**No. 03-4553**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1647,**

**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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**MISCELLANEOUS**

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## STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority ("Authority" or "FLRA") on September 30, 2003. The Authority's decision is published at 59 F.L.R.A. (No. 51) 369. A copy of the decision is included in the Joint Appendix (JA) at JA 1-5. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service

Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] 1 This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

## STATEMENT OF THE ISSUE

Whether the Authority properly ruled that the union's proposal, requiring the use of appropriated funds to compensate employees for lost personal expenses when scheduled leave is cancelled, is inconsistent with 31 U.S.C. § 1301(a) and, therefore, is nonnegotiable.

## STATEMENT OF THE CASE

This case arises as a negotiability proceeding under § 7117 of the Statute. The American Federation of Government Employees, AFL-CIO, Local 1647 ("union," "AFGE," or "petitioner"), sought to negotiate an amendment to the union's collective bargaining agreement with the United States Department of the Army, Tobyhanna Army Depot, Tobyhanna, Pennsylvania ("TYAD," "Depot," or "agency"). The terms of the proposal would have required the agency to compensate employees for lost personal expenses if management cancelled

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

previously scheduled leave. The agency refused to bargain over the proposal on the grounds that it was inconsistent with law.

Pursuant to § 7105(a)(2)(E) of the Statute, the union appealed the matter to the Authority. The Authority (Chairman Cabaniss, concurring) held that the agency properly refused to negotiate over the proposal as it was inconsistent with law and, therefore, nonnegotiable. Under § 7123(a), AFGE now seeks review in this Court of the Authority's decision and order.

## STATEMENT OF THE FACTS

### A. Background

The Tobyhanna Army Depot "is the largest full-service electronics maintenance facility in the Department of Defense[.]" JA 1 (internal quotations omitted). "Its mission encompasses the repair, overhaul, modification, conversion, test, and system maintenance for a multitude of electronic systems[.]" *Id.* (internal quotations omitted). The Depot is funded by a defense working capital fund (DWCF), the Tobyhanna Army Depot Army Working Capital Fund (TYAD AWCF), as authorized by 10 U.S.C. § 2208. The TYAD AWCF is continuously replenished, as the Depot directly charges federal agencies and private businesses

for its services. JA 1. The TYAD AWCF, as necessary, also receives direct annual appropriations.[1] 2

During the summer of 2002, the union and the Depot exchanged proposals for amending the parties' collective bargaining agreement to include language concerning remedial steps that the Depot would take upon cancelling an employee's previously approved leave. The union's final proposal would have required the Depot to compensate an employee for lost personal expenses:

> Article 32, Annual Leave
>
> Section 4.
> . . .
> If cancellation of the employee's scheduled leave is still required, the Employer will reimburse the employee for any documented loss of funds (e.g., airline tickets, hotel reservations, etc[.];) incurred by the employee as the result of such cancellation. Such reimbursement will be from other than appropriated funds.

JA 1. On October 11, 2002, the Depot informed the union that its reimbursement proposal was nonnegotiable because the proposal was inconsistent with law.[1] 3 The union appealed to the Authority.

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[2] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 302 (appropriating $632,261,000 for military working capital funds); Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 302 (appropriating $387,156,000 for military working capital funds); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107 (appropriating $1,656,396,000 for military working capital funds) .

[3] "[T]he duty to bargain in good faith . . . [applies] to the extent not inconsistent with any Federal law or any Government-wide rule or regulation . . . ." § 7117(a)(1).

## B. The Authority's Decision

The Authority determined that the reimbursement proposal was nonnegotiable under § 7117(a)(1), as it is contrary to federal appropriations law. Specifically, the Authority held that the funds in the TYAD AWCF, although comprised largely of customer payments – or "offsetting contributions" – are nonetheless "appropriated funds" for the purposes of 31 U.S.C. § 1301(a). JA 4. Section 1301(a) mandates that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a); JA 1, 4. Because there is no specific authority for the Depot to use appropriated funds to reimburse employees for lost personal expenses, the Authority held that the union's proposal violates 31 U.S.C. § 1301(a) and is thus nonnegotiable. JA 3-4.

In considering a proposal's negotiability, the Authority first determines its meaning. Here, although the union's language called for the use of "other than appropriated funds," the union admitted that reimbursements would be made from the TYAD AWCF. JA 3. As a result, the Authority interpreted the union's proposal "to require the use of the TYAD AWCF to reimburse employees for any documented financial losses reported by those employees that resulted" from the cancellation of leave. JA 3.

Next, the Authority noted two important union concessions. First, "[t]he [u]nion acknowledge[d] that the TYAD AWCF is a revolving fund. Generally speaking, a revolving fund is one in which outflows of capital from the fund are replenished or reimbursed by funds derived from billings to the organization's customers." JA 4 (citations omitted), JA 83. Second, the union acknowledged that the statute governing the TYAD AWCF does not contemplate using the fund to reimburse employees for lost personal expenses. JA 3-4, 83, 90.

Because the TYAD AWCF is a revolving fund, the Authority, citing D.C. Circuit case law and Comptroller General decisions, determined that the TYAD AWCF should be "treated as [an] on-going or continuing appropriation[.]" JA 4 (citations omitted).[1] 4 As a result, the Authority concluded that the use of TYAD AWCF funds is subject to 31 U.S.C. § 1301(a)'s prohibition against using appropriated funds for unauthorized purposes. JA 3, 4. The Authority also rejected, as unsupported, union arguments attempting to create an exception and distinguish the TYAD AWCF from other revolving funds. JA 4.

[4] The union agreed that "traditional revolving funds" are indeed appropriated funds. JA 85; *see also* JA 88 (arguing that the TYAD AWCF is "a special type of revolving fund which is different than traditional revolving funds which the [u]nion agrees are appropriated funds.").

Furthermore, because the union offered no support for not applying the general rule that revolving funds are appropriated funds, and because the union's proposal is inconsistent, as the union conceded, with laws governing appropriated funds, the Authority concluded that "the proposal is contrary to law and outside the duty to bargain under § 7117(a)(1) of the Statute." JA 4.

## STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings.

## STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Dep't of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1410 (3d Cir. 1988).

"Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). With regard to a negotiability decision like the one under review in this case, such a "decision will

be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted). Courts "also owe deference to the FLRA's interpretation of [a] union's proposal." *Nat'l Treasury Employees Union v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994).

The instant case involves the Authority's interpretation of its own organic statute as it relates to other federal laws, specifically 31 U.S.C. § 1301(a) and 10 U.S.C. § 2208. When the Authority interprets other statutes, although it is not entitled to deference, *Department of the Navy, Military Sealift Command*, 836 F.2d at 1410, the Authority's interpretation should be followed to the extent the reasoning is "sound." *Ass'n of Civilian Technicians, Tex. Lone Star Chapter v. FLRA*, 250 F.3d 778, 782 (D.C. Cir. 2001) (quoting *Dep't of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988)).

## SUMMARY OF ARGUMENT

The Authority properly decided that a union proposal, requiring the Tobyhanna Army Depot to compensate employees for lost personal expenses upon the cancellation of scheduled leave, is inconsistent with 31 U.S.C. § 1301(a) and, therefore, is nonnegotiable.

As the union conceded, and as the Authority correctly held, the TYAD AWCF, from which employees would be compensated, is a revolving fund. Revolving funds are those that receive initial capital funding and then are continuously replenished from user fees or offsetting contributions. Under well-established case law, Comptroller General decisions, and Government Accounting Office (GAO) guidance, revolving funds, as a general rule, are appropriated funds for the purpose of applying 31 U.S.C. § 1301(a). The Authority properly applied this general rule to the TYAD AWCF, rejected the union's argument that the TYAD AWCF is an exception to the general rule, and determined that the TYAD AWCF is an appropriated fund. As such, 31 U.S.C. § 1301(a), which prohibits the expenditure of appropriated funds for unauthorized purposes, applies here.

The Authority, looking to the TYAD AWCF's authorizing statute, 10 U.S.C. § 2208, properly determined that compensating employees for lost personal expenses is not an authorized use of the TYAD AWCF. The union did not contest this point. In fact, the union explicitly admitted that its proposal would be contrary to law if the TYAD AWCF is an appropriated fund, subject to 31 U.S.C. § 1301(a).

Furthermore, the union provides no basis for reversing the Authority's decision. The union erroneously contends in this regard that Department of

Defense financial regulations and accounting forms show that the TYAD AWCF is a non-appropriated fund. The materials cited by the union do not support this proposition. However, even interpreted in the light most favorable to the union, these regulations and forms do not supercede the TYAD AWCF's authorizing statute, applicable case law, or Comptroller General decisions, all of which support the Authority's determination that the TYAD AWCF is an appropriated fund. The union also incorrectly disputes the general rule holding that revolving funds are appropriated funds. This new contention, not raised in proceedings before the Authority, is barred by § 7123(c) of the Statute. Moreover, and in any event, the case law that petitioner relies upon supports the Authority's decision, not petitioner's challenge.

Accordingly, the petition for review should be denied.

## ARGUMENT

### THE AUTHORITY PROPERLY RULED THAT THE UNION'S PROPOSAL, REQUIRING THE USE OF APPROPRIATED FUNDS TO COMPENSATE EMPLOYEES FOR LOST PERSONAL EXPENSES WHEN SCHEDULED LEAVE IS CANCELLED, IS INCONSISTENT WITH 31 U.S.C. § 1301(a) AND, THEREFORE, IS NONNEGOTIABLE

The Authority Correctly Held That the Proposal is Nonnegotiable Because it is Contrary to 31 U.S.C. § 1301(a)

The Authority correctly held that the union's proposal is nonnegotiable as contrary to law. The TYAD AWCF, as a revolving fund, is by definition an appropriated fund. As a result, 31 U.S.C. § 1301(a)'s prohibition against unauthorized expenditures applies to the TYAD AWCF. The union's proposed expenditures, compensating employees for lost personal expenses, are not authorized by statute and, therefore, are contrary to 31 U.S.C. § 1301(a) and render the proposal nonnegotiable.

**1. The Authority properly determined that the TYAD AWCF is an appropriated fund for the purpose of applying 31 U.S.C. § 1301(a)**

The Authority properly applied the general rule, as explained by the courts and the Comptroller General, that revolving funds are appropriated funds for the purpose of applying 31 U.S.C. § 1301(a)'s limitation on the unauthorized use of such funds.[1] 5 In *United Biscuit Co. of America v. Wirtz*, 359 F.2d 206 (D.C. Cir. 1965), *cert. denied* 384 U.S. 971 (1966) (*Wirtz*), the D.C. Circuit considered a case concerning military commissaries. In deciding the case, the court was required to determine whether or not a military commissary's revolving fund constituted appropriated funds. The D.C. Circuit ruled that:

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[5] As noted above, *supra* 5-6, it is undisputed that the TYAD AWCF is a revolving fund. The union conceded this point, *id.*, and Comptroller General decisions support this approach, as well. *See, e.g., Matter of: Dep't of the Air Force -- Reimbursement of Industrial Fund for Damage to Vehicle*, 65 Comp. Gen. 910, 910 (1986) (noting that "[t]he Air Force Industrial Fund, technically termed a 'working capital fund,' is a type of revolving fund.").

> The provision for a revolving fund, replenished by the proceeds from commissary sales, was apparently considered an administrative convenience. It eliminated the need for a new appropriation each fiscal year by creating what was, in effect, an on-going appropriation . . . . Long standing administrative rulings and practice support this interpretation . . . .

*Wirtz*, 359 F.2d at 212-213. *Wirtz* concluded that the commissary's revolving funds "constitute[] 'appropriated funds' . . . ." *Wirtz*, 359 F.2d at 213. *Wirtz*'s conclusion supports the Authority's holding that "[r]evolving funds . . . are treated as on-going or continuing appropriations . . . [a]s such, they are considered a type of appropriated fund." JA 4 (internal citations omitted).

More recently, the Court of Federal Claims has embraced *Wirtz* and its logic. In *MDB Communications, Inc. v. United States*, 53 Fed. Cl. 245 (Fed. Cl. 2002) (*MDB Communications*), the court examined whether the U.S. Mint's contracts were paid with appropriated funds, a threshold question for determining Court of Claims jurisdiction. Noting that the statute establishing the Mint was styled to create a revolving fund, the court went on to hold –

> that a revolving fund is, in substance, a continuing or permanent appropriation, i.e., money that is made available for obligation or expenditure without further action by Congress. . . . [Congress] may authorize the collection or receipt of certain funds by an agency and, simultaneously, specify the uses to which such funds may be applied. Such an authorization constitutes an appropriation. . . . Hence, a revolving fund amounts to a continuing appropriation.

*MDB Communications*, 53 Fed. Cl. at 248-49.

In following *Wirtz* and *MDB Communications*, the Authority also remained faithful to Comptroller General decisions, which uniformly treat revolving funds as appropriated funds.[1] 6 As the Authority correctly observed, "[the Comptroller General] has consistently regarded statutes which authorize collection of receipts and their deposit in a specific fund, and which make the fund available for a specific purpose, as constituting continuing or permanent appropriations." *In re Army Self-Service Supply Centers*, 60 Comp. Gen. 323, 325 (1981).

The facts of the instant case meet the Comptroller General's criteria for appropriated funds as set forth above. Defense working-capital installations, like the TYAD AWCF, are authorized to collect receipts from "customers" for whom the installations provide services. Those receipts are deposited in specific accounts; in the Depot's case, Treasury account, No. 97X4930.AAPS62. JA 1. The funds in these accounts are then available to defense working-capital installations for the specific purposes set forth in 10 U.S.C. § 2208(a)(2): "such commercial-type activities that provide common services within or among

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[6] The Comptroller General is "'an expert opinion, which we should prudently consider . . . .'" *Ass'n of Civilian Technicians. v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001) (quoting *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 201 & n.1 (D.C. Cir. 1984)).

departments and agencies of the Department of Defense, as [the Secretary of Defense] may designate." Because each of the elements set forth in *In re Army Self-Service Supply Centers*, and other Comptroller General cases, is true of the TYAD AWCF, the same result should obtain.

The Authority correctly noted that the union did not present to the Authority, as it has failed to offer to this Court, any statutory language or legislative history suggesting that Congress intended that a special set of rules apply to the TYAD AWCF, in particular, or DWCFs, in general. JA 4. Before the Authority, the union argued that "[t]he DWCF is a special type of revolving fund which is different than traditional revolving funds which the [u]nion agrees are appropriated funds." JA 88. Lacking any clear indication to the contrary, the Authority was correct in applying the general rule. As the GAO has noted, "[t]here are perhaps two 'foundation rules' of revolving funds from which all else flows. One . . . is that specific statutory authority is necessary to create a revolving fund. The second is that a revolving fund is an appropriation. Hence, funds in a revolving fund are appropriated funds." United States General Accounting Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, Vol. 4, Ch. 15, Pt.C (2d Ed. 2001). In any event, the union appears to have abandoned this theory in favor of the new argument that "the entire concept of 'continuing appropriations' is

a legal fiction," Petitioner's Brief (Pet. Br.) 14, and that revolving funds, as a rule, are *not* appropriated funds. This new union contention is discussed *infra*, at 19-23.

Because substantial evidence supports the Authority's conclusion that the TYAD AWCF is a revolving fund, and based on the consistent decisions of the courts and the Comptroller General holding that revolving funds are appropriated funds, the Court should uphold the Authority's application of the general rule of *Wirtz* – one of the GAO's "foundation rules" – to the instant case.

**2. Viewed as an expenditure of appropriated funds, the union's proposal is contrary to 31 U.S.C. § 1301(a)**

Because revolving funds like the TYAD AWCF are appropriated funds, 31 U.S.C. § 1301(a) applies. *See, e.g.*, United States General Accounting Office, *Principles of Federal Appropriations Law*, Vol. 4, Ch. 15, Pt. C (2d Ed. 2001) ("[S]ince funds in a revolving fund are appropriated funds, they are fully subject to 31 U.S.C. § 1301(a), which restricts the use of appropriated funds to their intended purposes.")

As noted above, *supra* at 5, 31 U.S.C. § 1301(a) directs that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a); JA 1, 4. Because the TYAD AWCF's authorizing statute, 10 U.S.C. § 2208, does not authorize the payment of

employees' personal expenses, the Authority properly determined that the union's proposal is contrary to law and, therefore, nonnegotiable.

Section § 2208(c) authorizes DWCFs, such as the TYAD AWCF, to be

> charged, when appropriate, with the cost of –
> (1) supplies that are procured or otherwise acquired, manufactured, repaired, issued, or used; and
> (2) services or work performed;
> including applicable administrative expenses . . .

10 U.S.C. § 2208(c).

In the face of this specific, limited, authorization, the union did not argue before the Authority, and does not contend now, that there is any statutory authorization for appropriated funds to be used to compensate employees for lost personal expenses. To the contrary, the union is bound by its admission that "if . . . the DWCF is an appropriated fund then the [u]nion's proposal is nonnegotiable." JA 90. Based on the foregoing, the Authority correctly ruled that because the TYAD AWCF is a revolving fund and, thus, is composed of appropriated funds, the union's proposal calling for unauthorized disbursement of those appropriated funds is contrary to law and is thus nonnegotiable.

The Union's Remaining Arguments are Meritless

1. Department of Defense regulations cited by the union do not establish that the "offsetting collections" portion of the TYAD AWCF is exempt from 31 U.S.C. § 1301(a)

The union bases its argument, in part, on various Department of Defense (DOD) financial regulations and miscellaneous accounting forms. Pet. Br. 18-22. Specifically, the union claims that these regulations and forms conclusively establish that the TYAD AWCF is not an appropriated fund. As an initial matter, none of these authorities have the weight of Comptroller General decisions, much less court of appeals decisions or the statutes themselves.

Furthermore, the union's arguments on this point lack merit. The union cites, for instance, DOD Financial Management Regulation, Vol. 11B, Ch. 3, 030503(A). That DOD regulation provides, in part, that "[t]he sources of budgetary resources are reimbursable authority from customer orders accepted, contract authority, direct authority from appropriations, and nonexpenditure fund transfers. . . ." Pet. Br. 19., citing JA 69. AFGE does not offer any analysis or explanation of how this passage pertains to the issue of whether revolving funds are appropriated funds for the purposes of applying 31 U.S.C. § 1301(a). However, to the extent that the union contends that by listing "reimbursable authority" and "direct authority from appropriations" separately, the regulation distinguishes

"reimbursable authority," or offsetting contributions, from appropriated funds, the union is mistaken. The short answer to the union's apparent point is that regardless of how DOD instructs its accountants to classify funds, and what labels it creates to aid in this process, *as a matter of law*, revolving funds are appropriated funds.

The union also points to DOD Financial Management Regulation, Vol. 11B, Ch. 3, 030502(A)(4), Pet. Br. 21, and quotes language that "there are no statutory restrictions placed on the obligational availability (or availability to liquidate contract authority obligations) of offsetting collections . . . ." AFGE fails, however, to acknowledge the Depot's explanation of that regulation. As the Depot explained:

> FMR paragraph 030502.A.4 means that the DWCF does not have a limit on how long it has to obligate, or liquidate, its funds. Any DWCF, to include TYAD AWCF, has the flexibility to obligate or liquidate any funds received on any order for any time period – the funds never expire. . . . In contrast, the funds given to activities who operate through annual direct appropriations are generally available for obligation for one year and must be liquidated within five years.

Agency Reply to Union Response to Agency Statement of Position, pp 12-13. The Depot's reasonable interpretation of the DOD regulation, as pertaining to the temporal "obligational availability" of DWCFs, is entitled to deference and should be favored over the union's alternative reading. *See Bowles v. Seminole Rock and*

*Sand Co.*, 325 U.S. 410, 414 (1945) ("the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

The Depot's explanation of the regulation is also consistent with the GAO's own direction:

> [O]ne of the key features of a revolving fund is that it is available without further congressional action and without fiscal year limitation. This continuing availability has long been recognized as an inherent characteristic of a revolving fund, at least as that term is used in statutes enacted by the United States Congress.

United States General Accounting Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, Vol. 4, Ch. 15, Pt.C (2d Ed. 2001). This Court should reject the union's alternative interpretation of the regulation.

**2. The union's argument that revolving funds are not appropriated funds is both barred by § 7123(c) of the Statute and incorrect**

In its brief, the union argues for the first time that "money in a so called revolving fund such as the TYAD AWCF may properly be viewed as 'other than appropriated funds[.]'" Pet. Br. 27. The union relies in this connection on *AINS, Inc. v. United States*, 56 Fed. Cl. 522 (Fed. Cl. 2002) (*AINS*). This argument is both barred by § 7123(c) of the Statute and incorrect.

(a) The union contends in its brief that revolving funds are *not* appropriated funds. "[A]s a matter of statutory construction, . . . 'revolving' funds, and the like, should not be considered appropriated fund activities." Pet. Br. 27, *citing AINS*, 56 Fed. Cl. at 539-40. This new argument stands in stark contrast to the union's theory before the Authority, where the union maintained that although the *Wirtz* rule "applies to traditional revolving funds, . . . it does not apply to the DWCF which operates differently than traditional revolving funds in regards to the disposition of funds." JA 85-86. Phrased differently, the union originally argued that *Wirtz* was right, but that DWCFs represent an exception; now, under a new theory, the union argues that *Wirtz* was incorrectly decided.

Section 7123(c) of the Statute precludes judicial consideration of arguments or theories that a party raises for the first time in review proceedings, but that were not presented to the Authority. Specifically, § 7123(c) provides that "[n]o 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." As the D.C. Circuit ruled in a negotiability case: "The union raises two other arguments in support of [its proposal]. Having failed to raise them before the [Authority], however, it cannot prevail with them here." *Patent Office Professional Assoc. v. FLRA*, 47 F.3d 1217,

1223 (D.C. Cir. 1995); *see also United States Dep't of Commerce, NOAA, Nat'l Weather Svc. v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993) (rejecting contention that arguments were "implicitly raised" below).

Because the union did not argue before the Authority that the general rule in *Wirtz* is incorrect, instead arguing only that the rule does not apply to DWCFs and the TYAD AWCF in particular, and because no extraordinary circumstances exist, § 7123(c) prohibits this Court from now considering the union's new argument.

(b) In any event, the union's new argument is unfounded. The union relies upon *AINS* for the proposition that "'revolving' funds, and the like, should not be considered appropriated fund[s]. . . ." *See* Pet. Br. 27, *citing AINS*, 56 Fed. Cl. at 539-40. However, *AINS* is inapposite. First, *AINS* was not a 31 U.S.C. § 1301(a) case; the Court of Federal Claims was not trying to decide whether or not funds were appropriated for the purposes of determining whether a particular expenditure was authorized. Nor was a DWCF at issue. Instead, *AINS* concerned only whether the Court of Federal Claims had subject matter jurisdiction under Court of Federal Claims Rule 12(b)(1) and the doctrine of sovereign immunity to hear a contractual dispute between a private party and the United States Mint. *AINS*, 56 Fed. Cl. at 526; *see also id.* at 544 ("We have thus come full circle and returned to what this case is really about: sovereign immunity.").

There are a number of other important differences between *AINS* and the instant case. The U.S. Mint receives no appropriated funds, instead "fund[ing] all its activities with revenues derived solely from seigniorage (the difference between the cost of producing a coin and its face value). . . ." *Id.* at 526. As noted above, *supra*, note 2, DWCFs, in contrast, receive sizable annual appropriations to supplement their initial capitalization.

Second, to the extent that *AINS* has any application to the instant case, it supports the Authority's ruling, not AFGE's challenge. *AINS* acknowledges that revolving funds *can* be appropriated funds. In this regard, *AINS*'s test for determining whether an activity is a non-appropriated fund activity is whether, "there is no situation in which appropriated funds could be used to fund the federal entity. . . . In other words, 'appropriated funds not only *are not* used to fund the agency,' here, 'but *could not* be.'" *AINS*, 56 Fed. Cl. at 542 (emphasis added, internal citations omitted). *AINS*'s diminished view of what constitutes an "appropriated fund" is out of step with the overwhelming weight of relevant precedent. However, even under *AINS*'s attenuated definition, the TYAD AWCF is an appropriated fund. Nothing in TYAD AWCF's authorizing statute, 10 U.S.C. § 2208, precludes the appropriation of funds to fund the TYAD AWCF; in fact, the

last three Defense Appropriations Acts have specifically appropriated more than two billion dollars for DWCFs. *Supra*, note 2.

Moreover, the *AINS* court specifically approved of the holding in *Wirtz*. As an illustrative example of *AINS*'s rule, the Court of Federal Claims discussed *Wirtz*:

> For instance, the revolving fund described in [*Wirtz*], the military commissary program, is clearly an appropriated fund activity. In this program, the military commissary's purchases of goods was paid for out of a stock fund funded through annual appropriations. Thereafter, whatever money received for goods on resale to military consumers was credited to the stock fund. The following fiscal year, additional monies were appropriated by Congress to the program. This is far different than, for instance, the Mint's Public Enterprise Fund, where only the initial [c]apital outlay for the program came from appropriated funds. Thereafter, *as required by the authorizing statute*, the Fund became self-financing.

*AINS* , 56 Fed. Cl. at 540, n. 29. (emphasis added). Like the commissary fund in *Wirtz*, there is no statutory requirement that DWCFs *must* be self-financing in perpetuity.

Therefore, not only is *AINS* factually distinguishable; it also supports the Authority's ruling that DWCFs are appropriated funds, rather than the union's contrary theory.

In sum, the Authority correctly held that the TYAD AWCF is a revolving fund and, thus, an appropriated fund for the purpose of applying 31 U.S.C. § 1301(a). Because the 10 U.S.C. § 2208 does not authorize paying employees for

lost personal expenses, the union's proposal is contrary to 31 U.S.C. § 1301(a). Furthermore, the union's arguments to the contrary are mistaken and, as to the union's new argument, not within the Court's jurisdiction to consider.

## CONCLUSION

The petition for review should be denied.

Respectfully submitted,


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February 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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|---|---|---|
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1647, Petitioner | ) | |
| v. | ) | No. 03-4553 |
| FEDERAL LABOR RELATIONS AUTHORITY, Respondent | ) | |

**CERTIFICATE OF SERVICE**

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

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Paralegal Specialist

March 19, 2004

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**§ 7105. Powers and duties of the Authority**

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

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

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

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

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

*** * ***

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

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matter which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

* * *

**§ 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.

* * *

**10 U.S.C. § 2208. Working-capital funds**

(a) To control and account more effectively for the cost of programs and work performed in the Department of Defense, the Secretary of Defense may require the establishment of working-capital funds in the Department of Defense to-- (1) finance inventories of such supplies as he may designate; and (2) provide working capital for such industrial-type activities, and such commercial-type activities that provide common services within or among departments and agencies of the Department of Defense, as he may designate.

* * *

(c) Working-capital funds shall be charged, when appropriate, with the cost of--(1) supplies that are procured or otherwise acquired, manufactured, repaired, issued, or used; and (2) services or work performed; including applicable administrative expenses, and be reimbursed from available appropriations or otherwise credited for those costs, including applicable administrative expenses and costs of using equipment.

* * *

**31 U.S.C. § 1301. Application**

(a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

* * *