ORAL ARGUMENT SCHEDULED FOR OCTOBER 18, 2001

No. 00-1485

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

ASSOCIATION OF CIVILIAN TECHNICIANS,
NEW YORK STATE COUNCIL,
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, New York State Council (Union) and the U.S. Department of Defense, National Guard Bureau, New York Division of Military and Naval Affairs, Latham, New York (Agency). The Union 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 and Order on Negotiability Issues in *ACT, New York State Council*, Case No. 0-NG-2373, decision issued on June 19, 2000, reported at 56 F.L.R.A. (No. 66) 444, Order denying Motion for Reconsideration issued September 29, 2000, reported at 56 F.L.R.A. (No. 145) 868.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority are 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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AFGE, Local 3509	*American Federation of Government Employees, Local 3509*, 46 F.L.R.A. 1590 (1993)
Agency	United States Department of Defense, National Guard Bureau, New York Division of Military And Naval Affairs, Latham, New York
AGR	Active Guard and Reserve
ANGI	Air National Guard Instruction
Authority	Federal Labor Relations Authority
Council of AFGE Locals	*Am. Fed'n of Gov't Employees, Dep't of Educ., Council of AFGE Locals*, 38 F.L.R.A. 1068 (1990), *enforcement denied on other grounds sub nom., United States Dep't of Educ. v. FLRA*, 969 F.2d 1158 (D.C. Cir. 1992)
Guard	United States Department of Defense, National Guard Bureau, New York Division of Military And Naval Affairs, Latham, New York
IRS v. FLRA	*United States Department of Treasury, Internal Revenue Service v. FLRA*, 494 U.S. 922 (1990)
JA	Joint Appendix

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National Guard	United States Department of Defense, National Guard Bureau, New York Division of Military And Naval Affairs, Latham, New York
Northeast Sector	Northeast Air Defense Sector
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Treasury v. FLRA	*Dep't of the Treasury v. FLRA*, 836 F.2d 1381 (D.C. Cir. 1988)
Union	Association of Civilian Technicians, New York State Council

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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 June 19, 2000. The Authority's decision is published at 56 F.L.R.A. 444. The Authority's order denying petitioner's motion for reconsideration was issued on September 29, 2000, and is published at 56 F.L.R.A. 868. Copies of these Authority determinations are included in the Joint Appendix (JA) at JA 5-23 and JA 24-35, 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

(1994 & Supp. V 1999) (Statute).[1] This Court has jurisdiction to review the Authority's final decisions and orders pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether a bargaining proposal that would grant eligibility to National Guard civilian technicians to apply for vacant military positions is nonnegotiable because the proposal affects the Guard's right under § 7106(a)(1) of the Statute to determine its organization.

STATEMENT OF THE CASE

This case arose as a negotiability proceeding under § 7117(c) of the Statute. The Authority adjudicated a petition filed by the Association of Civilian Technicians, New York State Council ("ACT" or "union"). The petition challenged the claim of the United States Department of Defense, National Guard Bureau, New York Division of Military and Naval Affairs, Latham, New York ("National Guard," "Guard," or "agency") that an agreement proposed by the union was not within the Guard's duty to bargain under the Statute. The proposed agreement would have required the Guard to convert certain full-time military positions to positions that could be filled by civilian technicians. The Authority held that the proposed agreement was nonnegotiable because it affected the Guard's management right under §7106(a)(1) of the Statute to determine its organization. Accordingly, the Authority dismissed the union's petition and, subsequently, denied the union's motion for reconsideration. Pursuant to § 7123(a) of the Statute, the union seeks review of the Authority's decision.

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

STATEMENT OF THE FACTS

A. Background

The union is the exclusive representative of certain National Guard dual-status technicians employed by the New York Air 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.[2] *See* National Guard Technicians Act of 1968, as amended, 32 U.S.C.A. § 709 (West Supp. 2000); *Am. Fed'n of Gov't Employees, Local 2953 v. FLRA*, 730 F.2d 1534, 1537 (D.C. Cir. 1984) (*AFGE v. FLRA*).

