UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

OFFICE OF THE ADJUTANT GENERAL MISSOURI NATIONAL GUARD JEFFERSON CITY, MISSOURI Respondent and ASSOCIATION OF CIVILIAN TECHNICIANS SHOW-ME AIR #93 AND ARMY #94 CHAPTERS Charging Party	Case No. DE-CA-01-0445

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 17, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

SUSAN E. JELEN
Administrative Law Judge

Dated: May 14, 2002
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 14, 2002

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: OFFICE OF THE ADJUTANT GENERAL
MISSOURI NATIONAL GUARD
JEFFERSON CITY, MISSOURI

Respondent

and Case No. DE-CA-01-0445

ASSOCIATION OF CIVILIAN TECHNICIANS
SHOW-ME AIR #93 AND ARMY #94 CHAPTERS

Charging Party

Pursuant to section 2423.27(c) of the Rules and Regulations 5 C.F.R. § 2423.27(c), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed is a Stipulation of Facts and other supporting briefs and documents filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 02-39
WASHINGTON, D.C.

OFFICE OF THE ADJUTANT GENERAL MISSOURI NATIONAL GUARD JEFFERSON CITY, MISSOURI Respondent and ASSOCIATION OF CIVILIAN TECHNICIANS SHOW-ME AIR #93 AND ARMY #94 CHAPTERS Charging Party	Case No. DE-CA-01-0445

LTC. John B. Keller, II, Esquire
For the Respondent

William D. Miller, Representative
For the Charging Party

Ayodele G. Labode, Esquire
For the General Counsel

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

The General Counsel of the Federal Labor Relations Authority (the Authority), by the Regional Director of the Denver Regional Office, issued a Complaint and Notice of Hearing on June 29, 2001, alleging that the Office of the Adjutant General, Missouri National Guard, Jefferson City, Missouri (Respondent/Respondent Missouri Guard), violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), by failing to provide uniforms in accordance with Article 8 of the

parties' Collective Bargaining Agreement.[1] Respondent's Answer denied that it violated the Statute as alleged and further asserts that it is unable to abide by the collective bargaining agreement because it would be illegal to do so.

A hearing in this matter was scheduled for November 16, 2001. Prior to that date, however, the parties entered into a Stipulation of Facts and filed a joint motion to transfer the case to an administrative law judge for a decision based on the stipulated facts. By their joint motion, the parties have waived their right to a hearing and to present evidence, except for the Stipulation of Facts and its attached exhibits. The joint motion was granted and the hearing was canceled. The parties also requested the opportunity to file reply briefs in this matter, which was granted. The General Counsel and the Respondent subsequently filed timely and helpful briefs and reply briefs in support of their positions.

Based on the Stipulation of Facts[2] and its attached exhibits (Jt. Ex. 1(a)-(d)-18), I make the following findings of fact, conclusions of law and recommendations.

Statement of the Facts

1. The Association of Civilian Technicians (ACT) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative for a unit of employees appropriate for collective bargaining at Respondent Missouri Guard. (Stip. ¶2)

2. The Association of Civilian Technicians, Show-Me Air and Army Chapters (the Union) is an agent of the ACT for the purpose of representing the employees at the Missouri

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[1] The Consolidated Complaint initially alleged violations by the National Guard Bureau, Washington, D.C., based on a charge filed by the Association of Civilian Technicians, Show-Me Air #93 and Army #94 Chapters (the Union, in Case No. DE-CA-01-0446. On November 2, 2001, the Regional Director for the Denver Region of the Authority issued an Order Withdrawing All Allegations in Consolidated Complaint and Notice of Hearing Against Respondent National Guard Bureau and Approving Withdraw of the Charge Against the National Guard Bureau (Jt. Ex. 1(d)), leaving only the current allegations against Respondent Missouri National Guard.

[2] References to the Stipulation of Facts will be referred to as "Stip."

