ORAL ARGUMENT SCHEDULED JANUARY 9, 2004

No. 03-1141

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

ASSOCIATION OF CIVILIAN TECHNICIANS,
WICHITA AIR CAPITOL CHAPTER,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent

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

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the Association of Civilian Technicians, Wichita Air Capitol Chapter (ACT) and United States Department of Defense, National Guard Bureau, Kansas National Guard. ACT is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *Association of Civilian Technicians, Wichita Air Capitol Chapter and United States Department of Defense, National Guard Bureau, Kansas National Guard*, Case No. 0-NG-2581, decision issued on September 6, 2002, reported at 58 F.L.R.A. 28. The Authority's order denying ACT's motion for reconsideration was issued on April 18, 2003, reported at 58 F.L.R.A. 483.

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, Wichita Air Capitol Chapter
ACT, Schenectady	*Ass'n of Civilian Technicians, Schenectady Chapter v. FLRA*, 230 F.3d 377 (D.C. Cir. 2000)
Agency	United States Department of Defense, National Guard Bureau, Kansas National Guard
Authority	Federal Labor Relations Authority
Br.	Brief
FLRA	Federal Labor Relations Authority
Guard	United States Department of Defense, National Guard Bureau, Kansas National Guard
JA	Joint Appendix
Kansas National Guard	United States Department of Defense, National Guard Bureau, Kansas National Guard
Local 1669	*Nat'l Fed'n of Fed. Employees, Local 1669*, 55 F.L.R.A. 63 (1999)
Lone Star I	*Ass'n of Civilian Technicians, Texas Lone Star Chapter 100*, 55 F.L.R.A. 1226 (2000), *aff'd* 250 F.3d 778 (D.C. Cir. 2001)
Lone Star II	*Ass'n of Civilian Technicians, Texas Lone Star Chapter 100*, 56 F.L.R.A. 432 (2000), *aff'd* 250 F.3d 778 (D.C. Cir. 2001)
MOS	Military Occupational Speciality

GLOSSARY
(Continued)

NFFE v. FLRA	*Nat'l Fed'n of Fed. Employees, Local 1623 v. FLRA*, 852 F.2d 1349 (D.C. Cir. 1988)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
Union	Association of Civilian Technicians, Wichita Air Capitol Chapter

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THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) on September 6, 2002. The Authority's decision is published at 58 F.L.R.A. 28. The Authority's order denying petitioner's motion for reconsideration was issued on April 18, 2003, and is published at 58 F.L.R.A. 483. Copies of these Authority determinations are included in the Joint Appendix (JA) at JA 23-36 and JA 47-54, respectively. 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 (2000) (Statute).[1] This Court

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[1] Pertinent statutory provisions are set forth in the attached Addendum (Add.) to this brief.

has jurisdiction to review the Authority's final decisions and orders pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether the Authority properly determined that bargaining over proposals concerning military training duties assigned to dual-status National Guard technicians is prohibited by 10 U.S.C. § 976(c).

STATEMENT OF THE CASE

This case arises as a negotiability proceeding under section 7117(c) of the Statute. The Association of Civilian Technicians, Wichita Air Capitol Chapter ("ACT" or "union"), the exclusive representative of a unit of employees of the United States Department of Defense, National Guard Bureau, Kansas National Guard ("Kansas National Guard," "Guard," or "agency"), submitted a collective bargaining proposal that would require the Guard to adopt certain procedures regarding the assignment of military training. The agency declared the proposal to be outside its obligation to bargain. ACT then appealed the agency's allegations of nonnegotiability to the Authority under section 7117(c) of the Statute.

The Authority (Chairman Cabaniss, concurring) held the proposal to be outside the agency's obligation to bargain because the proposal concerned terms and conditions of military service within the scope of 10 U.S.C. § 976(c). Pursuant to section 7123(a) of the Statute, ACT seeks review in this Court of the Authority's decision and order.

STATEMENT OF THE FACTS

A. Background

The union is the exclusive representative of certain National Guard dual-status technicians employed by the Kansas National Guard. National Guard technicians are referred to as "dual status" because they are civilian employees who must – as a

prerequisite to their employment – become and remain military members of the National Guard unit in which they are employed and maintain the military grade specified for their technician positions. *See* National Guard Technicians Act of 1968, as amended, 32 U.S.C.A. § 709 (2000); *Am. Fed'n of Gov't Employees, Local 2953 v. FLRA*, 730 F.2d 1534, 1537 (D.C. Cir. 1984).