Sometime prior to 1994, the Air Defense mission for the continental United States was assigned to the Air National Guard. The Air National Guard created three Air Defense Sectors and in 1994 the Northeast Air Defense Sector (Northeast Sector) initially became operational. The Northeast Sector, headquartered at Griffiss Air Force Base, Rome, N.Y., was created as a unit of the New York Air National Guard. Supplemental Appendix (SA) at 2. The Northeast Sector has approximately 186 positions. SA at 28. The Northeast Sector's mission was performed predominantly by full-time Active Guard and Reserve (AGR) personnel,[3] plus a small number of civilian technicians. JA at 6.

Subsequently, the Guard determined that the mission of the Northeast Sector

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[2] In order to distinguish National Guard technicians from full-time military personnel, we will refer to the technicians as "civilian technicians" or simply "technicians."

[3] In contrast to the dual status technicians, AGR personnel are full-time members of the military.

would be performed exclusively by AGR personnel. JA at 6. The previously-assigned technicians were "grandfathered in," that is, they retained their civilian status, but were slotted against military positions in lieu of AGR incumbents. JA at 6-7. In response to the determination to staff the Northeast Sector only with AGR personnel, the union submitted a proposed bargaining agreement to address the impact on New York Air National Guard technicians. After some partially successful negotiations, the agency declared that seven sections of the proposed agreement were not negotiable. JA at 44. The union then filed a petition for review of negotiability issues with the Authority. JA at 39.

B. The Authority's Decision

Considering the disputed sections of the proposed agreement as "an integrated whole," JA at 14-16, the Authority held it nonnegotiable. Specifically, the Authority ruled that one of the proposed agreement's sections, section 5, violated the Guard's right to determine its organization under § 7106(a)(1) of the Statute. Section 5 provides: "Technicians employed in the State of New York shall be among those eligible to apply for any announced, vacant [Northeast Sector] position that may be filled by a technician." JA at 21.

As pertinent here, the Authority noted that the Guard had organized "the Northeast Sector . . . to be supported solely by full-time military personnel." JA at 18. The Authority held that by expanding eligibility for Northeast Sector vacancies beyond full-time military personnel to civilian technicians, "section 5 . . . would precipitate a change in the Agency's organization." *Id.* For civilian technicians to be eligible to apply for what the Guard had determined should be exclusively military vacancies, "section 5 would effectively require the Agency to convert full-time military positions in the Northeast Sector to positions that can be filled either by civilian technicians or [military] personnel." *Id.* The Authority

explained, "[b]y imposing such a requirement, the agreement dictates how the Agency will be structured to accomplish its mission and functions." JA at 18-19. Such an agreement, the Authority concluded, "affects the Agency's right to determine its organization" and is therefore outside the Guard's duty to bargain. JA at 19.

In reaching the conclusion that proposed section 5 violated the agency's right to determine its organization, the Authority examined the relationship of section 5 to the proposed agreement's other sections. As particularly relevant here, the Authority addressed the relationship of section 5 to section 3, a part of the proposed agreement on which the Authority did not rule. Operating in tandem with a nationwide Air National Guard regulation,[4] section 3 would require the Guard to compile a listing of positions in the Northeast Sector that, at least "theoretically," "may be filled by" either civilian technicians or military personnel. JA at 15, 20. The positions so identified would be, as the Guard explained, "future positions in the Northeast Sector that could be filled by civilian technicians *if management so desired*." JA at 7 (emphasis added).

In contrast to section 3's "theoretical" character, the Authority viewed the agency determinations addressed by section 5 as dealing with actual agency organizational decisions in particular circumstances. In this connection, the Authority observed that the Guard, considering the particular mission and functions of the Northeast Sector, had decided to organize the Northeast Sector solely along military lines, by adopting an organizational structure consisting exclusively of full-time military personnel. JA at 18. Because they are not full-time military personnel, civilian technicians would not be eligible to apply for vacancies in such an

[4]Air National Guard Instruction (ANGI) 36-101, set forth at Add. B-1 and JA 22.

organizational structure. Thus, section 5's contrary mandate, that civilian technicians be considered eligible to apply for Northeast Sector vacancies, clearly would require the Guard to alter the character of the positions in the Northeast Sector by requiring elimination of the "military only" restriction. Section 5 would thus dictate an aspect of the Guard's organizational structure. JA at 18-19. The Authority accordingly held that section 5 affected the Guard's management right to determine its organization under § 7106(a)(1) of the Statute. JA at 19. Considering the various sections of the proposed agreement as an integrated whole, the Authority therefore ruled that the proposed agreement was nonnegotiable. *Id.*

The Authority subsequently denied the union's request for reconsideration. JA at 24, 35.