National Guard within the unit described in paragraph 1 above. (Stip. ¶3)

3. The Office of the Adjutant General, Missouri National Guard, Jefferson City, Missouri, is an agency under 5 U.S.C. § 7103(a)(3). (Stip. ¶4)

4. During the time period covered by the Complaint, the persons listed below occupied the position opposite their name, were supervisors and/or management officials under 5 U.S.C. § 7103(a)(10) and (11) and were acting on behalf of Respondent:

Maj. Gen. John D. Havens	The Adjutant General Missouri National Guard
Col. Dennis W. Heldenbrand	Human Resources Officer Missouri National Guard
Maj. Vicki L. Hiland	Labor Relations Specialist Missouri National Guard
LTC. Paul E. Monda	Logistics Management Officer Missouri National Guard
Colonel George D. Shull	Chief of Staff Missouri National Guard

(Stip. ¶7, 8 & 9)

5. During the time period covered by the Complaint, the Union and the Respondent Missouri Guard were parties to a collective bargaining agreement (CBA) effective August 1, 2000, covering the bargaining unit employees described in paragraph 1. (Stip. ¶10; Jt. Ex. 2)

6. The CBA contains the following provision:

> Article 8 <u>Uniforms for Excepted Service Technicians</u>
>
> (A) Technicians are required by Federal Statute to wear the military uniform. In doing so, management agrees that serviceable uniforms will be provided by the Missouri National Guard in the amount of three (3) sets of duty uniforms for each dual status technician. This number of uniforms is in addition to their normal military issue of uniforms.
>
> . . .
>
> (G) Compliance with the terms of this article will be accomplished within six (6) months of the signing of this agreement.

(Stip. ¶11; Jt. Ex. 2)

7. On August 30, 2000, Respondent Missouri Guard, through Havens, sent a letter to the Army National Guard Readiness Center and Air National Guard Readiness Center requesting authority to furnish funds for additional uniforms in order to comply with Article 8 of the CBA, stating:

> 1. The new labor contract requires that "serviceable uniforms will be provided by the Missouri National Guard in the amount of three sets of duty uniforms for each dual status technician. This number is in addition to their normal military issue of uniforms."
>
> 2. The DOD approval letter included in the contract states "The approval of this agreement does not constitute a waiver of or exception to any existing law, rule, regulation or published policy." The USPFO-MO finds no authority for added uniforms for technicians in Common Table of Allowances 50-900/Clothing Allowance for Air Force Personnel AFI 36-3014.
>
> 3. Request authority to furnish these as OCIE in the amount required by the contract to be paid for from federal funds. Technician pay funds could be transferred to OCIE account in order to fund. Otherwise, it would appear the state would have to fund additional uniforms.

(Stip. ¶12; Jt. Exs. 1(a)(ii)(A) and 3)

8. On January 17, 2001, the Union, through Theresa Allen, President Show-Me Army Chapter sent a letter to Hiland at Respondent Missouri Guard requesting the status of Respondent Missouri Guard's compliance with Article 8 of the CBA. (Stip. ¶13; Jt. Ex. 4)

9. On January 25, 2001, Respondent Missouri Guard, through Hiland, sent a letter to Allen which stated that the Respondent Missouri Guard is awaiting a reply from the National Guard Bureau regarding compliance with Article 8 of the CBA. (Stip. ¶14; Jt. Ex. 6)

10. In response to the letter described in paragraph 7 above, on January 30, 2001, the National Guard Bureau, through Col. Timothy J. Carroll, Director of Logistics,

denied authority to exceed uniform allowances, stating in part:

> After a thorough review of the aforementioned publications and consulting with the legal authorities in NGB-JA it has been determined there are no provisions to exceed uniform allowances in AFI 36-3014. Uniforms are issued based on military participation and replaced free of charge on a fair wear and tear basis. Authority can not and will not be granted to exceed previously established authorizations.

(Stip. ¶15, Jt. Exs. 1(a)(iii) and 7)

11. On January 31, 2001, the National Guard Bureau, through Col. Allen Stark, United States Property and Fiscal Office, assigned to the Missouri National Guard, responded to an e-mail sent by Lt. Darrell Fraser, Chief of Supply, Missouri National Guard, in which he stated that the National Guard Bureau agreed that he was without authority to provide additional uniforms. (Stip. ¶16; Jt. Ex. 8)

12. On January 31, 2001, Respondent National Guard, through LTC. Paul Monda, Logistics Management Officer, sent an e-mail to administrative supply agents in which it stated that additional uniforms should not be ordered because it is not an approved purchase from the National Guard Bureau. (Stip. ¶17; Jt. Ex. 9)

13. On January 31, 2001 (dated February 1, 2001) Respondent Missouri Guard, through Heldenbrand, issued a Human Resources Bulletin in which the three uniforms for bargaining unit employees in accordance with Article 8 of the CBA were distinguished from the uniforms which were provided by Respondent Missouri Guard in compliance with a

decision by the Administrative Law Judge.[3] (Stip. ¶18; Jt. Ex. 10 at 7)

14. On February 3, 2001, Respondent Missouri Guard, through Col George Shull, Chief of Staff, stated in an e-mail to Jerry Countryman, Executive Vice President, Show-Me Army Chapter, that the National Guard Bureau notified Respondent Missouri Guard that uniforms may not be purchased with federal funds. (Stip. ¶19; Jt. Ex. 11)

15. On February 5, 2001, the Union, through William Miller, President Show-Me Air Chapter sent a letter to Hiland in which he asked if Respondent Missouri Guard intended to comply with Article 8 of the CBA. (Stip. ¶20; Jt. Ex. 12)

16. On February 5, 2001, the Union, through Theresa Allen, President Show-Me Army Chapter sent a letter to Hiland in which she asked if Respondent Missouri Guard intended to comply with Article 8 of the CBA. (Stip. ¶21; Jt. Ex. 13)

17. On February 7, 2001, Col. Allen Stark, United States Property and Fiscal Office, assigned to the Missouri National Guard, sent an e-mail to Dennis Heldenbrand in which Stark wrote that he had no authority to issue more uniforms. (Stip. ¶22; Jt. Ex. 14)

18. On February 8, 2001, Respondent Missouri Guard, through Hiland, sent a letter notifying the Union that the Agency is unable to honor Article 8 of the CBA because of guidance received from the National Guard Bureau. (Stip. ¶23; Jt. Exs. 1(a)(ii) and 15)

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[3] This apparently refers to the Administrative Law Judge's decision in *Office of the Adjutant General, Missouri National Guard, Jefferson City, Missouri,* OALJ 00-39, CH-CA-60849 (2000) *(Missouri National Guard)* affirmed by the Authority without precedent on August 16, 2000. The Administrative Law Judge determined that the Missouri National Guard committed an unfair labor practice by repudiating the contractual obligation to provide uniforms to certain bargaining unit employees, in violation of sections 7116(a)(1) and (5) of the Statute. This matter concerned the parties' 1995 collective bargaining agreement. The Order required that the Missouri National Guard issue uniforms to bargaining unit employees as required by Article XXIII of the parties' collective bargaining agreement. The stipulation does not specify how these additional uniforms were funded.

19. On February 21, 2001, the National Guard Bureau, through Layne J. Walker, Chief, Army Logistics, sent a letter to Havens denying Respondent Missouri Guard authority to issue Organizational Clothing and Equipment, which exceed the Common Table of Allowances. (Stip. ¶24; Jt. Ex. 16)

20. On October 11, 2001, the National Guard Bureau, through Glenn W. Walker, Chief Institution, Logistics and Environmental Officer, Army National Guard, sent a Memorandum for the Adjutant Generals of All States, et. al., stating in part:

> 2. The purpose of this memorandum is to provide guidance on uniforms for ARNG State technicians. It is highly encouraged that the State leadership perform a comprehensive review of CTA 50-900 to fully understand limits and flexibility provided to the States in regards to clothing and individual equipment for State technicians.
>
> 3. The CTA 50-900, Table 1 and Table 2 authorizes, initial issue uniforms for Active Army, Army National Guard (ARNG), United States Army Reserve (USAR) and Reserve Officer Training Corps (ROTC) personnel. Enlisted ARNG dual status (Excepted Service) technicians are authorized an initial free issue of uniforms purchased with National Guard Procurement Appropriations (NGPA) funds; total quantity of items issued to an individual will not exceed allowances listed. In addition to initial issue, the Issue In Kind System authorized ARNG enlisted soldiers free of charge replacement uniforms when they are worn or damaged. Enlisted ARNG dual status technicians are not limited to the amount of replacement uniforms as long as replacement conditions outlined in AR 700-84 paragraph 15-9 are met.
>
> . . .
>
> 5. State Adjutant Generals (TAGs) are authorized to allow the issue of Operations and Maintenance (OMARNG) funded Organizational clothing and individual equipment listed in Table 4 of CTA 50-900 for discharge of assigned duties and then only in the (sic) quantities necessary. These items are identified as "Discretionary Allowances" of clothing and equipment. Issued at the discretion of the TAG, in the exercise of his command authority as defined in AR 10-5. "Authority to authorize the issue of discretionary

> items may be delegated to subordinate commands if deemed desirable. Items of clothing and equipment authorized on a discretionary basis by this table are authorized organizational clothing and equipment, and issue will be governed by procedures established in AR 710-2. These items will not be requisitioned by nor issued to organizations unless required for the necessary operation of the unit, military mission, or for discharge of assigned military duties including climatic and geographical requirements, and then only in the quantities as necessary and required".