During collective bargaining, ACT submitted a proposal concerning the assignment of "military training duties." As their name implies, these duties have a distinctly military nature. The union's proposal defines "military training" as duties that are: (1) required by a written policy or regulation that is applicable to members of the National Guard irrespective of whether they are employees; (2) designed to impart or to measure proficiency in a military skill; and (3) required by written policy or regulation to be performed for a specified period of time, or with a specified frequency, or until a specified level of proficiency is achieved. Examples of military training duties are rifle qualification and training in the wear of garments designed to afford protection from chemical weapons. JA 24.

ACT sought to impose a variety of requirements on the Guard's assignment of military training duties. For example, ACT's proposal would require the Guard to include any military training duty assigned to a technician in the technician's position description. In addition, under the proposal, the Guard must provide the technician and the union with prior notice of such inclusion and an opportunity to discuss the inclusion with the agency. The proposal also would require that such military training be assigned as work only under certain conditions -- for example, that the Guard provide an opportunity for both the union and technician to discuss the decision to assign such work with the Guard. Further, under the union's proposal the Guard

would be required to engage in impact and implementation bargaining any time a technician is assigned a military training duty.[2] JA 29.

The Kansas National Guard declared the proposal to be outside its obligation to bargain under the Statute, and ACT petitioned the Authority for review of the agency's determination pursuant to § 7117(c)(1) of the Statute. JA 23.

B. The Authority's Decision

The Authority first referenced 10 U.S.C. § 976(c), which prohibits bargaining over the "terms and conditions" of military service. The Authority noted that it had previously determined that "terms and conditions" are interpreted in a broad manner so that with respect to dual-status technicians, whose day-to-day work lives have both civilian and military components, the prohibition applies to the military aspects of dual-status technician employment. According to the Authority, terms and conditions of military aspects of technician employment are categorically outside the duty to bargain (citing *ACT, Texas Lone Star Chapter 100*, 55 F.L.R.A. 1226, 1229 (2000) (*Lone Star I*), *aff'd* 250 F.3d 778 (D.C. Cir. 2001)). JA 29-30.

Citing *ACT, Texas Lone Star Chapter 100*, 56 F.L.R.A. 432, 433 (2000) (*Lone Star II*) *aff'd* 250 F.3d 778 (D.C. Cir. 2001), the Authority held that a technician's status at the time a proposal would operate is not critical in applying § 976(c). Rather, the crucial distinction is whether the proposal relates to military service or civilian employment. The Authority found this view to be consistent with this Court's decision in *Ass'n of Civilian Technicians, Schenectady Chapter v. FLRA*, 230 F.3d 377, 379 (D.C. Cir. 2000) (*ACT, Schenectady*), which held that the "substance of the proposal," not the status of the technicians at the time of the negotiations, determines the negotiability of the proposal. JA 30.

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[2] The complete text of the union's proposal is set forth at JA 24-26.

The Authority found that the military training duties referenced in the union's proposal concerned the terms or conditions of military service. The Authority based this determination on the fact that the referenced duties involve skills required because an individual is a member of the National Guard -- not skills based in the individual's civilian status. In this connection, the Authority noted that ¶ 5 of the proposal conditions the assignment of military training duties on a variety of requirements, including bargaining over the impact and implementation of the assignment. According to the Authority, these requirements, among others, clearly "concern" military training duties that, in turn, constitute "conditions of service" under § 976(c). Consequently, the Authority held that bargaining over ¶ 5 of the proposal would violate § 976(c). Because the Authority had denied the union's request to sever the proposal, the Authority denied the petition for review as to the entire proposal.[3] JA 30-31.

The Authority subsequently denied ACT's request for reconsideration. JA 47. The Authority found that the union's arguments had been addressed in the initial decision and that the union had not established extraordinary circumstances warranting reconsideration. JA 50-51.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *Am. Fed'n of Gov't Employees, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action

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[3] The union had asserted before the Authority that certain of the proposal's paragraphs could operate independently and, therefore, the Authority should sever them and consider them as separate proposals. The Authority denied the request to sever because the union had not explained how each of the severed portions would stand alone or otherwise operate, as required by §§ 2424.22(c) and 2424.25(d) of the Authority's regulations, 5 C.F.R. §§ 2424.22(c) and 2424.25(d) (2003). JA 26-27. ACT is not contesting the Authority's denial of the request to sever.

shall be set aside only if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *See* 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A).

"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). 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). 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).

The instant case involves the Authority's interpretation of its own organic statute as it relates to another federal law, specifically 10 U.S.C. § 976. When the Authority interprets other statutes, although it is not entitled to deference, 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)).

SUMMARY OF ARGUMENT

1. The Authority properly determined that bargaining over "military training duties" to be assigned to dual-status National Guard technicians is prohibited by 10 U.S.C. § 976. These military training duties involve matters, such as rifle qualification, required solely to assure that a technician's military skills are maintained. Thus, these duties concern quintessentially military, rather than civilian, aspects of technician

employment. Section 976(c)(2) makes it unlawful for any person to negotiate on behalf of members of the armed forces concerning the terms and conditions of military service. As the Authority has consistently held, and as this Court has recognized, military aspects of dual-status technicians' employment constitute terms and conditions of military service within the scope of § 976. *See ACT, Schenectady*, 230 F.3d at 379.

Contrary to ACT's contentions, § 976 bars negotiations over purely military matters, even where the proposal would operate at a time when the technician is in a civilian status. The purpose of § 976 is "to promote the readiness of the armed forces to defend the United States." Pub. L. 95-610, § 1(b), 92 Stat. 3085 (1978). The military training at issue here, regardless of when it takes place, is intended to maintain skills and expertise required of an active duty member of the military. Because dual-status technicians are subject to recall to active military duty at any time, this training is clearly intended to promote the military readiness of the technicians. As this Court has held, it is the "substance of the proposal," not the status of the technicians at any particular time that determines negotiability. *ACT, Schenectady*, 230 F.3d at 379.

ACT's position that a proposal should be viewed strictly based on the time in which it operates runs counter to Congress' intent to shield conditions of military service from collective bargaining. This Court has consistently recognized that because technicians are dual status, some proposals, such as that at issue here, will simultaneously relate to both their civilian status and their military status. *See Nat'l Fed'n of Fed. Employees, Local 1623 v. FLRA*, 852 F.2d 1349, 1350 (D.C. Cir. 1988) (*NFFE v. FLRA*). Consistent with the intent of § 976, this Court has held that in such situations, "the military side of technicians' employment takes precedence" and proposals relating to military aspects of technician employment are nonnegotiable. *NFFE v. FLRA*, 852 F.2d at 1351.

2. ACT's contention that the Authority's decision here is inconsistent with prior decisions is without merit. In none of the cases cited by ACT did the proposal involve the assignment of military duties.

Finally, contrary to ACT's claims, nothing in the Authority's decision implies that all technician work assignments would be considered terms or conditions of military service. The basis of the Authority's decision is that the training assignments at issue here concern skills that are required solely by technicians' status as members of the military -- not skills related to technicians' civilian duties. The negotiability of bargaining proposals relating to civilian duties, such as routine administrative and maintenance assignments, would continue to be determined on the same terms as those applied in the federal sector generally.

ARGUMENT

THE AUTHORITY PROPERLY DETERMINED THAT BARGAINING OVER PROPOSALS CONCERNING MILITARY TRAINING DUTIES ASSIGNED TO DUAL-STATUS NATIONAL GUARD TECHNICIANS IS PROHIBITED BY 10 U.S.C. § 976(c)

National Guard dual-status technicians are unique federal employees because they have both civilian and military aspects to their employment and "simultaneously inhabit" both the civilian and military worlds. *Nat'l Fed'n of Fed. Employees, Local 1623 v. FLRA*, 852 F.2d 1349, 1350 (D.C. Cir. 1988) (*NFFE v. FLRA*). As this Court has recognized, "a technician's military status will often impinge on his civilian status and . . . when this happens, the needs of the military must prevail." *Id.* at 1353. Accordingly, this Court has held that "the military side of the National Guard lies wholly outside of the collective bargaining realm." *Id.* "[T]he military enjoys special

status, and its decisions involving the organization of security forces are especially shielded from outside interference."[4] *Id.*

The union's proposal in this case would dictate the conditions under which the Guard could assign military training. This training, required only to assure that the technician's military skills are maintained, constitutes a term or condition of the technician's military service. Accordingly, the Authority properly determined that bargaining over such training is prohibited by § 976. In addition, the union's arguments to the contrary provide no basis for disturbing the Authority's conclusion.

A. The Authority Has Properly Interpreted and Applied § 976

The Authority's analysis is straightforward. Section 976(c)(2) makes it unlawful for any person to negotiate on behalf of members of the armed forces concerning the terms and conditions of military service. As established in Authority precedent, *e.g., Lone Star I*, 55 F.L.R.A. at 1228, the scope of this prohibition includes bargaining over the military aspects of a National Guard technician's employment.

Further, as also established in Authority precedent, *e.g., Lone Star II*, 56 F.L.R.A. at 433-34, a proposal that relates to a military aspect of technician employment runs afoul of § 976's proscription even if the proposal operates while the employee is in a civilian status. As this Court has emphasized, it is the "substance of the proposal," not the status of the technicians at any particular time that determines negotiability. *ACT, Schenectady*, 230 F.3d at 379. Thus, the crucial distinction is whether the proposal relates to military service or civilian employment. *Lone Star II*, 56 F.L.R.A. at 433.

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[4] Neither the Court nor the Authority expressly relied on § 976 in *NFFE v. FLRA*. Nonetheless, the Court's observations on the unique status of dual-status technicians remain highly instructive.

There can be no dispute that the union's proposal relates to only the technician's military service. The proposal itself defines a "military training duty" as duty required by written directive applicable to members of the National Guard, "irrespective of whether they are [technicians]." JA 24. As examples of military training duties, ACT references rifle qualification and training in the wear of garments intended to afford protection from chemical weapons, skills not required in the technicians' civilian capacity. *Id.* The purpose of such training is to maintain *military* proficiencies required in the event of a member's recall to active duty. The Authority properly recognized that the proposal relates to the technicians' military service, not their civilian employment. Accordingly, bargaining over the proposal is proscribed by § 976.

ACT's objections to the Authority's decision lack merit. In that regard, ACT concedes (Brief (Br.) at 8 n.4) that § 976 restricts bargaining over matters concerning the military service of technicians. Further, ACT also appears to concede that the duties at issue relate solely to military aspects of the dual-status technician's employment. *See* Br. at 2. ACT's sole argument contesting the Authority's conclusion is that "the time during which duties are performed, not the nature or subject of the duties, is the statutory criterion determining whether duties are civilian employment or military service." Br. at 6.

ACT's contention misconstrues the intent of § 976. The union argues (Br. at 4) that the Authority's interpretation of § 976 is overly broad, citing the maxim that criminal statutes must be interpreted narrowly. However, as this Court has noted, this maxim is not to be "woodenly applied," and "cannot provide a substitute for common sense, precedent and legislative history." *United States v. Moore*, 613 F.2d 1029, 1044

(D.C. Cir. 1979). Here, common sense, precedent, and congressional intent support the Authority's interpretation.

The purpose of § 976 is "to promote the readiness of the armed forces to defend the United States." Pub. L. 95-610, § 1(b), 92 Stat. 3085 (1978). Proposals, like that at issue here, that specifically concern and affect the individual technician's military readiness, plainly fall within the intended scope of § 976's prohibitions. As this Court recognized, all members of the National Guard, including dual-status technicians, are subject to recall to active military duty. *ACT, Schenectady*, 230 F.3d at 380. The military training at issue here, regardless of when it takes place, is intended to maintain skills and expertise required of an active duty member of the military.

This Court's precedent is supportive. Contrary to ACT's contention (Br. 8-9), the Authority's reliance on this Court's decision in *ACT, Schenectady* is well founded. In *ACT, Schenectady*, the Court affirmed an Authority decision holding that a proposal restricting communications to technicians about volunteering for active military duty concerned a term and condition of military service, and was therefore nonnegotiable under § 976. 230 F.3d at 379-80. Like the military duties at issue here, the communications at issue in *ACT, Schenectady* would have taken place during a time when technicians were in civilian status. Nonetheless, the Court held that because the proposal would affect the Guard's ability to call technicians to active duty as it saw fit, the matter fell within the scope of § 976.

Of course, *ACT, Schenectady* does not precisely fit this case's fact pattern because *ACT, Schenectady* did not concern military duties to be performed on civilian time. However, *ACT, Schenectady* does support the proposition that the intent of § 976 is to foster military readiness and that one must look to the "substance of the proposal" to determine its negotiability. 230 F.3d at 379-80. On the other hand,

nothing in *ACT Schenectady* lends any support to ACT's contention that a proposal, regardless of its effect on the military readiness of the technicians, does not fall within § 976 if it operates while the technician is in civilian status. Thus, *ACT, Schenectady*, supplies ample support for the Authority's conclusion that the union's proposal is outside the Guard's obligation to bargain.

Finally, ACT's position that a proposal should be viewed strictly based on the time in which it operates runs counter to Congress's intent to shield conditions of military service from collective bargaining. Because technicians are dual status, some proposals will simultaneously relate to both their civilian status and their military status. *See NFFE v. FLRA,* 852 F.2d at 1350; *see also, ACT, Schenectady,* 230 F.3d at 380. This proposal is an example: although the proposal is intended to operate in situations where the technician is in a civilian status, it concededly concerns a technician's *military* readiness. As this Court has already recognized in such situations, "the military side of technicians' employment takes precedence." *NFFE v. FLRA*, 852 F.2d at 1351.

In sum, as demonstrated above, the Authority properly determined that the union's proposal concerns the terms and conditions of dual-status technicians' military service. Accordingly, regardless of the particular time in which the proposal operates, bargaining over the proposal is prohibited by § 976(c).

B. ACT's Other Arguments Are Without Merit

1. The Authority's Decision Is Consistent with Precedent

ACT contends (Br. 6-7) that the Authority's decision is "incompatible" with previous negotiability decisions involving dual-status technicians. Such a contention cannot withstand scrutiny.

ACT first argues that the decision at issue here is inconsistent with those Authority decisions, such as *ACT, Arizona Army Chapter 61*, 48 F.L.R.A. 412 (1993), holding that the requirement to wear a military uniform while performing technician duties does not affect a military aspect of technician employment. However, the Authority has distinguished proposals concerning the wearing of the uniform during the technician's civilian status from those, like that in the instant case, concerning the assignment to military duties. *See ACT, Schenectady Chapter*, 55 F.L.R.A. 925, 932-33 (1999), *aff'd* 230 F.3d 377 (2000). The Authority noted there that the fact that the proposal operates in a period of time during which the technician is in civilian status may be relevant to determining whether the proposal concerns a military or civilian aspect of employment, but is not dispositive. *Id.* at 933 n.10. Rather, consistent with the Authority's holding in the instant case, the key element in determining if a proposal involves conditions of military service is whether the proposal relates to a military assignment or attempts to influence a military decision. *Id.* at 932. A proposal concerning the uniform to be worn while performing purely civilian duties does neither, whereas the proposal at issue here undeniably involves military assignments.

ACT also mistakenly claims (Br. 7) that the Authority's decision here is inconsistent with an Authority decision holding that inclusion of the technician's "Military Occupational Specialty" (MOS) in his or her civilian position description is a civilian matter within the duty to bargain.[5] The Authority held that such proposals

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[5] ACT cites *Nat'l Fed'n of Fed. Employees, Local 1669*, 55 F.L.R.A. 63 (1999) (*Local 1669*). However, the case in which the Authority discussed the inclusion of an MOS in position descriptions was *ACT, Pennsylvania State Council*, 29 F.L.R.A. 1292, 1300-01 (1987). *ACT, Pennsylvania State Chapter* was cited as an example in (continued...)

focus only on the content of the position description -- a civilian document -- and simply require that an independent preexisting determination be recorded. *ACT, Pa. State Council*, 29 F.L.R.A. at 1300-01. Unlike the proposal at issue here, the proposal in *ACT, Pennsylvania State Council*, did not affect the assignment of military duties itself.

2. The Authority's Decision Would Not Convert All Technician Duties into "Terms and Conditions of Military Service"

Finally, ACT argues (Br. 9) that the Authority's decision here "would deem all, or nearly all technician duty work assignments to be terms or conditions of military service." ACT's contention is simply hyperbole.

The basis of the Authority's decision is that the training assignments at issue here concern skills, such as rifle qualification, that are required solely by technicians' status as members of the military -- not skills related to technicians' civilian duties. Technician civilian employment involves "the day-to-day administrative, training, and logistic needs of the Guard," duties similar to those of other federal employees who work in a typical civilian setting. *See Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1398 (D.C. Cir. 1988). The negotiability of bargaining proposals relating to these assignments would be determined on the same terms as those applied in the federal sector generally. Nothing in the Authority's decision implies anything to the contrary.

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[5](...continued)
Local 1669. 55 F.L.R.A. at 65.

CONCLUSION

The union's petition for review should be denied.

Respectfully submitted,

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October 2003

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	)	
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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§ 7105. Powers and duties of the Authority

* * *

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

* * *

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

* * *

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

* * *

(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.

* * *

§ 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.

* * *

(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 side 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.

* * *

10 U.S.C. § 976. Membership in military unions, organizing of military unions, and recognition of military unions prohibited

* * *

(c) It shall be unlawful for any person –

(1) to enroll in a military labor organization any member of the armed forces or to solicit or accept dues or fees for such an organization from any member of the armed forces; or

(2) to negotiate or bargain, or attempt through any coercive act to negotiate or bargain, with any civilian officer or employee, or any member of the armed forces, on behalf of members of the armed forces, concerning the terms or conditions of service of such members;

(3) to organize or attempt to organize, or participate in, any strike, picketing, march, demonstration, or other similar form of concerted action involving members of the armed forces that is directed against the Government of the United States and that is intended to induce any civilian officer or employee, or any member of the armed forces, to –

(A) negotiate or bargain with any person concerning the terms or conditions of service of any member of the armed forces,

(B) recognize any military labor organization as a representative of individual members of the armed forces in connection with any complaint or grievance of any such member arising out of the terms or conditions of service of such member in the armed forces, or

(C) make any changes with respect to the terms or conditions of service in the armed forces of individual members of the armed forces; or

(4) to use any military installation, facility, reservation, vessel, or other property of the United States for any meeting, march, picketing, demonstrations, or other similar activity for the purpose of engaging in any activity prohibited by this subsection or by subsection (b) or (d).

* * *

32 U.S.C.A. § 709. Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in –

> (1) the administration and training of the National Guard; and
>
> (2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

> (1) Be a military technician (dual status) as defined in section 10216(a) of title 10.
>
> (2) Be a member of the National Guard.
>
> (3) Hold the military grade specified by the Secretary concerned for that position.
>
> (4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c)(1) A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

> (2) The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned –

> (1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who –
>
> > (A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and
> >
> > (B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component

under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;
(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;
(4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned; and
(5) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

(g) Sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(h) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i) The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

5 C.F.R. § 2424.22(c). Exclusive representative's petition for review; purpose; content; severance; service

* * *

(c) Severance. The exclusive representative may, but is not required to, include in the petition for review a statement as to whether it requests severance of a proposal or provision. If severance is requested in the petition for review, then the exclusive representative must support its request with an explanation of how each severed portion of the proposal or provision may stand alone, and how such severed portion would operate. The explanation and argument in support of the severed portion(s) must meet the same requirements for information set forth in paragraph (b) of this section.

* * *

5 C.F.R. § 2424.25(d). Exclusive representative's petition for review; purpose; content; severance; service

* * *

(d) Severance. If not requested in the petition for review, or if the exclusive representative wishes to modify the request in the petition for review, the exclusive representative may request severance in its response. The exclusive representative must support its request with an explanation of how the severed portion(s) of the proposal or provision may stand alone, and how such severed portion(s) would operate. The exclusive representative also must respond to any agency arguments regarding severance made in the agency's statement of position. The explanation and argument in support of the severed portion(s) must meet the same requirements for specific information set forth in paragraph (c) of this section.

* * *