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 shall be set aside only if it is "arbitrary, capricious, or an abuse of discretion and . . . otherwise not in accordance with law." 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).

SUMMARY OF ARGUMENT

Section 7106(a)(1) of the Statute reserves to agency management the right to determine its organization. The right to determine an agency's organization encompasses the right to determine the functional structure of the agency, including whether positions associated with a particular mission and function will be military or civilian in character. In this case, the New York Air National Guard determined that its Northeast Sector should function as a military operation staffed exclusively with full-time members of the military.

The Authority properly dismissed as nonnegotiable an agreement proposed by the union that would require the Guard to alter its organizational determination concerning the Northeast Sector. It is not disputed that section 5 of the proposed agreement would require the Guard to reformulate its organizational structure for the Northeast Sector so that civilian technicians, in addition to full-time military personnel, would be eligible to apply for all vacancies. By so reversing the Guard's determination to adopt a strictly military organization for the Northeast Sector, section 5 would affect the Guard's right to determine its organization. Accordingly, the proposed agreement is outside the Guard's obligation to bargain.

The Court should reject petitioner's argument that it is primarily section 3, not section 5 that requires a change in the Northeast Sector's organization, and that section 3 is negotiable. First, the record does not support petitioner's argument that section 3 establishes technicians' eligibility to apply for Northeast Sector vacancies. As it operates in the proposed agreement, section 3, through the incorporation of a nationwide National Guard Bureau regulation, merely requires the Guard to compile a listing of positions that *may*, as a theoretical matter, be

filled by civilian technicians. Section 3 does not, by its terms, mandate that eligibility for any particular vacancies be extended beyond full-time military personnel, to civilian employees.

Also meritless is petitioner's argument that section 3 is negotiable because the Guard need only modify a nationwide regulation in order to freely exercise its organizational rights. It is well established that bargaining proposals that impose substantive conditions on the exercise of a management right affect that right and thereby render the proposal nonnegotiable. Further, the Statute does not empower unions, through the collective bargaining process, to enforce limitations, including agency regulations, on the management rights found in §7106(a)(1) of the Statute.

For all these reasons, the Authority properly concluded that the union's proposed agreement is outside the agency's obligation to bargain.

ARGUMENT

A BARGAINING PROPOSAL THAT WOULD GRANT ELIGIBILITY TO NATIONAL GUARD CIVILIAN TECHNICIANS TO APPLY FOR VACANT MILITARY POSITIONS IS NONNEGOTIABLE BECAUSE THE PROPOSAL AFFECTS THE GUARD'S RIGHT UNDER § 7106(A)(1) OF THE STATUTE TO DETERMINE ITS ORGANIZATION

A. The Right to Determine the Agency's Organization

Section 7106(a)(1) of the Statute reserves to agency management the right to determine an agency's organization. Bargaining proposals that affect a right reserved to agency management under § 7106(a) are outside the agency's obligation to bargain. *Patent Office Prof'l Ass'n v. FLRA*, 47 F.3d 1217, 1220 (D.C. Cir. 1995). Management's right to determine its organization under section 7106(a)(1) encompasses the right to determine the administrative and functional structure of the agency, including the relationship of personnel through lines of

authority and the distribution of responsibilities for delegated and assigned duties. *See, e.g., Am. Fed'n of Gov't Employees, Local 1336*, 52 F.L.R.A. 794, 802 (1996). That is, this right includes the authority to determine how an agency will structure itself to accomplish its mission and functions. *Id.*

In this case, the Guard determined that the Northeast Sector should function as a military operation staffed exclusively with full-time members of the military. This determination clearly falls within the agency's right to determine the functional structure of its organization. Accordingly, any bargaining proposal that would affect the agency's ability to so structure its operations would affect the agency's right to determine its organization and therefore be outside the obligation to bargain. As we demonstrate below, section 5 of the proposed agreement at issue here would, if adopted, alter the agency's organizational determination that the Northeast Sector be structured solely with full-time military positions. Accordingly, the proposed agreement affects the agency's reserved right to determine its organization and is outside the agency's obligation to bargain.