(Stip. ¶25; Jt. Ex. 17)

21. On November 8, 2001, Joseph Monachino, Chief, Contract & Fiscal Law, National Guard Bureau sent a Memorandum for Missouri National Guard Staff Judge Advocate regarding "Authority to Increase Battle Dress Uniform Issuance", stating, in part:

> 1. This replies to your request for a legal opinion regarding issuance of Battle Dress Uniforms (BDUs) to 32 U.S.C. 709 "dual status" technicians, pursuant to collective bargaining agreements, in excess of the number established under Army and Air Force regulations. Common Table of Allowances (CTA) 50-900 applies to the Army National Guard (ARNG) and authorizes 4 BDUs per enlisted soldier. Similarly, Air Force Instruction (AFI) 36-3014, *Clothing Allowances for Air Force Personnel,* 1 September 1998, applies to the Air National Guard (ANG) and authorizes the issuance of up to 4 BDUs upon enlistment in the ANG. Gratuitous replacement of BDUs to ANG airmen is provided in-kind, based on fair wear and tear. *See AFMAN 23-110, Vol 1, Part 1, Chapter 17.* These are item for item, serviceable for unserviceable, replacements. Neither Army nor Air Force regulations authorize the National Guard to issue more than the standard 4 BDUs to "dual status" technicians.
>
> 2. Therefore, absent an exception to current policy granted by the Army and/or the Air Force, only 4 BDUs may be issued. The State of Missouri has no authority to expend Federal funds for the purchase and issuance of BDUs beyond that authorized in CTA 50-900/AFI 36-3014. Moreover, purchase with Federal funds of BDUs to be issued in excess of that authorized by these regulations

would create a purpose statute violation. *See* 31 U.S.C. § 1301(a).

(Stip. ¶26; Jt. Ex. 18)

22. As of November 14, 2001, Respondent Missouri Guard has not provided the three additional uniforms to bargaining unit employees as required by CBA. (Stip. ¶27)

Discussion

Issues

The issue in this case is whether or not the Respondent Missouri Guard repudiated Article 8 of the parties' Collective Bargaining Agreement by failing and refusing to provide three sets of duty uniforms to each dual status technician and thereby violated section 7116(a)(1) and (5) of the Statute. Respondent Missouri Guard does not dispute that it has failed to provide three sets of duty uniforms to each dual status technician in accordance with the collective bargaining agreement, but sets forth defenses to its conduct.

Analytical Framework

In *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois,* 51 FLRA 858 (1996) (*Scott AFB)*, the Authority clarified the analytical framework it will follow for determining whether a party's failure or refusal to honor an agreement constitutes a repudiation of a collective bargaining agreement. Consistent with its previous decision in *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia,* 40 FLRA 1211, 1218-19 (1991)(*Warner Robins AFB*), the Authority held that it will examine two elements in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?). The examination of either element may require an inquiry into the meaning of the agreement provision allegedly breached. The Authority also has held that collective bargaining agreement provisions that are contrary to law are not enforceable under the Statute. Therefore, a respondent's refusal to comply with such a provision is not an unlawful repudiation of the agreement. *General Services Administration, Washington, D.C.*, 50 FLRA 136 (1995)(*GSA)* (respondent's refusal to honor portion of agreement that authorized combination of work schedules held not to

constitute an unlawful repudiation because agreement portion was contrary to the Work Schedules Act); *Department of the Navy, United States Marine Corps,* 34 FLRA 635 (1990) (respondent's repudiation of memorandum of understanding that required it to pay for reflective safety vests that were not used in the performance of work held not unlawful as payment for vests was inconsistent with law). The Authority dismisses the unfair labor practice complaints in such cases without regard to whether the law was in existence at the time the agreement was entered into or was enacted subsequent to the agreement's effective date.

Positions of the Parties

General Counsel

Counsel for the General Counsel asserts Respondent Missouri Guard has refused to provide three duty uniforms to bargaining unit employees in accordance with Article 8 of the parties' collective bargaining agreement. Article 8 is clear and unambiguous and obligates the Respondent Missouri Guard to provide the uniforms within six months of the signing of the agreement effective on August 1, 2000. By refusing to provide the uniforms, the Respondent Missouri Guard has clearly and patently breached Article 8. *Scott AFB,* 51 FLRA at 858.

Having met the first element of the Authority's test set out in *Scott AFB*, the General Counsel argues that the Respondent Missouri Guard's breach of Article 8 went to the heart of the agreement, the second element of the Authority's test set forth in *Scott AFB*. The only topic discussed in Article 8 is uniforms and addresses what type of uniforms will be provided, the logistics of the distribution of the uniforms and the accouterments that the agency agreed to sew on the uniforms. The clear intent of Article 8 was for the Respondent Missouri Guard to provide three uniforms to service technicians within six months of signing the collective bargaining agreement. The Respondent's failure to do so goes to the heart of the agreement and thereby constitutes an illegal repudiation in violation of section 7116(a)(1) and (5) of the Statute. *See Panama Canal Commission, Balboa Republic of Panama,* 43 FLRA 1483, 1508-09 (1992)(agency's action in unilaterally terminating portions of the parties' collective bargaining agreement which allowed certain employees to appeal adverse decisions through the administrative grievance procedure was a breach that went to the heart of the agreement and amounted to a repudiation of the terms of the CBA)*; 24th Combat Support Group, Howard Air Force Base, Republic of Panama,* 55 FLRA 273 (1999)(Authority determined that the

agency decision to terminate the negotiated grievance procedure went to the heart of the collective bargaining agreement and constituted a repudiation under the Statute); *Federal Aviation Administration,* 55 FLRA 1271 (2000) (Authority found that agency's refusal to honor a Memorandum of Understanding that provided for an interim performance evaluation system for bargaining unit employees went to the heart of the agreement and constituted a repudiation under the Statute.)

The General Counsel asserts that Respondent Missouri Guard's defenses have no merit. Although Respondent Missouri Guard may argue that it would be in violation of the Anti-Deficiency Act by authorizing the expenditure of federal funds for the uniforms provided for in Article 8, the General Counsel asserts that this defense fails since nothing in Article 8 requests the Respondent to use federal funds to furnish the uniforms and Respondent has clearly stated that it may use funds from its Missouri state budget to pay for the uniforms. The Anti-Deficiency Act does not concern expenditures from Respondent's state budget.

Association of Civilian Technicians, Evergreen and Rainier Chapters and U.S. Department of Defense, National Guard Bureau, Military Department, State of Washington, Camp Murray, Tacoma, Washington, 57 FLRA 475 (2001)*(Evergreen and Rainier)* concerned the negotiability of three proposals, one involving uniforms.[4] The Authority found the proposals within the duty to bargain and ordered the Agency to bargain on the proposals, including the uniform proposal. The Authority rejected the Agency's argument that the proposal was inconsistent with 37 U.S.C. §§ 415-418. The Authority also found that Subsection 4 of Proposal 3 is not inconsistent with the Anti-Deficiency Act, 31 U.S.C. § 1341. The Anti-Deficiency Act precludes an agency from expending funds: (1) in excess of those appropriated for the fiscal

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[4] Subsection 1 of Proposal 3 requires the Agency to provide unit employees with an adequate number of uniforms with all appropriate insignia and patches properly sewn on. Subsection 2 of Proposal 3 requires that the Agency provide unit employees, other than officers, with two pair of regular or safety footwear as required and to co-pay the maximum rate for such footwear that is allowed by regulation. Subsection 3 of the proposal requires the Agency to provide the maximum uniform allowance authorized under 37 U.S.C. §§ 415-417 for officers who are unit employees. Subsection 4 of the proposal requires that the Agency provide unit employees cleaning services for uniforms that employees must wear in the performance of their duties. *Evergreen and Rainier,* 57 FLRA at 482.

year in which the expenditure is made; and (2) prior to their appropriation. 31 U.S.C. § 1341(a)(1)(A) and (B). *See, e.g., Fort Knox Teachers Association and Board of Education of the Fort Knox Dependents Schools,* 27 FLRA 203, 216 (1987). Nothing in Proposal 3, however, requires the expenditure of funds in excess of, or prior to, an appropriation covering uniforms.

The General Counsel also argues that Respondent will likely argue that it was only following the direction of the National Guard Bureau when it failed to provide uniforms to bargaining unit employees. When higher level management directs management at a subordinate level in the same chain of command to act in a manner that is inconsistent with the subordinate level's bargaining obligations under the Statute, and the higher level agency is a party to the complaint, the higher level may violate the Statute. *Department of the Interior, Water and Power Resources Service, Grand Coulee Project, Grand Coulee, Washington,* 9 FLRA 385 (1982); *See also U.S. Department of the Interior, Washington D.C. and U.S. Geological Survey, Reston, Virginia,* 52 FLRA 475, 481 (1996); *Headquarters, National Guard Bureau, Washington, D.C., Nevada Air National Guard, Reno, Nevada,* 54 FLRA 316 (1998)(*Nevada National Guard*). The lower entity must establish that the higher-level prohibited it from meeting its obligations as opposed to merely providing advice. In this matter, the General Counsel argues that the National Guard Bureau denied Respondent Missouri Guard's request to grant authority to provide uniforms using federal funds but at no time did it order or prohibit the Respondent from providing the uniforms.

The General Counsel further argues that even if it was established that the Respondent Missouri Guard was acting in a ministerial capacity without discretion, it should still be found liable for the unfair labor practice because the higher-level management is not a named respondent in this matter. *Missouri National Guard, supra.* The General Counsel did not discuss what impact the earlier withdrawal of all allegations against Respondent National Guard in this case would have on this theory.

Respondent Missouri Guard

Respondent Missouri Guard asserts that it has not violated the Statute by its failure to furnish the three uniforms for bargaining unit employees as required by Article 8 of the parties' collective bargaining agreement. It argues that the collective bargaining agreement negotiated between the parties is contrary to the Purpose

Statute, 31 U.S.C. § 1301 and the Anti-Deficiency Act, 31 U.S.C. § 1341. Therefore, Respondent's failure to comply with the provision of the agreement is not an unlawful repudiation of the agreement since the provision is unlawful and therefore unenforceable. *NFFE Local 1862 and DHHS, Education and Welfare, Public Health Service, Indian Health Service, Phoenix, Arizona*, 3 FLRA 182 (1980); *Office of the Adjutant General and Georgia Department of Defense, Atlanta, Georgia,* 54 FLRA 654, 661 (1988); and *GSA, supra.*

Further Respondent argues that it attempted to comply with the provisions of the collective bargaining agreement without violating the Purpose Statute and the Anti-Deficiency Act by requesting the authority to exceed the uniform allowance. Both Army and Air Force Regulations allow such a request for modification, which the Respondent Missouri Guard submitted. The National Guard Bureau refused its requests. Further the National Guard Bureau did not forward the requests to the appropriate Department of the Army and the Department of the Air Force approval authority. Respondent Missouri Guard argues that the National Guard Bureau did not follow service regulations by not forwarding its requests and therefore interfered in the bargaining relationship between the Respondent Missouri Guard and the Union. Although the National Guard Bureau had been a party to the original Consolidated Complaint, the Authority, through the Denver Regional Director, incorrectly dismissed the National Guard Bureau from these proceedings.

Reply Briefs

As noted above the parties were afforded the opportunity to file reply briefs in this matter.

The General Counsel noted that the Respondent Missouri Guard failed to address the funding options that are available to provide uniforms, specifically the use of state funds. The Adjutant General for the Missouri National Guard clearly states in his request to pay for the uniforms out of federal funds that if permission to use federal funds was not granted, "it would appear the state would have to fund additional uniforms." (Jt. Ex. 3)

The Respondent Missouri Guard's brief is based on the assumption that only federal funds are available to pay for the uniforms but this is not supported by the facts.

The General Counsel further argues that the Respondent Missouri Guard has made no showing that compliance with Article 8 of the collective bargaining agreement would result in the expenditure of funds it does not have. Nor

does the Respondent show that providing additional uniforms is impossible because no appropriations are available for that purpose. Rather, Respondent generally argues that compliance with Article 8 would violate the Purpose Statute and the Anti-Deficiency Act.

Finally, the General Counsel argues that the Respondent Missouri Guard is relying on Air Force and Army Regulations to supports its defense that Article 8 is unenforceable, however, such regulations are not government-wide rules or regulations and as such do not negate the requirement that an agency fulfill its obligations under the collective bargaining agreement. *See National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District,* 3 FLRA 748 (1980) and *Department of the Treasury, United States Customs Service v. FLRA,* 873 F.2d 1473 (D.C. Cir. 1989)(a regulation that applies to one governmental entity is not a government-wide regulation.)

The Respondent Missouri Guard asserts that there are constitutional limits on whether state funds could be used in this case and argues that there has been no appropriation by the Missouri State legislature for the purpose of additional uniforms. It argues that the uniform provision of the agreement is unenforceable regarding state funds unless the Missouri legislature makes an appropriation for the purchase of these uniforms. Since the provision is unenforceable, the failure to comply is not an unlawful repudiation.

The Respondent Missouri Guard further takes issue with the General Counsel's reliance on *Evergreen and Rainier*, noting that the proposal in that case dealt with cleaning of uniforms and that the issue was one of negotiability rather than fiscal law.

Discussion and Conclusion

The issue of uniforms for National Guard dual technicians has been of longstanding duration in the negotiability, arbitration and unfair labor practice arenas. According to Public Law No. 104-106, §§ 1038(a) the Authorization Act of 1996, amended 32 U.S.C. §§ 709(b) to read as follows:

> (b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed –
>
> (1) be a member of the National Guard

(2) hold the military grade specified by the Secretary concerned for that position, and
(3) wear the uniform appropriate for the members grade and component of the armed forces while performing duties as a technician.

The collective bargaining agreement between the Respondent Missouri Guard and the Union recognizes that technicians are required by Federal Statute to wear the military uniform. Article 8 of the agreement then proceeds to discuss the provision of serviceable uniforms by the Missouri National Guard, and to require that the Missouri National Guard provide three (3) sets of duty uniforms for each dual status employee. The parties' collective bargaining agreement does not discuss where the funds for such uniforms will be found, only that such uniforms will be furnished. The Missouri National Guard admits that it has not furnished the uniforms as required by Article 8 of the parties' collective bargaining agreement, but argues that the terms of the agreement are unenforceable since neither federal or state funds are available for such purchases.

As stated above, the Authority has set forth its test for determining whether there has been a repudiation of a collective bargaining agreement. *Scott AFB,* 51 FLRA at 858*; Warner Robins AFB,* 40 FLRA at 1211. Two elements are examined in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?).

In this matter, the Respondent Missouri Guard has clearly and patently refused to comply with the provisions of Article 8 of the parties' collective bargaining agreement by refusing to furnish the additional uniforms for its dual technicians bargaining unit employees. Further the provision deals exclusively with the subject of uniforms in detail and was clear and concise in the obligations of the parties. I therefore find that the Respondent Missouri Guard's failure to comply with the provisions of Article 8 goes to the heart of the parties' agreement.

The question then becomes whether Article 8 of the parties' collective bargaining agreement is contrary to law and therefore unenforceable. Respondent Missouri Guard argues that it does not have the authority to use federal funds to pay for the uniforms and that furnishing the uniforms without such funds would be a violation of the Purpose Statute and the Anti-Deficiency Act. The Purpose Statute requires that appropriations should be applied only

to the objects for which they were made. The Anti-Deficiency Act precludes an agency from expending funds: (1) in excess of those appropriated for the fiscal year in which the expenditure is made; and (2) prior to their appropriation. However, Respondent Missouri Guard has made only generalizations regarding these Statutes and has not shown that providing the uniforms at issue would result in the expenditure of funds that it does not have or that no appropriations are available for that purpose.

The General Counsel noted the unprecedential Administrative Law Judge's decision in *Missouri National Guard* on August 16, 2000, in which the Missouri National Guard was ordered to furnish uniforms in accordance with a prior collective bargaining agreement. The stipulation contains no information on how these uniforms were to be funded, but they were apparently furnished to bargaining unit employees since there is a reference to those uniforms in a Human Resources Bulletin dated February 1, 2001. (Stip. ¶18; Jt. Ex. 10) Since the Respondent Missouri Guard was able to furnish those uniforms, and has presented no explanation as to how those uniforms were funded, this lends support to the General Counsel's argument that the uniforms at issue in this case can be legally funded.

While the Respondent Missouri Guard argues that it has followed the guidance of National Guard Bureau and that both the Army and Air Force divisions have not properly forwarded its requests, the evidence clearly shows that the National Guard Bureau has **not** ordered the Respondent Missouri Guard not to furnish the uniforms required under Article 8 of the collective bargaining agreement. The National Guard Bureau has certainly not made the Respondent Missouri Guard's ability to comply with the provisions of its collective bargaining agreement easier, but it's conduct does not amount to "interference with the bargaining relationship" between the Respondent Missouri Guard and the Union in violation of the Statute. *Nevada National Guard,* 54 FLRA at 316 (Higher management did not interfere with the local bargaining relationship where higher management provided an internal legal opinion and a labor relations alert concerning official time, but did not direct the subordinate level management to act in a manner inconsistent with its bargaining obligation.)

Finally, the Respondent Missouri Guard argues in its reply brief that the uniform provision is unenforceable since it would violate the Constitution of Missouri, Article IV, Section 28 if it used state funds to provide the additional uniforms. The Respondent Missouri Guard asserts that the Missouri State legislature has not made an

appropriation for the purchase of the additional uniforms. The parties' stipulation contains no evidence related to the state of Missouri and its appropriations, except for one comment by Major General John D. Havens, the Adjutant General, Missouri National Guard in his letter to the Army National Guard Readiness Center and Air National Guard Readiness Center dated August 30, 2000, which concluded "**Otherwise, it would appear the state would have to fund additional uniforms.**" (Stip. ¶12; Jt. Exs. 1(a)(ii)(A) and 3)(emphasis added), and one comment by Joseph Manachina, Chief, Contract & Fiscal Law, National Guard Bureau in his November 8, 2001, memorandum, which stated "**The State of Missouri has no authority to expend Federal funds for the purchase and issuance of BDUs beyond that authorized in CTA 50-900/AFI 36-3014.**" (Stip. ¶21, Jt. Ex. 18)(emphasis added). Under these circumstances, the evidence fails to establish that the state of Missouri could not be responsible for the purchase of the additional uniforms. Whether an appropriation from the Missouri legislature would have to be approved prior to the purchase of the uniforms is not an issue before me.

Therefore, I find that the Respondent Missouri Guard has violated section 7116(a)(1) and (5) of the Statute by failing to comply with Article 8 of the parties' collective bargaining agreement.

Remedy

Having found that the Respondent violated the Statue by failing to comply with Article 8 of the parties' collective bargaining agreement, an appropriate remedy includes an order requiring the Respondent to comply with Article 8. Based on the above findings and conclusions, I find that the Respondent violated section 7116(a)(1) and (5) of the Statute as alleged, and I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Office of the Adjutant General, Missouri National Guard, Jefferson City, Missouri, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with Article 8 of the collective bargaining agreement with the Association of Civilian Technicians, Missouri Council of Chapters, the

exclusive representative of certain of its employees, with respect to the issuance of employee uniforms.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Comply with Article 8 of the collective bargaining agreement with the Association of Civilian Technicians, Missouri Council of Chapters, the exclusive representative of certain of its employees, by issuing three uniforms to employees as required by Section A.

(b) Post at its facilities, where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Missouri Adjutant General, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, May 14, 2002.

_____

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Office of the Adjutant General, Missouri National Guard, Jefferson City, Missouri, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to honor our collective bargaining agreement with the Association of Civilian Technicians, Show-Me Air and Army Chapters, by refusing to comply with Article 8, the agreement's provision for issuing uniforms to bargaining unit employees who are required to wear prescribed uniforms in the performance of their official civilian duties.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the Association of Civilian Technicians, Show-Me Air and Army Chapters, issue three uniforms to bargaining unit employees as required by Article 8, Section A of our the collective bargaining agreement.

_____
(Respondent/Agency)

Dated:_____By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244

Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is: (303)844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-01-0445, were sent to the following parties:

CERTIFIED MAIL ___ **CERTIFIED NUMBERS**:

Ayodele Labode, Esquire
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Show-me Air Chapter
P.O. Box 45406
St. Louis, MO 63145

_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MAY 14, 2002

WASHINGTON, DC