, Local 3884 v. FLRA*, 930 F.2d 1315, 1319 (8th Cir. 1991) (*AFGE Local 3884*). Further, a proposal that does not relate to "conditions of employment" as defined by the Statute is not within an agency's duty to bargain. *See* 5 U.S.C. § 7103(a)(14). "Conditions of employment" does not include, *inter alia*, matters "specifically provided for by Federal statute." 5 U.S.C. § 7103(a)(14)(C); *AFGE Local 3884*, 930 F.2d at 1319. Finally, civilian technicians are not permitted to negotiate over the military aspects of their employment, and, therefore, proposals related to such aspects are outside the Guard's duty to bargain. *See National Fed'n of Fed. Employees, Local 1623 v. FLRA*, 852 F.2d 1349, 1350-51 (D.C. Cir. 1988) (*NFFE Local 1623*).

A determination by the Authority that a particular proposal is negotiable does not mandate its adoption; it only commits the parties to bargain in good faith over the issue. During bargaining, the agency may continue to resist the proposal, seek modification of the proposal, or bargain for union concessions in exchange for agreeing to the proposal. *See National Treasury Employees Union Chapter 83 & Dep't of the Treasury, IRS*, 35 FLRA 398, 414 (1990); *U.S. Naval Ordnance Station, Louisville, Ky. v. FLRA*, 818 F.2d 545, 551 n.7 (6th Cir. 1987); *American Fed'n of Gov't Employees v. FLRA*, 798 F.2d 1525, 1530 (D.C. Cir. 1986).

II. The Authority's Decision

During contract negotiations, the union submitted the following proposal, which relates to the military uniforms that technicians are required to wear while performing their technician duties:

> The employer will provide uniforms in a ready to wear fashion. All emblems, name tags, insignia etc. will be attached, and any cost will be borne by the agency.

Arkansas National Guard, 55 FLRA at 63. Based on the wording of the proposal and the union's statement of intent, the Authority found that the proposal means that the Guard will either (1) provide uniforms with the emblems already attached or (2) issue chits that could be used at the Guard's sewing service facilities. *Id.* at 64.

The Guard acknowledged Authority precedent that had found similar proposals concerning uniforms and civilian technicians to be within the Guard's duty to bargain. *Arkansas National Guard*, 55 FLRA at 65. However, the Guard argued that a 1996 amendment to the Technicians Act removed this subject from the Guard's duty to bargain.

In 1996, the Technicians Act was amended to include a requirement that technicians wear a military uniform while performing their technician duties. 1996 Department of Defense Authorization Act, Pub. L. 104-106, sec. 1038(a), 110 Stat. 432; 1997 Department of Defense Authorization Act, Pub. L. 104-201, sec. 654, 110 Stat. 2583 (collectively "the 1996 amendments") (set out in full at Add. B 13-14). This statutory amendment codifies a long-standing rule that technicians wear a military uniform while performing their civilian duties. *Arkansas National Guard*, 55 FLRA at 63. In addition to this requirement, the 1996 amendments provide that technician officers are entitled to receive uniform allowances pursuant to 37 U.S.C. § 417 and that technician enlisted personnel are entitled to receive uniforms or uniform allowances pursuant to 37 U.S.C. § 418. Thus, under the 1996 amendments, uniform allowances and uniforms previously supplied only for military service are also supplied for technician duties. *Arkansas National Guard*, 55 FLRA at 63. Prior to these amendments, technicians received uniform allowances pursuant to 5 U.S.C. § 5901 and 10 U.S.C. § 1593, which govern uniforms for all Department of Defense employees. *Id.* at 63-64.

The Guard argued that the proposal is outside the duty to bargain for three reasons, all based on the 1996 amendments. *Arkansas National Guard*, 55 FLRA at 63-64. First, the Guard argued that the proposal is contrary to 37 U.S.C. §§ 417 and 418. Second, according to the Guard, the 1996 amendments make the subject of uniforms for technicians a military aspect of technician employment and, therefore, not a "condition of employment" as defined by the Statute. Third, the Guard contended that the 1996 amendments "deal comprehensively with" the subject of uniforms for technicians and, therefore, the proposal does not concern a "condition of employment" under the Statute. *See* 5 U.S.C. § 7103(a)(14)(C). The union argued to the Authority that the proposal asks for civilian technicians to be provided "nothing more than what is provided" under sections 417 and 418 to members of the military. *Arkansas National Guard*, 55 FLRA at 64.