B. Section 5 of the Union's Proposed Agreement Affects the Agency's Right to Determine its Organization

The Authority reasonably determined that the union's proposed agreement was nonnegotiable because proposed section 5 affected the Guard's management right to determine its organization. As discussed above, and not disputed by petitioner, an agency's right to determine its organization includes the right to determine what functional structure to adopt to accomplish agency missions and functions. Consistent with Authority precedent, and as also not disputed by petitioner, this encompasses the right to determine whether positions associated with a particular mission and function will be military or civilian in character. *See United States Dep't of Defense, Nat'l Guard Bureau, Washington Army Nat'l*

Guard, Tacoma, Wash., 45 F.L.R.A. 782, 787 (1992) (holding that the agency's right to determine its organization includes the discretion to determine "that [a] vacant . . . position would be designated and filled as a military position, not a civilian position").

As the Authority found, *e.g.*, JA at 6, 18, the Guard determined that the Northeast Sector would be organized solely with full-time military positions. This organizational determination implicitly rendered the Guard's civilian technicians ineligible for all Northeast Sector vacancies, because civilian technicians are not full-time military personnel.

By effectively reversing the Guard's determination to adopt a strictly military organization for the Northeast Sector, section 5 would affect the Guard's right to determine its organization. Specifically, section 5 would require the Guard to reformulate its organizational structure for the Northeast Sector so that civilian technicians, in addition to full-time military personnel, would be eligible to apply for all vacancies.

In this connection, section 5 pertinently provides: "Technicians . . . shall be among those eligible to apply for any announced, vacant [Northeast Sector] position that may be filled by a technician." JA at 46. As the Authority found, section 5's reference to positions "that may be filled by a technician" incorporates the list of positions that the Guard would be required by section 3 to compile. *E.g.*, *Id.* at 15. Discussing this list of positions that "theoretically" could be filled by civilian technicians "if management so desired," *Id.* at 15, 7, the Guard explained in its submission to the Authority that "many, if not most, categories of full time positions which are found in the various units of the Air National Guard across the nation can, pursuant to ANGI 36-101, be filled by technicians." SA at 8. Thus, with section 3's general listing of positions that "*may* be filled by

technicians" as a reference, JA at 17, section 5 would sweep aside the Guard's determination to establish positions in the Northeast Sector for which only full-time military personnel would be eligible, substituting instead section 5's requirement that civilian technicians also be eligible. As the Authority held (*Id.* at 18-19), "[b]y imposing such a requirement, the agreement dictates how the Agency will be structured to accomplish its mission and functions." This improperly affects management's right to determine its organization.

C. The Union's Arguments Are Without Merit

Petitioner defends its proposed agreement by claiming that a section of the agreement not ruled on by the Authority, section 3, does not suffer from the defects that the Authority found objectionable in a different section of the proposed agreement, section 5. As discussed in more detail below, the Court should reject petitioner's arguments for a variety of reasons. First, to the extent that petitioner claims that the Authority erred because of flaws in a nonexistent ruling, petitioner's point is irrelevant. The Authority held that section 5, not section 3 of the proposed agreement violated the Guard's right to determine its organization. Petitioner's related argument, that section 3, not section 5 establishes technicians' eligibility to apply for Northeast Sector vacancies is not supported by the record. Second, and in any event, even if section 5 and section 3 serve redundant purposes, petitioner's defense, that the Guard should be required to amend its regulations to remedy a defect in the union's bargaining agreement, would place an improper limitation on the Guard's exercise of its management rights.

1. Petitioner's defense of proposed section 3 fails to address the defects in section 5

Petitioner acknowledges (Petitioner's Brief (Pet. Br.) at 4) that the Authority held the proposed agreement nonnegotiable because "[t]he FLRA reasoned that section 5 of the proposal requires organizational change . . . ." However, rather than address the Authority's ruling on section 5, petitioner frames its defense of the proposed agreement by asserting the negotiability of section 3. *E.g.*, Pet. Br. at 8-9.

