

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

ALABAMA STATE MILITARY DEPARTMENT ALABAMA ARMY NATIONAL GUARD MONTGOMERY, ALABAMA Respondent and ASSOCIATION OF CIVILIAN TECHNICIANS INC., NORTH ALABAMA CHAPTER Charging Party	Case No. AT-CA-01-0743

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 **APRIL 17, 2002**, and addressed to:

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

PAUL B. LANG
Administrative Law Judge

Dated: March 18, 2002
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM
2002

DATE: March 18,

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: ALABAMA STATE MILITARY DEPARTMENT
ALABAMA ARMY NATIONAL GUARD
MONTGOMERY, ALABAMA

Respondent

and
CA-01-0743

Case No. AT-

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.
NORTH ALABAMA CHAPTER

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 are the Motions for Summary Judgment and other supporting documents filed by the parties.

Enclosures

Position of General Counsel

The General Counsel maintains that on February 23, 2001, Arbitrator Bernard Marcus issued an award to the effect that the Respondent was contractually obligated to furnish two additional sets of Battle Dress Uniforms ("BDU's") to all bargaining unit personnel. In his decision the arbitrator specifically addressed the issue of the legality of the contract provision at issue and ruled that, in implementing the terms of that provision, the Respondent would not be in violation of federal law. The Respondent has not requested that the Authority review the arbitrator's award¹ but has refused to comply with its terms in spite of repeated requests that it do so.

Position of Respondent

In its response to the motion for summary judgment the Respondent does not contest the General Counsel's assertions as to the arbitration award. However, the Respondent maintains that there is a material issue of fact that precludes summary judgment. The alleged issue of fact is whether the expenditure of funds for additional uniforms would violate Army regulations and various federal statutes dealing with appropriations and expenditures.

In support of its position the Respondent has submitted an affidavit from The Adjutant General of the State of Alabama stating that, while he acknowledges his responsibility to comply with the arbitration award, he is legally prohibited from doing so. The affidavit also states that the Respondent has submitted a request to the National Guard Bureau for an amendment to the table of allowances so as to authorize the issuance of two additional BDU's as required by the arbitration award.

The Respondent has also submitted an additional brief in which it restates its contention that it is prohibited by law from providing its employees additional BDU's pending a change in the governing Army regulations. Respondent requests that no decision be issued pending action on its request for permission to issue the uniforms.

Findings of Fact

1

Respondent submitted a proposed appeal to the Defense Field Advisory Service which declined to authorize its submission to the Authority.

The pertinent facts have been admitted by the Respondent both in its Answer to the Complaint and in its response to the motion for summary judgment.² They are as follows:

- The Union and Respondent are parties to a collective bargaining agreement.
- The Union filed a grievance under the collective bargaining agreement concerning the issuance of two additional BDU's. That grievance was eventually submitted to arbitration.
- On February 23, 2001, arbitrator Bernard Marcus issued an award in which the Union's grievance was sustained (G.C. Ex. 1(c)). The arbitrator ordered the Respondent to furnish two additional BDU's to its bargaining unit employees. In the words of the arbitrator, "The award is conditioned on there being funds available to pay for the negotiated two additional BDUs and is subject to the comments set forth in the text of the Award."³
- By letter dated August 1, 2001 (G.C. Ex. 1(f)), Respondent informed the Union that the Respondent's appeal of the arbitrator's decision to the Department of Defense Field Advisory Service was denied because the Department of Defense had approved the collective bargaining agreement upon which the award was based.
- Respondent has not sought review of the arbitrator's award by the Authority.

2

The Respondent has not admitted that the arbitrator ordered the issuance of additional uniforms. Rather, it has deferred to the language of the award in response to the allegations of the complaint which characterize the award as having so ordered.

3

The arbitrator concluded that if there were no available funds to implement the award, the parties were committed to discuss the matter. He also opined that there might be sufficient funds for partial implementation, that an advance against the next year's budget might be obtainable or that the parties might look into the issuance of additional coveralls in place of the BDU's. (Apparently the issuance of coveralls is not subject to the statutory restrictions upon which the Respondent relies in its opposition to the General Counsel's motion.)

Discussion and Analysis

After careful consideration of all memoranda and evidence submitted by the parties as well as applicable law, it is determined that there are no material issues of fact and that the General Counsel's Motion for Summary Judgment should be granted on the grounds set forth below.

Summary Judgment is Appropriate

In numerous cases, including *Department of Veterans Affairs, Veterans Affairs Medical Center*, 50 FLRA 220, 222 (1995), the Authority has confirmed that, in considering motions for summary judgment which have been filed pursuant to 5 C.F.R. §2423.27, it will apply the principles which have been established with regard to Rule 56 of the Federal Rules of Civil Procedure. Rule 56 states in pertinent part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Respondent has characterized the issue of the legal implications of the arbitration award as a question of fact. That characterization is clearly incorrect. A legal dispute cannot be transformed into an issue of fact (let alone an issue of material fact within the meaning of Rule 56) by an affidavit which does no more than reiterate a legal argument.

The Respondent has admitted that it has not implemented the award and defends its position by an attack on its merits. The merits of the arbitrator's decision, whether legal or factual, is not a proper issue in an unfair labor practice proceeding. The sole mechanism for challenging an arbitration award is by filing exceptions with the Authority pursuant to §7122(a) of the Statute within thirty days of the date of the service of the award. If exceptions are not timely filed the award shall, in the words of §7122(b) of the Statute, be:

. . . . final and binding. An agency shall take the actions required by an arbitrator's final award.

The Respondent has, for whatever reason, failed to file exceptions in accordance with the Statute and cannot now challenge the arbitrator's decision.

The Respondent's argument that this case should be held in abeyance pending action by the Department of the Army on the requested change in the uniform allowance is unpersuasive. As shown above, the arbitrator's award allows the Respondent the option of negotiating with the Union in the event that it is unable to provide the additional uniforms at present. The arbitrator suggested a number of alternative arrangements including the issuance of coveralls. If, as maintained by the Respondent in its supplemental brief, the technicians are in a civilian status during the regular work week, there should be no impediment to their wearing civilian coveralls while so employed.

The Remedy

The General Counsel maintains that the appropriate remedy is an order directing the Respondent to supply two additional sets of BDU's to each bargaining unit employee. However, that is not the remedy that the arbitrator ordered and the General Counsel, like the Respondent, must take the award as it stands. The arbitrator's remedy is somewhat equivocal, taking into account the possibility of a lack of sufficient funds to provide the additional uniforms as well as the alternative of providing coveralls in place of additional BDU's.

After careful consideration of the memoranda and evidence, I have concluded that the Respondent violated §7116(a)(1) and (8) of the Statute by failing to implement the arbitration award in FMCS Case No. 00-16841 and that the motion of the General Counsel should be granted. Accordingly, I recommend that the Authority issue the following Order:

ORDER

IT IS ORDERED that the motion of the General Counsel for summary judgment be, and hereby is, granted.

IT IS FURTHER ORDERED, pursuant to §2423.41(c) of the Authority Rules and Regulations and §7118(a)(7) of the Federal Service Labor-Management Relations Statute, that the Alabama State Military Department, Alabama Army National Guard, Montgomery, Alabama, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the final and binding award of Arbitrator Bernard Marcus dated February 23, 2001.

(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.

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

(a) Provide all of its employees in the bargaining unit with two additional sets of Battle Dress Uniforms ("BDU's") provided that there are sufficient funds to do so.

(b) In the event that there are insufficient funds to provide the additional sets of BDU's, negotiate with the Union as to alternative arrangements including:

(i) partial implementation of the arbitration award at present and final implementation at a later time;

(ii) an advance against the budget of the following year; and

(iii) the issuance of additional coveralls in place of the BDU's.

(c) Post at its facilities throughout the State of Alabama 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 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.

(d) Pursuant to §2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Atlanta 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 herewith.

Issued, Washington, D.C., March 18, 2002.

PAUL B. LANG
Administrative Law Judge

**NOTICE TO ALL TECHNICIANS
IN THE COLLECTIVE BARGAINING UNIT
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Authority has found that the Alabama State Military Department, Alabama Army National Guard, Montgomery, Alabama, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

We hereby notify all technicians in the collective bargaining unit that:

1. We will not fail or refuse to abide by the final and binding arbitration award in FMCS Case No. 00-16841.

2. We will provide all bargaining unit technicians with two additional sets of Battle Dress Uniforms ("BDU's") if there are sufficient funds to do so.

3. In the event that there are insufficient funds to provide the additional sets of BDU's, we will negotiate with the Union as to alternative arrangements including:

(i) partial implementation of the arbitration award at present and final implementation at a later time;

(ii) an advance against the budget of the following year; and

(iii) the issuance of additional coveralls in place of the BDU's.

4. 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.

(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, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: Marquis Two Tower, 285 Peachtree Center Avenue, Suite 701, Atlanta, Georgia 30303, and whose telephone number is: (404) 331-5380.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-01-0743, were sent to the following parties:

CERTIFIED MAIL:

CERTIFIED NOS:

Gwen Anderson, Esquire
7000-1670-0000-1176-3405
Federal Labor Relations Authority
285 Peachtree Center Avenue, Suite 701
Atlanta, GA 30303

Lt. Col. Bryan Morgan, JA
7000-1670-0000-1176-3412
Alabama Army National Guard
P.O. Box 3711
Montgomery, AL 36109

Terry Garnett, Representative 7000-1670-0000-1176-3597
North Alabama Army Chapter, ACT
2042 New Berlin Road
Jacksonville, FL 32218

CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MARCH 18, 2002
WASHINGTON, DC