The Authority rejected each of the Guard's arguments. First, the Authority found that the proposal was not inconsistent with sections 417 or 418, noting that nothing in those sections prohibits the Guard from agreeing to supply "ready to wear" uniforms. *Arkansas National Guard*, 55 FLRA at 64-65.

Second, relying on established Authority precedent holding that proposals related to technicians' wearing of uniforms relates to civilian -- rather than military -- aspects of technician employment, the Authority determined that the proposal does not relate to a miliary aspect of technician employment. *Id.* at 65. As the Authority explained, the decisive consideration is not the "'military nature of the uniform'" but the "'status of the personnel who wear the uniform.'" *Arkansas National Guard*, 55 FLRA at 65 (quoting *Association of Civilian Technicians, Arizona Army Chapter 61 & U.S. Dep't of Defense, Nat'l Guard Bureau, Arizona Nat'l Guard*, 48 FLRA 412, 417 (1993) (*Arizona National Guard*)). After

examining the language and legislative history of the 1996 amendments, the Authority rejected the Guard's argument that the amendments make the supplying of uniforms a military matter. As the Authority emphasized, the amendments did not alter the fact that the technicians are civilian employees and that the "ready to wear" uniform proposal relates solely to the wearing of the uniform in their civilian capacity. *Arkansas National Guard*, 55 FLRA at 66-67.

Finally, the Authority rejected the Guard's argument that the subject of the proposal was not a "condition of employment" under section 7103(a)(14)(C) because the matter is "specifically provided for by Federal statute." The Guard argued that the 1996 amendments were intended to "deal comprehensively" with the issue of uniforms and uniform allowances, relying on two prior Authority decisions that found proposals concerning uniform allowances to be outside the duty to bargain on this ground. Since those cases were decided, however, the Authority has clarified that the "comprehensiveness of a statutory scheme is not, in itself, a sufficient basis to find a matter outside the duty to bargain because the matter is 'specifically provided for by Federal statute' under section 7103(a)(14)(C)." *Arkansas National Guard*, 55 FLRA at 67. The appropriate inquiry, as the Authority explained, is "whether the statute at issue provides the Agency the discretion to agree to the proposal." *Arkansas National Guard*, 55 FLRA at 67 (citing *International Ass'n of Machinists & Aerospace Workers, Franklin Lodge No. 2135 & U.S. Dep't of the Treasury, Bureau of Engraving & Printing*, 50 FLRA 677, 685 (1995) (*BEP*), *aff'd mem. sub nom. Bureau of Engraving & Printing v. FLRA*, 88 F.3d 1279 (D.C. Cir. 1996)).

Here, the Guard did not claim that it lacked the discretion to provide sewing services to technicians under sections 417 and 418. Further, the union sought for

technicians only what the Guard provided to military personnel. Therefore, the Authority found no basis on which to conclude that the matter is specifically provided for by federal statute and not a condition of employment. *Arkansas National Guard*, 55 FLRA at 67. Accordingly, the Authority held that the proposal was within the duty to bargain under the Statute and ordered the Guard to negotiate over the proposal upon request.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *American Fed'n of Gov't Employees, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, or 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); *U.S. Dep't of Agriculture v. FLRA*, 836 F.2d 1139, 1141 (8th Cir. 1988) (*Department of Agriculture*). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 844 (1984). A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 845; *Department of Agriculture*, 836 F.2d at 1141.

The instant case reviews a negotiability determination made by the Authority. Such determinations, which lie at the heart of the Authority's expertise, are given considerable deference. "[T]his Court's practice is to uphold the Authority's negotiability determinations if they are 'reasonably

defensible.'" *American Fed'n of Gov't Employees, Local 1336 v. FLRA*, 829 F.2d 683, 685 (8th Cir. 1987) (citation omitted).

This case also concerns the Authority's interpretation of its own organic statute as it relates to another statute, the National Guard Technicians Act and the 1996 amendments. When the Authority's work requires interpretation of other statutes, while it is not entitled to deference, the Authority's interpretation should be given "respect." *Nebraska Guard,* 705 F.2d at 948; *Department of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988) (*Department of the Treasury*). In its interpretation of other federal statutes, the Authority's reasoning should be followed to the extent the reasoning is "sound." *Department of the Treasury*, 837 F.2d at 1167.

Further, as the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities of federal labor relations.'" *Department of the Interior*, 119 S. Ct. at 1011 (quoting *BATF,* 464 U.S. at 97). As the instant case demonstrates, among the "complexities of Federal labor relations" that the Authority must address as part of its everyday work is the interrelationship of the Statute and other laws governing the federal employment relationship.

SUMMARY OF ARGUMENT

The Authority properly determined that the Guard has a duty to bargain with its civilian technicians over sewing services for work attire. Although technicians wear two hats -- *i.e.* when performing their technician duties, they are federal civilian employees and when serving their military obligations, they are Guard members -- this case concerns the civilian, not the military, aspect of technician employment. Indeed, for years the Guard has been required to bargain over

proposals like the one in this case. Each of the arguments posited by the Guard in an attempt to avoid its bargaining obligation fails.

First, the proposal relates to the civilian, as opposed to the military, aspect of technician employment. Petitioner's arguments to the contrary -- raised for the first time on appeal -- are not properly before this Court because the Supreme Court has ruled that courts of appeals lack jurisdiction to consider objections not first raised to the Authority. In any event, petitioner's arguments lack merit. Congress has specifically provided, as this Court has recognized, that Guard technicians are federal civilian employees who have the right to collectively bargain over the non-military conditions of their employment. Petitioner's arguments -- that everything about the technician is military -- nullify this congressional mandate. Because the proposal concerns the provision of uniforms that will be worn by technicians while performing their civilian duties, the proposal relates to the civilian side of their employment and, therefore, is within the Guard's duty to bargain.

Second, nothing in 37 U.S.C. §§ 417-418 is inconsistent with or specifically provides for "ready to wear" uniforms, the subject of the proposal. Although these sections provide uniforms and uniform allowances for military members and civilian technicians, they do not prescribe the condition of the uniforms so provided. In addition, the Guard admits that it has the discretion to provide sewing services for military members; therefore, there is no reason why it does not have the discretion to provide the same services for its technicians.

Finally, contrary to petitioner's assertion, the Militia Clause of the Constitution does not preclude this Court from enforcing the Authority's order in this case. The Militia Clause's reservation to the states of the right to train their militia is unhampered by the Authority's decision in this case, which relates to technicians as federal civilian employees. In fact, no court, including this Court, has ever

questioned its power to enforce the Authority's orders against a state Guard. Accordingly, petitioner's argument that the Militia Clause prevents this Court from enforcing the Authority's order should be rejected.

ARGUMENT

I. THE AUTHORITY PROPERLY DETERMINED THAT THE UNION'S PROPOSAL, WHICH REQUIRES THE GUARD TO SUPPLY CIVILIAN TECHNICIANS "READY TO WEAR" UNIFORMS, IS WITHIN THE AGENCY'S DUTY TO BARGAIN UNDER THE STATUTE.

Contrary to petitioner's suggestion (*e.g.*, Br. at *iii*) that it brings to the Court a military issue implicating national defense policy, this case involves a routine labor question concerning federal civilian employment. Specifically, the proposal at issue here concerns who will pay for sewing services for work attire -- the employer or the employee. The Authority in this case followed its well-established precedent, which has consistently held that proposals concerning uniform provision and maintenance are within the duty to bargain. *See, e.g., Arizona Nat'l Guard*, 48 FLRA 412 (1993); *U.S. Dep't of Defense, Nat'l Guard Bureau, Alexandria, Va.*, 47 FLRA 1213 (1993).

Despite the fact that for years the National Guard has been required to negotiate over such proposals, petitioner asserts that the proposal is not within the Guard's duty to bargain**.** First, the Guard makes several arguments (Br. at 6-9) that the proposal relates to a military aspect of technician employment. However, because it neglected to present any of these arguments to the Authority in this case, none of these arguments is properly before this Court. *See* 5 U.S.C. § 7123(c). In addition, each argument lacks merit. Second, the Guard posits (Br. at 3-5) that the negotiability of this proposal is governed by 37 U.S.C. §§ 415-418. As explained

below, the proposal is neither inconsistent with nor "specifically provided for" by that statute. Accordingly, the proposal is within the Guard's duty to bargain, and the Authority's decision should be affirmed.

A. The Proposal Concerns a Condition of Employment of Bargaining Unit Employees Because It Relates to the Technicians' Civilian, Not Military, Employment.

Civilian technicians employed by the Guard are required, as a condition of that employment, to wear the military uniform while performing their civilian duties. *See* 32 U.S.C. § 709(b)(3). The Authority properly has held that matters relating to the provision and maintenance of uniforms worn by technicians do not relate to the "military aspect" of technician employment because the uniforms in question are "'worn by technicians as civilian employees of the National Guard' and the decisive consideration was not 'the military nature of the uniform,' but 'the status of the personnel who wear the uniform.'" *Arkansas National Guard*, 55 FLRA at 65 (quoting *Arizona National Guard*, 48 FLRA at 417).

Here, the union proposes that the agency provide "ready to wear" uniforms to technicians for their civilian -- as opposed to their military -- tours of duty. Because this proposal relates to matters affecting unit employees with respect to their civilian duties, the Authority properly considered the proposal to be one relating to conditions of employment and, therefore, under Authority precedent, negotiable unless it is shown to be inconsistent with applicable law, a government-wide regulation, or an agency regulation for which a compelling need exists. *See* 5 U.S.C. § 7117.

Petitioner nonetheless contends before this Court that the proposal concerns "the military aspects" of the technicians' employment and is, therefore, outside its obligation to bargain under the Statute. Petitioner does not -- and can not-- deny that the uniforms requested by the union are to be worn by the technicians in the performance of their technician duties,[5] and during times when they are subject to most civilian civil service laws, rules, and practices. Rather, petitioner maintains that the uniform proposal concerns military matters because: 1) the technician is not a "civilian" (Br. at 6); 2) the military and civilian aspects of the technicians' duties are inseparable (Br. at 6); 3) the proposal asks for "special treatment" (Br. at 8); and

[5] *See Arkansas National Guard*, 55 FLRA at 63; Union's Response to Agency Statement of Position, App. 75-77.

4) "no subject could be more military than care and maintenance of the uniform" (Br. at 8). As a threshold matter, petitioner failed to make any of these objections to the Authority, and, accordingly, is barred from making them to this Court. In addition, each argument is either inaccurate or irrelevant to the agency's obligation to bargain.[6]

1. Petitioner's arguments concerning the military status of the technicians and the proposal are not properly before this Court.

In its brief before the Authority, the Guard argued that although the provision of uniforms used to be a condition of employment, the 1996 amendments made the topic a military matter and therefore not a condition of employment. App. 68-70. The Authority held that the amendments did not make the matter a military one -- that the provision of uniforms to an individual "while employed as a National Guard technician" continues to relate to the civilian aspect of the technician's employment. *Arkansas National Guard*, 55 FLRA at 66. Petitioner does not challenge this determination on appeal. Instead, petitioner makes new and additional arguments that

[6] To the extent that the Guard's arguments address the merits -- as opposed to the negotiability -- of the proposal, those arguments can be raised during bargaining and are irrelevant to the negotiability question before this Court. As explained above on page 7, the Authority's determination that a proposal is negotiable does not obligate an agency to abandon at the bargaining table what it believes are its best interests.

it failed to raise to the Authority. These arguments are not properly before this Court.

It is well-established that a party may not raise before the Court an argument not presented to the Authority. Pursuant to 5 U.S.C. § 7123(c), "[n]o objection that has not been urged before the Authority . . . shall be considered by the court [of appeals] . . . ." The Supreme Court has applied the plain words of this section and held that "under § 7123(c) review of 'issues that [a party] never placed before the Authority' is barred absent extraordinary circumstances." *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (citation omitted). Thus, the Court will dismiss arguments that were not first raised to the Authority. *See American Fed'n of Gov't Employees, Local 3748 v. FLRA*, 797 F.2d 612, 618 (8th Cir. 1986). Indeed, courts will refuse to consider even arguments that encompass a "somewhat different twist" to the argument advanced before the Authority. *Overseas Educ. Ass'n, Inc. v. FLRA*, 827 F.2d 814, 820 (D.C. Cir. 1987). The requirements of section 7123(c) apply even as to issues that the Authority raises *sua sponte*. *See U. S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv., Silver Spring, Md. v. FLRA*, 7 F.3d 243, 245-46 (D.C. Cir. 1993) (noting that the party should have filed a motion for reconsideration concerning an issue raised by the Authority *sua sponte*). Further, the Guard has not alleged or demonstrated the existence of any extraordinary circumstances that would excuse its failure to raise these objections to the Authority. Accordingly, this Court should decline jurisdiction to hear the petitioner's arguments and objections that it did not

raise to the Authority. In any event, as shown below, each of these objections lacks merit.

2. Technicians are civilians.

As this Court has noted, the National Guard technicians are "civilians." *See Nebraska Guard*, 705 F.2d at 946 n.2 ("Guard technicians are full-time *civilian* employees") (emphasis added); *see also New Jersey Guard*, 677 F.2d at 279 ("the Guard employs civilians to perform a wide range of administrative, clerical, and technical tasks"). Indeed, the legislative history of the Technicians Act of 1968 expressly refers to the technicians as civilians. *See* House Report No. 1823, at 3319 ("The technicians . . . are full-time civilian employees of the National Guard . . . ."). Therefore, petitioner's assertion that the technician "is not, and never has been a 'civilian'" (Br. at 6) is plainly false. *Wright v. Park*, 5 F.3d 586 (1st Cir. 1993), cited by petitioner (Br. at 6), is not to the contrary and explicitly recognizes, *id*. at 587, the dual status of the civilian technician.

3. The military and civilian aspects of the technician's employment are separable for the purpose of determining bargaining obligations.

Petitioner states, without justification, that determining whether a particular proposal relates to a civilian or a military aspect of the technician's job "is of decreasing utility." Br. at 6. Both the Authority and the D.C. Circuit Court of Appeals disagree. *See Arkansas National Guard*, 55 FLRA at 65; *NFFE Local 1623*, 852 F.2d at 1350-51. Although the technician is a federal civilian employee, and therefore has the right to bargain over conditions of employment under the Statute, the Authority recognizes that that employment takes place in a military

environment. The Authority has accommodated this reality by consistently holding that technicians may negotiate concerning their employment in a civilian capacity but are not permitted to negotiate over the military aspects of civilian technician employment. *See Arkansas National Guard*, 55 FLRA at 65; *NFFE Local 1623*, 852 F.2d at 1350-51. For example, in *NFFE Local 1623* a proposal relating to changes in the technicians' military status was found to be a military matter and, therefore, outside the agency's duty to bargain. *See also American Fed'n of Gov't Employees, Local 3013 & U.S. Dep't of Defense, Nat'l Guard Bureau, Maine Air Nat'l Guard, Augusta, Me.*, 40 FLRA 203, 207 (1991) (proposal relating to qualifications for military position does not concern conditions of employment). In contrast, here the proposal relates to sewing services for uniforms worn by technicians while performing civilian duties -- clearly not a military matter.[7]

The court's and the Authority's line-drawing analysis is useful and necessary to accommodate both the military interests of the Guard and the civilian rights of the technicians. Under petitioner's theory, every bargaining proposal has a military aspect, the logical extension of which is that technicians have no bargaining rights. To adopt petitioner's analysis is to write the technicians out of the Statute's

[7] On appeal, petitioner states that "the Union's proposal is more than just paying for some sewing services. It calls for uniforms 'ready to wear, etc.' for Technicians." Br. at 8. Although it is not clear what petitioner means by this statement, the Authority determined that the proposal meant that the agency would either provide the uniform "with emblems attached" or issue "chits" to employees to procure sewing services. *Arkansas National Guard*, 55 FLRA at 64. The agency did not dispute this meaning below and petitioner may not do so here on appeal.

coverage. Such a drastic revision to the relevant statutes must come from Congress.

4. Petitioner's "special treatment" argument lacks merit.

Petitioner's argument that the proposal asks for "special treatment" (Br. at 8) fails for several reasons. First, in prior cases the Authority has rejected the argument that proposals providing "extra benefit[s]" to civilian technicians that are not afforded to military members of the National Guard undermine *esprit de corps*. *See, e.g.*, *Arizona Guard*, 48 FLRA at 421. As the Authority has explained, this argument is just another way of stating the general claim that collective bargaining by civilian technicians is incompatible with the military mission of the Guard. Congress, by providing civilian technicians rights under the Statute, has disagreed with petitioner's policy argument. Thus, again, it is up to Congress, not the Authority or the courts, to reassess the technicians' right to bargain under the Statute.

Second, in this case, the union states, and the agency before the Authority did not dispute, "that the proposal for the attachment of emblems onto uniforms seeks the same services as are provided to enlisted personnel." *Arkansas National Guard*, 55 FLRA at 67. In other words, the union seeks only what the military members are provided, not some extra benefit. Thus, petitioner's argument lacks both a legal and factual foundation.

5. Provision of the uniform worn by individuals performing civilian duties is a civilian, not a military, subject.

Petitioner asserts -- without any supporting authority -- that a proposal concerning the provision of sewing services for uniforms worn by technicians while performing their civilian duties relates to the military rather than the civilian aspect of their employment. Indeed, petitioner ignores the numerous Authority decisions that have found proposals concerning the provision of military uniforms to be negotiable.[8] As the Authority has reasoned, the decisive issue is not the military nature of the uniform but the status of the personnel who wear the uniform -- here, the uniforms are worn by technicians in their capacity as civilian employees. *Arkansas National Guard*, 55 FLRA at 65.

[8] *See, e.g. Arizona Nat'l Guard*, 48 FLRA 412 (1993); *U.S. Dep't of Defense, Nat'l Guard Bureau, Alexandria, Va.*, 47 FLRA 1213 (1993).

Petitioner's reliance on *New York Council, Association of Civilian Technicians v. FLRA*, 757 F.2d 502 (2d Cir. 1985) (Br. at 8) is misplaced. There, the court held that the National Guard's requirement that the technicians wear the military uniform while performing civilian duties was an exercise of the National Guard's right under section 7106(b)(1) of the Statute to determine the methods and means of performing the agency's work. However, section 7106(b)(1) matters are negotiable if the agency so elects. In that case, the uniform-wearing requirement was not within the mandatory scope of bargaining only because it constituted a matter over which the agency may -- but need not -- bargain. That holding does not, therefore, establish that the uniform-wearing requirement is a "military" matter. To the contrary, by acknowledging that the matter was permissibly negotiable, the court assumed that the uniform-wearing requirement did relate to the technicians' civilian conditions of employment.[9]

[9] The uniform-wearing requirement has recently been removed from the permissive scope of bargaining because federal law, the 1996 amendments, now mandates the wearing of the uniform. *See Association of Civilian Technicians, Mile High Chap. & U.S. Dep't of Defense, Colorado Air Nat'l Guard, 140th Fighter Wing*, 53 FLRA 1408, 1415 (1998).

In the absence of supporting precedent, petitioner attempts to convince this Court that proposals concerning the uniform worn by technicians while in civilian status is part of the technicians' military service because of its "military objective." Br. at 8. However, everything that the civilian technician does supports the military objective of the Guard. As noted above in section I.A.3, the sweeping scope of "military aspect of employment" advocated by petitioner here, carried to its logical conclusion, leaves no aspect of the technicians' employment nonmilitary. This Court should reject petitioner's argument and preserve the technicians' rights as civil servants to collectively bargain, a right acknowledged by this Circuit in *Nebraska Guard*, 705 F.2d at 952.

B. The Negotiability of the Proposal Is Not Precluded by 37 U.S.C. 417-418.

Petitioner states (Br. at 3), without explaining, that the Authority erred because 1) the proposal violates sections 417 and 418; 2) sections 417 and 418 "deal[] comprehensively with the subject" and therefore the issue is not negotiable; and 3) Air Force regulations "deal comprehensively with the subject" and therefore the issue is not negotiable. Each of these conclusory claims lacks merit and should be dismissed.

First, the Authority found that the proposal was not inconsistent with sections 417 and 418. *Arkansas National Guard*,

55 FLRA at 64-65. Under the Statute, a proposal that is inconsistent with a federal law is not within an agency's duty to bargain. *See* 5 U.S.C. § 7117; *AFGE Local 3884*, 930 F.2d at 1319. However, sections 417 and 418 merely state that if a uniform allowance is provided under those sections, then an allowance under 5 U.S.C. § 5901 and 10 U.S.C. § 1593 would not be permitted. Sections 417 and 418 are silent both as to the condition of the uniforms to be provided and as to any bargaining obligation regarding the provision of uniforms. Therefore, as the Authority noted, nothing in section 417 or 418 prohibits an agency from agreeing to supply uniforms "ready to wear." *Arkansas National Guard*, 55 FLRA at 64. On appeal, petitioner does not dispute the Authority's analysis. Therefore, the Authority's conclusion that the proposal is not inconsistent with sections 417 and 418 should be affirmed.

Second, the Authority rejected the Guard's argument that the subject matter of the proposal was outside the duty to bargain because it is "specifically provided for by Federal statute" under 7103(a)(14)(C) and, therefore, not a condition of employment. *Arkansas National Guard*, 55 FLRA at 67. Under Authority precedent, if a statute addressing the subject matter of a proposal nevertheless provides the agency discretion to agree to the proposal, then the matter is not "specifically provided for by Federal statute" and is a condition of employment that must be bargained over. *See BEP*, 50

FLRA 677, 685 (1995), *aff'd mem. sub nom. Bureau of Engraving and Printing v. FLRA*, 88 F.3d 1279 (D.C. Cir. 1996).

Petitioner did not argue to the Authority and does not suggest to this Court that it lacks the discretion to provide these services to technicians under sections 417 and 418.[10] *Arkansas National Guard*, 55 FLRA at 67. Further, petitioner does not dispute that the union seeks for civilian technicians only what the Guard provides to military personnel. *Id.* Instead, petitioner -- relying on a legal test that has been rejected by the Authority -- merely states that the statute "deals comprehensively" with the subject matter of the proposal. Br. at 3. As the Authority explained, "the comprehensiveness of a statutory scheme is not, in itself, a sufficient basis to find a matter outside the duty to bargain because

[10] In its brief to this Court, petitioner concedes (Br. at 1-2, 4-5) that it has the discretion to provide sewing services for uniforms. It is well established that where an agency has discretion under law to act with respect to conditions of employment, it has an obligation to bargain over the exercise of that discretion. *See Department of the Treasury, U.S. Customs Serv. v. FLRA*, 836 F.2d 1381, 1384 (D.C. Cir. 1988). An exception to this rule is where a statute specifically reserves the exercise of discretion to an agency's sole and exclusive control. *See, e.g.*, *Illinois Nat'l Guard v. FLRA*, 854 F.2d 1396, 1405 (D.C. Cir. 1988) (Technicians Act gives the Secretary of the Army "unfettered discretion" to prescribe hours of work, thus removing the obligation to bargain over the exercise of that discretion). Because petitioner does not assert that its discretion is sole and exclusive, it is obligated to bargain over the exercise of that discretion. Moreover, petitioner could not argue that Congress has given it sole and exclusive discretion over providing sewing services for uniforms because sections 417 and 418 do not contain the requisite limiting language that the court relied on in *Illinois National Guard*.

the matter is 'specifically provided for by Federal statute.'" *Arkansas National Guard*, 55 FLRA at 67. Petitioner must show that it also lacks discretion, and petitioner has failed to make that showing in this case. Therefore, the Authority's finding that the proposal was within the duty to bargain because the subject matter of the proposal was not "specifically provided for by Federal statute" should be affirmed.

Third and finally, this Court should disregard petitioner's argument regarding Air Force regulations. Petitioner raises for the first time before this Court the objection that the proposal is non-negotiable under 7103(a)(14)(C) because Air Force regulations "deal comprehensively with the subject." Br. at 3. As explained above in section I.A.1, it is well-established that a party may not raise before the Court an argument not presented to the Authority. *See* 5 U.S.C. § 7123(c). When it was before the Authority, the Guard did not refer in any way to the Air Force regulations that it relies on here. *See* App. 65-71. Therefore, the Guard's arguments concerning the Air Force regulations are not properly before this Court. *See DOD v. FLRA*, 982 F.2d at 580 (dismissing argument based on law not raised to the Authority).

In addition, the Guard's argument that the issue of uniform provision is provided for by Air Force regulations and therefore not a condition of employment fails because section "7103(a)(14)(C) demands a statute." *DOD v. FLRA*, 982 F.2d at 580. *See* 7103(a)(14)(C) ("conditions of employment" "does not include policies, practices, and matters . . . (C) to the extent such matters are specifically

provided for by Federal *statute*") (emphasis added).[11] Therefore, because the Statute does not exclude from the definition of "conditions of employment" matters specifically provided for by agency regulation, and because the agency failed to raise the Air Force regulations to the Authority, the Court should reject petitioner's arguments concerning those regulations.

II. THE COURT HAS THE STATUTORY POWER TO ENFORCE AUTHORITY ORDERS PERTAINING TO THE NATIONAL GUARD.

In its final argument, petitioner asserts that even if the Court determines that the Authority's order is in accordance with law, the Militia Clause of the Constitution, Art. I, § 8, cl.16, precludes this Court from enforcing the Authority's order. Br. at *ix*, *xi*, 10-11. Specifically, petitioner claims that 1) the Militia Clause reserves to the states the ability to train Guard members; and 2) the FLRA has no authority over the armed forces to determine military questions. As a threshhold matter, this objection may not be considered by the Court because petitioner failed to raise any Militia Clause objections before the Authority. *See* 5 U.S.C. § 7123(c) and section I.A.1 *supra*. However, even if the Court were to consider this argument, petitioner's reliance on these two irrefutable assertions do not affect the Court's enforcement powers in this case.

[11] Petitioner did not argue below and does not argue here that the proposal is inconsistent with Air Force regulations and, therefore, not within the duty to bargain under 7117(a)(2) of the Statute. In any event, agency regulations are a bar to negotiations only where the regulation is supported by a "compelling need" under section 7117(a)(2). No such claim has been offered here.

To be sure, the Militia Clause of the Constitution reserves certain Guard training functions to the states. *See Perpich v. Department of Defense*, 496 U.S. 334, 350-51 (1990); *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918). But petitioner fails to explain how this reservation of authority over training relates to the Court's enforcement powers under the Statute in this case. Were the Court to enforce the Authority's order and require bargaining over sewing services for civilian employees, there would be no apparent impact on the state Guard's status as the agent to carry out militia training.

Of course the FLRA lacks "authority to determine *military* questions" (Br. at *ix*) (emphasis added); indeed, this has been explicitly recognized by the Authority. *See, e.g., Arkansas National Guard*, 55 FLRA at 65; *Montana Air Nat'l Guard*, 20 FLRA 717, 739 (1985) (finding re-enlistment not subject to negotiation because it was a military matter), *pet. for review denied, Association of Civilian Technicians, Montana Air Chapter v. FLRA*, 809 F.2d 930 (D.C. Cir. 1987). But this argument is nothing more than a rehash of petitioner's assertion that the proposal at issue concerns a military rather than a civilian matter -- an assertion that the Authority rejected. *See* discussion section I.A. *supra*. As a result, the Court will never reach this superfluous argument because it will either agree that the proposal relates to the civilian aspects of technician employment and affirm the Authority, or instead determine that the proposal relates to military matters and reverse. In other words, the Court's holding on the primary issue in this case will moot petitioner's opposition to the enforcement petition.

Nor can petitioner seriously challenge (Br. at 10) the Court's power to enforce Authority orders against the Guard. In fact, all relevant authority is to the contrary. First, section 7123(b) does not limit to certain agencies the Court's enforcement powers regarding valid Authority orders. *See* 5 U.S.C. § 7123(b).

Indeed, the Statute expressly provides that the Authority may petition a court "for the enforcement of *any* order of the Authority." *Id.* (emphasis added). Second, the Authority has on numerous occasions sought enforcement of its orders against the Guard, including before this Court, and not once has any court questioned its ability to enforce Authority orders against the Guard. *See, e.g.*, *Nebraska Guard*, 705 F.2d at 952 ("we can protect the exclusivity of review intended to remain with the state adjutants general while leaving open all other matters properly negotiable under the Civil Service Reform Act"); *DOD v. FLRA*, 982 F.2d at 578 ("the Guard's civilian technicians are entitled to engage in collective bargaining regarding certain subjects"). Accordingly, this Court should grant the Authority's petition for enforcement of its order.[12]

CONCLUSION

The Authority's order should be enforced and the Guard's petition for review should be denied.

Respectfully submitted,

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[12] Petitioner's representation that "an order to enforce is unnecessary" (Br. at *ix*) because it states that it will comply with the Court's order is beside the point. The Authority is entitled to enforcement regardless of compliance. *See* 5 U.S.C. § 7123(b).

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June 1999

CERTIFICATION PURSUANT TO FRAP RULE 32 AND CIRCUIT RULE 28A

Pursuant to Federal Rule of Appellate Procedure 32 and Circuit Rule 28A, I certify that the attached brief is proportionately spaced, utilizes 14-point serif type, and contains 7,767 words. This brief was created in WordPerfect 8.

June 3, 1999

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Judith A. Hagley

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS NATIONAL GUARD, by the Adjutant General of the State of Arkansas, Major General Don C. Morrow, Petitioner	)	
v.	)	Nos. 99-1563 & 99-1974
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority have been served this day, by mail, upon the following counsel:

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