In this regard, petitioner contends that section 5's effect on the Guard's organization is only derivative, and that it is primarily section 3 that "requires organizational change." *Id.* Nevertheless, petitioner asserts, because section 3 changes the Guard's organization "only by requiring compliance with a regulation," section 3 should not render the proposed agreement nonnegotiable. *Id.* at 9. Citing case law arising in other contexts, petitioner argues that there is nothing wrong with requiring an agency to comply with its own regulations, even if requiring such compliance affects agency organizational determinations. Pet. Br. at 8-9.

The Court should reject petitioner's argument. The record does not support petitioner's assertion that section 3 and the Guard regulation section 3 incorporates would require the Guard to alter its determination to staff the Northeast Sector exclusively with military positions. As the Authority found, section 3 and the Guard regulation on which section 3 is based, ANGI 36-101, merely require the agency to compile a listing of the positions that "theoretically" could be filled by technicians. JA at 15.

Such a "theoretical" listing, addressing "categories of full[-]time positions," JA at 8, "that *may* be filled by technicians," JA at 17, is inherently different from

the actual organizational determinations the Guard must make when it is considering how to structure a particular function like the Northeast Sector. Thus, for example, the presence of the "grandfathered" civilian technicians in the Northeast Sector indicates that there are categories of Northeast Sector jobs that technicians *could*, if the Guard so desired, fill. However, there is no reason, and indeed it would be illogical, to convert this organizational option that the Guard might consider into the organizational mandate that petitioner reads into section 3 and ANGI 36-101. In other words, the fact that civilian technicians *could* perform the duties of certain positions in the Northeast Sector does not imply that technicians *must* be deemed eligible for such vacancies, in the face of a Guard determination, for other reasons, that a purely military organizational structure is preferable, as occurred in this case.

The Court should therefore reject petitioner's claim that section 3, and compliance with ANGI 36-101, requires the Guard to alter its organizational determination that the functional structure of the Northeast Sector should consist solely of military positions. Rather, as the Authority held, it is section 5, by its own terms and without a regulatory gloss, that intrudes improperly on the Guard's right to determine this aspect of its organization.

2. Requiring the Guard to alter its regulations to protect its management rights is impermissible

The Court should also reject petitioner's contention that its proposed bargaining agreement should be held negotiable because the Guard can avoid an infringement on its right to determine its organization "simply by changing [its] regulation." Pet. Br. at 9. Petition concedes in this regard that absent a change in the Guard's regulation, ANGI 36-101, the proposed agreement would require a change to the Guard's organization. *E.g.*, Pet. Br. at 5.

Petitioner's argument conflicts with a proposition, well established in the Authority's case law, that bargaining proposals that impose conditions on the exercise of a management right improperly infringe on the right, and are nonnegotiable. *E.g.*, *Nat'l Fed'n of Fed. Employees, Forest Serv. Council*, 46 F.L.R.A. 145, 150 (1992) (Proposals that impose conditions on the exercise of a management right interfere with that right.). In the instant case, the union's proposed agreement permits the Guard to exercise its management right to determine its organization at the Northeast Sector, a unit of the New York Air National Guard, only on the condition that a nationwide National Guard Bureau regulation is amended. Such a limitation places impermissible restrictions on the exercise of the right, and consistent with the Authority's case law, should be rejected. *See also Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 857 F.2d 819, 821-22 (D.C. Cir. 1988) (A proposal that places unreasonably burdensome constraints on the exercise of a §7106(a) management right is outside the obligation to bargain.).

Additionally, to the extent that petitioner argues that its proposed agreement is negotiable because it merely requires the Guard "to organize itself in accordance with its own regulation," Pet. Br. at 9, petitioner misapprehends the nature of the management rights set forth in § 7106(a)(1). The Authority has held that "§ 7106(a) does not, by its terms, subject the exercise of management's rights under § 7106(a)(1) to compliance with applicable laws and regulations." *Am. Fed'n of Gov't Employees, Dep't of Educ., Council of AFGE Locals*, 38 F.L.R.A. 1068, 1076 (1990) (*Council of AFGE Locals*), *enforcement denied on other grounds sub nom., United States Dep't of Educ. v. FLRA*, 969 F.2d 1158 (D.C. Cir. 1992).

The Authority's holding in that case was based on the Supreme Court's decision in *United States Department of Treasury, Internal Revenue Service v.*

FLRA, 494 U.S. 922 (1990) (*IRS v. FLRA*). In *IRS v. FLRA*, the Court held that "the [Statute] does not empower unions to enforce . . . 'external limitations' on management rights," such as laws and regulations, except to the extent that the Statute itself authorizes those limitations. *See id.* at 931. The Court was addressing the wording of a different provision of the Statute than that involved here, § 7106(a)(2), which requires that the management rights set forth therein be exercised "in accordance with applicable laws." The Court held that "insofar as union powers under § 7106(a) are concerned, other than the limitations imposed by 'applicable laws,'" no other restrictions on the exercise of management's rights set forth in § 7106(a)(2) are bargainable. *Id.*

Because § 7106(a)(1), involved in this case, does not contain such a limitation, the Authority has concluded that unions may not seek to subject the exercise of the management rights set forth in § 7106(a)(1), such as the right to determine an agency's organization, to compliance with applicable laws and regulations. *Council of AFGE Locals*, 38 F.L.R.A. at 1076. Accordingly, even if the union's proposed agreement in this case represented nothing more than an attempt to impose the limitations of agency regulations on the exercise of the Guard's right to determine its organization, the proposed agreement would still not be bargainable under the Statute.

Finally, the cases upon which petitioner relies (Pet Br. at 7) are distinguishable. For example, in *American Federation of Government Employees, Local 3509*, 46 F.L.R.A. 1590, 1616-18 (1993) (*AFGE Local 3509*), the disputed provision was only intended to provide employees with information as to what policies the employer had adopted. 46 F.L.R.A. at 1617. Ruling for the union, the Authority explained that such negotiable provisions "simply memorialize[] for informational purposes an agency's unilateral decision with respect to the exercise

of a management right" but make "clear that the agency remain[s] free at any time . . . to change that decision. . . ." *Id.* at 1618. Here in contrast, the proposed agreement is not intended to inform employees of the Guard's organizational determinations concerning the Northeast Sector. Rather, the proposed agreement requires the Guard to alter those determinations, unless certain other substantive actions are taken with respect to the content of a nationwide regulation. The Authority's case law does not provide any support for holding that such a proposed agreement is negotiable.

NTEU, Chapter 213 and 228, 32 F.L.R.A. 578 (1988), cited by petitioner (Pet. Br. at 8) is also inapposite. Unlike the instant case, the provision ruled nonnegotiable there, by restating in the parties' contract agency regulations bearing on the exercise of management rights, would have required the agency to exercise those rights in conformance with that contractual restatement, even if the agency were subsequently to alter those regulations. *Id*. at 586. Because the circumstances of the instant case are entirely different, the Authority's discussion in *NTEU, Chapter 213 and 228* is inapplicable and does not support petitioner's assertions.

CONCLUSION

The union's petition for review should be denied.

Respectfully submitted,

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August 2, 2001

CERTIFICATION PURSUANT TO FRAP RULE 32 AND CIRCUIT RULE 32

Pursuant to Federal Rule of Appellate Procedure 32 and Circuit Rule 32, I certify that the attached brief is proportionately spaced, utilizes 14-point serif type, and contains 4348 words.

_____
James F. Blandford

Aug. 2, 2001

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

ASSOCIATION OF CIVILIAN TECHNICIANS, NEW YORK STATE COUNCIL, Petitioner	)	
v.	)	No. 00-1485
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

SERVICE LIST

I certify that copies of the Brief for the Federal Labor Relations Authority, Motion For Leave To File Supplemental Appendix For the Respondent Federal Labor Relations Authority, and Supplemental Appendix for the Federal Labor Relations Authority have been served this day, by mail, upon the following:

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August 2, 2001

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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;

* * * * * * *

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

* * * * * * *

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

§ 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.

(2) The exclusive representative may, on or before the 15th day after the

date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

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

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

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

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

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

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

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

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

* * * * * * *

§ 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 aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * * * *

§ 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

* * * * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * * * * *