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

MEMORANDUM DATE: October 28, 2004

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. ARMY CORPS OF ENGINEERS
WATERWAYS EXPERIMENT STATION ERDC
VICKSBURG, MISSISSIPPI

Respondent

and Case No. AT-CA-01-0305

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3310

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring t he 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 transcript, exhibits, and any briefs filed by the parties.

Enclosures

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

U.S. ARMY CORPS OF ENGINEERS WATERWAYS EXPERIMENT STATION ERDC VICKSBURG, MISSISSIPPI Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3310 Charging Party	Case No. AT-CA-01-0305

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 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 **NOVEMBER 29, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

_____

PAUL B. LANG
Administrative Law Judge

Dated: October 28, 2004
Washington, DC

OALJ 05-03

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

U.S. ARMY CORPS OF ENGINEERS WATERWAYS EXPERIMENT STATION ERDC VICKSBURG, MISSISSIPPI Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3310 Charging Party	Case No. AT-CA-01-0305

Brent S. Hudspeth
For the General Counsel

Lewis H. Burke
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed on February 20, 2001, by the American Federation of Government Employees, Local 3310 (Union) against the United States Army Corps of Engineers, Waterways Experiment Station, ERDC, Vicksburg, Mississippi (Respondent). On May 24, 2001, the Acting Regional Director of the Atlanta Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed unfair labor practices in violation of §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by repudiating an agreement with the Union to provide insulated coveralls (coveralls) to bargaining unit employees and by failing to bargain in good faith with regard to the aforesaid agreement.

On October 8, 2002, the Respondent filed a motion to dismiss. On October 16, 2002, the General Counsel filed an opposition to the Respondent's motion along with a motion

for summary judgment. On October 29, 2002, Administrative Law Judge William B. Devaney issued a Decision along with a recommended Order dismissing the Complaint.[1] The General Counsel filed timely exceptions to the Decision and, on April 15, 2004, in *United States Army Corps of Engineers, Waterways Experiment Station, ERDC, Vicksburg, Mississippi*, 59 FLRA 835 (2004), the Authority issued a Decision and Order sustaining the exceptions and remanding the Complaint for a hearing.

A hearing was held in Vicksburg, Mississippi on July 20, 2004,[2] at which both parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel

The General Counsel maintains that the Respondent repudiated the agreement on the invalid premise that it called for the unlawful expenditure of government funds. According to the General Counsel, the expenditure required by the agreement would have been allowable under both the Purpose Statute, 31 U.S.C. §1301(a), and the Occupational Safety and Health Act, 29 U.S.C. §668(a)(2),(OSHA) inasmuch as the Respondent had already made a determination that coveralls were reasonably necessary to protect bargaining unit employees against an occupational hazard as is required by OSHA. Alternatively, the General Counsel asserts that, in entering into the agreement, the Respondent made the necessary determination of OSHA necessity and that the Respondent's chief negotiator, who executed the agreement on behalf of the Respondent, had been vested with the necessary authority.

The General Counsel also maintains that the Respondent failed to bargain in good faith. This is shown by the fact that, during the course of negotiations, the Respondent's chief negotiator as well as other management officials believed that the agreement would be unlawful. In spite of

[1] The additional effect of Judge Devaney's Decision was to deny the General Counsel's motion for summary judgment.

[2] Judge Devaney retired subsequent to the issuance of the Decision and Order by the Authority and, consequently, was unavailable to preside at the hearing.

that belief, the Respondent failed to have the agreement reviewed for legal sufficiency prior to its execution. According to the General Counsel, the Respondent's failure to seek legal review did not justify its misleading the Union as to its intentions to honor the agreement and is further evidence of the Respondent's failure to bargain in good faith.

The Respondent

The Respondent maintains that the agreement calls for an unlawful expenditure of government funds and that, therefore, its refusal to implement the agreement was not a repudiation within the meaning of the Statute. The expenditure for coveralls would have been unlawful because the Respondent had not determined that they were necessary to protect employees from a work related hazard. The chief negotiator had not made such a determination, nor did he have the authority to do so. Furthermore, the coveralls fall into the category of personal apparel which employees are required to provide for themselves. Accordingly, the expenditure of government funds for the coveralls would have been inconsistent with OSHA and would have been prohibited under the Purpose Statute.

The Respondent asserts that the illegality of the agreement was confirmed by decisions of the Comptroller General and by an opinion from the Government Accounting Office. However, during the course of negotiations over the agreement, the Respondent's chief negotiator was not concerned about OSHA and believed that the Respondent could lawfully purchase coveralls for issuance to bargaining unit employees under the weather conditions specified in the agreement. According to the Respondent, its intent to fully implement the agreement is evidenced by the purchase of coveralls and the installation of a thermometer in Hangar #4 so as to measure the temperature which would trigger its obligation to issue the coveralls.

The Remand by the Authority

In its Decision and Order the Authority remanded this case for a hearing so that the following factual issues could be resolved.

(a) Whether the Respondent, in accordance with OSHA, 29 U.S.C. §668(a)(2), made a determination that the issuance of insulated coveralls to bargaining unit employees was reasonably necessary.

(b) Whether the insulated coveralls agreement itself constituted a determination that the coveralls were necessary under 29 U.S.C. §668(a)(2).

(c) Whether the Respondent's chief negotiator was authorized to make a determination of OSHA necessity on behalf of the Respondent.

(d) Whether the Respondent's chief negotiator had any reservations as to the legality of the agreement.

(e) Whether the Respondent ever intended to implement the agreement after it was executed.

My resolution of those issues is as set forth herein.

Findings of Fact

The Respondent is an agency within the meaning of §7103(a)(3) of the Statute. The Union is a labor organization as defined in §7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining.

The Negotiation of the Insulated Coveralls Agreement

On December 2, 1999, Rudy Smith, the President of the Union, broached the subject of coveralls at a regular meeting of the WES Labor-Management Partnership Council[3] (GC Ex. 16, Item 12c). It was decided to refer the matter to Colonel Robin Cababa, the Commanding Officer, David Haulman, the Respondent's Director of Public Works, and Smith for further discussion. It was expected that Cababa, Haulman and Smith would arrive at a consensus as to the number of coveralls, hats and gloves to be provided.

There is some inconsistency in the testimony as to the events immediately following the meeting of the Partnership Council. Smith testified that during the conference Cababa stated that he thought that it was a good idea to provide coveralls to employees and told Haulman to consult with the

[3] Partnership Councils were discussion groups of representatives of agencies and unions. The groups would meet periodically to discuss matters of mutual interest in an attempt to promote cooperation and to arrive at a consensus so as to avoid disputes. Executive Order 13203 dated February 17, 2001, authorized agencies to withdraw from partnership agreements and to refuse to substantively negotiate management rights issues as defined in §7106 of the Statute.

legal department and find a way to do it legally (Tr. 48). Haulman testified that he did not remember such a meeting (Tr. 141). Edith Caples, the Chief Steward of the Union, testified that the subject of coveralls was brought before the Partnership Council at which time Cababa asked if it would be legal for the Respondent to provide the coveralls.[4] According to Caples, Haulman was to take the initiative of presenting the question to the legal department after which the parties would work out the details. (Tr. 128). In spite of the divergence of testimony, each of those witnesses confirmed that the issue of legality was raised prior to the commencement of negotiations regarding coveralls.[5]

The parties eventually sought the assistance of the Federal Service Impasses Panel (Panel) and of a mediator who was provided by the Federal Mediation and Conciliation Service. An agreement was reached in June of 2000 (Jt. Ex. 1). The Insulated Coveralls Agreement (agreement) states, in pertinent part:

> 1. Consistent criteria will be applied to determine when insulated coveralls are to be provided to employees of [the Respondent] who are asked to perform work in Vicksburg during what is defined as other-than-normal winter weather conditions.
>
> 2. Other-than-normal winter weather conditions is defined as: When an employee is in a duty status, including responses to winter emergencies after hours, and the temperature is less than 35 degrees Fahrenheit. National Weather Service wind chill factors will be used to adjust the actual measurement. . . . To determine whether other-than-normal temperatures exist, a permanent

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The General Counsel does not contend that Cababa's instructions to Haulman to find some way of doing so legally was tantamount to a determination of OSHA necessity.

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Caples also testified that, during term contract negotiations in 1998 or 1999, the Union requested that the Respondent provide coveralls for use during "bad weather". According to Caples, employees had been required to work outside during ice storms. Gene Chatham, who was the Respondent's chief negotiator at the time, requested that the matter be referred to the Partnership Council so that the conclusion of negotiations would not be delayed while a determination was made as to the legality of providing the coveralls; the Union agreed (Tr. 123, 124).

> thermometer will be placed inside the south end of Hangar #4. . . .
>
> * * * * *
>
> 5. An employee is expected to furnish his or her own winter clothing for conditions that normally exist at the location for which the employee was hired.
>
> 6. For employees on TDY [presumably, temporary duty] to work at exterior locations such as Alaska and other high-latitude locations, insulated coveralls will be issued prior to their departure for turn-in when the employee returns.

The agreement contains no language which refers to OSHA or to the protection of employees while working under hazardous conditions.

Haulman testified that he did not seek an opinion as to the legality of providing coveralls prior to the execution of the agreement because he assumed that the agreement would be legal based upon the decision of the Comptroller General in *Matter of: Purchase of Down-Filled Parkas*, 63 Comp. Gen. 245 (1984)*(Down-Filled Parkas)*(GC Ex. 10).[6] According to Haulman, he was not concerned about OSHA requirements (Tr. 145).[7]

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[6] In that decision the Comptroller General determined that the Department of the Interior could lawfully provide the parkas to employees who were temporarily assigned to Alaska or the high country of the western states during winter months. The decision was based upon a finding that the proposed procurement met the three-pronged test of 5 U.S.C. §7903 in that (1) the parkas were "special" in the sense that they were not part of the ordinary and usual furnishings that an employee would be expected to provide for himself, (2) the parkas were beneficial to the government, *i.e.*, essential for the successful accomplishment of the work, rather than solely for the protection of the employees and (3) the employees were engaged in hazardous duty.

[7] Haulman had been made aware of the *Down-Filled Parkas* decision and the decision in *Matter of T. Michael Dillon*, (unpublished opinion, February 24, 1987) (GC Ex. 11) by the auditing department prior to the commencement of negotiations (Tr. 163, 164). He informed Smith of those decisions but felt that they would not prevent the parties from arriving at a legally permissible agreement (Tr. 151).

Haulman arranged for the purchase of 24 sets of coveralls in January of 2000, which was several months prior to the completion of negotiations. According to Haulman, he was not concerned about OSHA standards, but only wished to ensure that employees would be protected during severe weather conditions (apparently there had been ice storms in Vicksburg around that time). He did not seek a legal opinion prior to initiating the purchase (Tr. 154, 155).

After the parties had negotiated the agreement Haulman first learned from the Respondent's auditing and legal departments that the agreement was considered to be illegal. On December 6, 2000, he sent a letter to Caples, who was then the Acting President of the Union, (Jt. Ex. 2) informing her that, after intensive legal research, the Respondent could find no way in which to legally implement the agreement. He further stated that he would provide Caples with a legal opinion at their tentatively scheduled meeting of December 13, 2000. A copy of the letter was addressed to Ellen Kolansky, the Panel representative with whom the parties had been dealing.

On December 13, 2000, Haulman provided Caples with a copy of a memorandum dated December 11, 2000, from Timothy L. Felker, Jr., an attorney for the Respondent (GC Ex. 9) to the effect that the Respondent could not legally expend appropriated funds to purchase coveralls for employees.[8] In support of his conclusion Felker cited the *Down-Filled Parkas* case, which he described as the "controlling GAO decision". Felker further stated that the decision stands for the general rule that employees are required to come to work properly attired for the requirements of their positions and that it is the personal responsibility of each employee to provide necessary wearing apparel.

According to *Down-Filled Parkas* there are three statutory exceptions to the general rule:

1. 5 U.S.C. §5901 which authorizes a uniform allowance when uniforms are required by statute or regulation.

2. OSHA, 29 U.S.C. §668, which requires each agency to designate items of clothing required to comply with an established occupational safety and health program.

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8 The memorandum refers to an inquiry as to whether it would be lawful to provide coveralls for employees who might be called upon to respond to emergencies when temperatures are below 32 degrees.

3. 5 U.S.C. §7903 which states that funds appropriated for supplies and material may be used to purchase and maintain "special clothing" and equipment for the protection of personnel in their assigned tasks.

Felker stated that the first exception does not apply because the employees at issue are not required to wear uniforms. He stated that the second exception also does not apply because he had been given to understand that the Respondent had not designated the coveralls as required under OSHA regulations. The third exception was deemed to be inapplicable because the employees were not engaged in hazardous duty.[9]

Felker cited the *Down-Filled Parkas* decision in support of his conclusion that the Vicksburg employees were not engaged in hazardous duty. While recognizing that cold weather can be hazardous, he noted the sharp contrast between the conditions in *Down-Filled Parkas*, where employees were temporarily assigned to Alaska or the mountainous western states, and the situation in Vicksburg in which the coveralls were intended for use by employees at their local duty station. Felker also noted the contrast between conditions at Vicksburg and those described in *C.E. Tipton, U.S.D.A.*, 51 Comp. Gen. 446 (1972) in which employees were required to ride in open snowmobiles in wind chill factors of between minus 35 degrees and minus 90 degrees.

For all of the above-stated reasons, Felker concluded that the expenditure of appropriated funds to purchase coveralls for the Vicksburg employees would be in violation of the Purpose Statute, 31 U.S.C. §1301(a).[10]

Felker's determination was eventually confirmed by a decision of the Comptroller General (GC Ex. 12) which was issued on October 3, 2002, over a year after the issuance of the Complaint and Notice of Hearing in this case. The reasoning set forth in the decision is basically identical to Felker's analysis. On page 4 of the decision it is stated that, "we would not object to an agency's use of appropriated funds to furnish coveralls so long as the

[9] See footnote 6. Having determined that the third of the three-prong test of 5 U.S.C. §7903 had not been satisfied, Felker stated that it was not necessary to address the other two elements of the test.

[10] Apparently Felker was not asked whether the Respondent could provide coveralls to its Vicksburg employees under any circumstances and he did not address that issue.

agency determines the coveralls to be necessary under OSHA."

The Respondent's Health and Safety Program

The Respondent's health and safety program is contained in EM 385-1-1 (GC Ex. 13(a) through (e))[11] which is part of the Engineering Manual for the entire Army Corps of Engineers. Section 06J.10, pages 127-8, entitled "Cold weather sheltering and clothing requirement", makes no mention of coveralls and does not call for the Respondent to provide protective clothing other than eyewear for protection against ultraviolet light, glare and blowing ice crystals (subparagraph h).

The record contains no other written policy which either obligates the Respondent to provide coveralls or which prohibits it from doing so. Therefore, I find as a fact that the Respondent had not made a determination of OSHA necessity prior to the commencement of negotiations.

The Intent of the Respondent

Although Haulman had been informed of possible legal impediments to providing coveralls to bargaining unit employees, he assumed that the Respondent could legitimately do so under the proper circumstances. This conclusion is based, not only on Haulman's own testimony, but on the fact that he arranged for the purchase of coveralls well before the completion of negotiations and that, after the agreement had been negotiated, he arranged for the installation of a thermometer in Hangar #4 as was required by the agreement. The General Counsel has not explained why Haulman would have taken those actions if he had thought that the negotiation of the agreement was an exercise in futility. While it may be argued that Haulman should have sought a definitive legal opinion prior to executing the agreement, assuming that such an opinion could have been obtained at that time, the weight of the evidence supports the proposition that he sincerely believed that the agreement was legal and that his belief was not unreasonable. Not only did the Respondent, through Haulman, intend to implement the agreement, it took steps to begin doing so.

The Scope of Haulman's Authority

It is undisputed that Haulman had the authority to negotiate and execute the insulated coveralls agreement on behalf of the Respondent. It is also undisputed that

[11] All of those exhibits are tabulated under GC Ex. 13.

neither Haulman nor any other agent had the authority to bind the Respondent to an illegal agreement. The pertinent factual issues are whether Haulman had the authority to determine, in accordance with the requirements of OSHA, if the coveralls were required to comply with an established occupational safety and health program and, if so, whether, by executing the agreement, Haulman had made such a determination.

Haulman testified that he "apparently" did not have the authority to make the determination required by OSHA (Tr. 150). Haulman repeatedly testified that he did not consider OSHA in making the decision to purchase the coveralls or in negotiating the agreement. His prime concern was to maintain productivity in cold weather; safety was a secondary consideration.

Article 30 of the collective bargaining agreement (CBA) (GC Ex.14), entitled "Occupational Safety and Health", states, in pertinent part:

> **SECTION 1.**
>
> 1. It will be the responsibility of the Employer to maintain an occupational Safety and Health Program in accordance [with] the appropriate Code of Federal Regulations, Occupational Safety and Health Act, Engineer Manual 385-1-1, and this Contract.
>
> * * * * *
>
> **SECTION 21.** The parties recognize that temperature conditions in and around work areas can have a direct bearing on employees' comfort, morale, health, and safety. In determining the stress that temperature extremes may place upon an individual employee, the personal comfort and health of the employee will be taken into consideration as well as related factors such as wind chill factor . . . and similar considerations. . . . The findings [*i.e.*, humidity and temperature readings] shall be evaluated by the facility Safety Officer and [the] Employer shall initiate action necessary to correct situations deemed unsafe.
>
> * * * * *
>
> **SECTION 23.** In accordance with Executive Orders, CFM, Engineer Manuals, other directives/

regulations and this Contract, the Activity, will provide at no cost to the employee standard approved safety equipment, approved personal protective equipment, and other devices necessary to provide protection of employees from hazardous conditions encountered during performance of official duties. . . .

* * * * *

SECTION 25. Protective devices include, but are not limited to . . . foul weather clothing . . . . Protective devices do not include such items normally provided by employees as a part of the requirement of doing their jobs. . . .

* * * * *

SECTION 55. Employees working in air temperatures of -15 F° or less shall utilize the work/warm up regiment [*sic*].

SECTION 56. At air temperatures of 36 F° or less, workers who become immersed in water or whose clothing becomes wet shall immediately be provided a change of clothing and treated for hypothermia.

SECTION 57. When manual dexterity is not required of a worker he shall be provided, and wear, gloves at the following temperatures:

a. for light work, 40 F°, and

b. for moderate and heavy work, 20 F°.

Article 30 contains other language pertaining to work in cold weather and below designated temperatures. However, it does not define hazardous conditions. Furthermore, Article 30 identifies the facility Safety Officer as the representative of the Respondent who has the authority to classify specific conditions as being hazardous. It is significant to note that the article does not specifically mention coveralls nor does it define "foul weather clothing" within the context of Section 25. The record contains no evidence of determinations regarding the legality of any of the provisions of the CBA which require the Respondent to provide protective clothing to employees.

Jerry W. Haskins is the Chief of Safety and Environmental Management for the Respondent. Haskins testified that he is charged with the responsibility of determining what is necessary to comply with OSHA. Haulman did not seek Haskins' advice before executing the insulated coveralls agreement. He first learned of the agreement when the Department of Public Works (which was headed by Haulman) initiated the procurement of coveralls (Tr. 79).[12] Haskins contacted Bill Walton, the chief of audit. He learned that Walton was not aware of the procurement but said that he would look into it. Haskins understood that Walton consulted with the office of counsel and that the procurement was eventually stopped.

Haskins also testified that OSHA is silent as to cold weather protection and that the Respondent, like all employers, is bound by OSHA regulations calling for the analysis of hazards in the workplace as well as the provision of safeguards to ensure that employees are not injured. Accordingly, Haskins believes that coveralls are not necessary to protect employees against hazardous conditions (Tr. 182). According to Haskins, the hazards associated with cold weather are best controlled by such measures as moving the work indoors when possible, providing area heaters and increasing the frequency of warmup breaks (Tr. 184, 185).

Hilton E. Kalusche is a industrial hygienist who is responsible for the recognition, evaluation and control of health hazards in the workplace. Prior to his employment by Respondent, Kalusche was an OSHA compliance officer for nine years and is familiar with OSHA and its regulations. In around 1995 Kalusche conducted a detailed hazard analysis for the Respondent. The analysis entailed a review of all of the job descriptions within the Department of Public Works and a position hazard analysis for each of them. The only cold weather hazards that Kalusche identified were for the electricians. He recommended training in the signs and symptoms of heat and cold stress and in cold weather clothing (Tr. 224, 225).

Kalusche did not see the insulated coveralls agreement before it was executed. In his opinion, a wind chill factor of 35 degrees Fahrenheit is not a hazardous condition.

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[12] There is a possible inconsistency between this testimony and the testimony of Haulman to the effect that he initiated the procurement about six months prior to the execution of the agreement. Haskins did not indicate when he became aware of the procurement. A resolution of the issue is not crucial to this Decision.

Frostbite and hypothermia are the two conditions which are usually associated with cold. They are primarily controlled through engineering measures, such as heaters or shields, or administrative controls, such as allowing employees an opportunity to get warm. Personal protective equipment such as coveralls would be another alternative (Tr. 226, 227). Kalusche is responsible for maintaining the OSHA accident logs for the Respondent. There has not been a reported case of a cold weather injury during the five years that he has been responsible for the logs (Tr. 228).

The Respondent's Representations to the Union

There is no evidence that Haulman ever represented to the Union that he had the authority to determine whether the coveralls were necessary to the Respondent's compliance with OSHA. Furthermore, there is nothing in the language of either Article 30 of the CBA or of the agreement itself to suggest that, by executing the agreement, Haulman was indicating that the Respondent had determined that the coveralls were needed to effect compliance with OSHA.

It is possible that, in the absence of any contrary communication from the Respondent, the Union assumed that the issue of legality had been resolved. While, in retrospect, Haulman might have been prudent to have sought an earlier legal determination or at least a clarification,[13] the Union was aware of the reservations expressed by the auditors and did not press the issue. It is not alleged that either Haulman or another representative of the Respondent specifically told the Union that the agreement was legal.

Haulman testified that he believes that, in light of the decisions of the Comptroller General, he still can issue the coveralls under severe weather conditions such as an ice storm (Tr. 157). That reasonableness of that belief was corroborated by Kalusche's testimony that protective clothing such as coveralls can be an effective, if not preferred, method of combating hypothermia. Therefore, it is understandable that Haulman did not seek a legal determination while negotiations were still in progress. Haulman thought that the coveralls could lawfully be issued under appropriate conditions and that a wind chill index of 35 degrees Fahrenheit was an appropriate condition. While he might have been mistaken in that belief, he did nothing to mislead the Union.

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Haulman conceded that point at the hearing (Tr. 164).

For the reasons set forth above, I have concluded that Haulman had neither the actual nor the apparent authority to make a determination as to the necessity of coveralls to OSHA compliance. The uncontroverted evidence shows that Haulman did not consider OSHA either in the procurement of the coveralls or in the negotiation of the insulated coveralls agreement. Haskins' testimony indicates that he, rather than Haulman, had the actual authority to make the necessary determination. There is no evidence to support the General Counsel's contention that Haulman's authority to negotiate the coveralls agreement included the implied authority to determine whether the coveralls were necessary within the context of OSHA.

In view of the limitations to Haulman's authority, his execution of the agreement on behalf of the Respondent did not constitute a determination by the Respondent that the coveralls were necessary to protect employees from a hazard under the conditions stated in the agreement.

Discussion and Analysis

The Respondent Did Not Repudiate the Agreement

There is no dispute as to the applicable law regarding repudiation. Although not every breach of an agreement between an agency and a union is an unfair labor practice, the repudiation of an agreement is a violation of the Statute, *U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois*, 19 FLRA 454, 467 (1985). A contract is repudiated when (a) the breach is clear and patent and (b) when the nature of the breach goes to the heart of the agreement, *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211, 1218 (1991).

The Respondent does not deny that it has refused to implement the agreement, that its breach of the agreement is clear and patent and that the nature of the breach goes to the heart of the agreement. Rather, it relies upon the doctrine, as set forth in *General Services Administration, Washington, DC*, 50 FLRA 136, 139 (1995), that it is not an unfair labor practice for an agency to breach an agreement that calls for action which is contrary to law.

The pertinent law regarding the issue of the legality of the agreement has been identified by the Authority in its Decision and Order, 59 FLRA at 837, 838, and by Felker in his memorandum of December 11, 2000 (GC Ex. 9). Although the General Counsel correctly maintains that decisions of the Comptroller General are not binding, the Authority has

cited the decision in *Matter of: Purchase of Insulated Coveralls, Vicksburg, Mississippi* (GC Ex. 12) with approval. In particular, the Authority indicated that, in order to reach a legitimate conclusion as to the legality of the agreement, it is necessary to determine whether in accordance with OSHA, 29 U.S.C.A. §668(a)(2)[14], the Respondent found that coveralls were reasonably necessary to protect employees against hazards. In *Mississippi Insulated Coveralls* the Comptroller General assumed that the Respondent had not made that determination. One of the reasons for the Authority's remand was so that a factual finding could be made as to whether the Comptroller General's assumption was correct.

The threshold issue in determining whether the Respondent approved the issuance of coveralls is whether it regarded a wind chill index of 35 degrees Fahrenheit as posing a hazard to its employees. The unrebutted testimony of both Haskins and Kalusche supports the conclusion that the Respondent did not regard that condition as hazardous. The evidence also suggests that the Respondent has not yet made a determination as to whether the coveralls may be issued under other circumstances. The General Counsel has produced no evidence to show that the Respondent specifically determined that the coveralls were necessary for OSHA compliance. I have found as a fact that Haulman did not have either the actual or the apparent authority to make the determination as alleged by the General Counsel.

Since the Respondent did not make a determination of OSHA necessity either before or after the commencement of negotiations over the agreement, the purchase of coveralls

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[14] The cited portion of OSHA provides that:

> It shall be the responsibility of the head of each Federal agency . . . to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 655 of this title. The head of each agency shall (after consultation with representatives of the employees thereof)-
>
> * * * * *
>
> (2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees . . . .

in compliance with the agreement would not be an authorized expenditure of appropriated funds and would be a violation of the Purpose Statute, 31 U.S.C. §1301.[15] Accordingly, the implementation of the agreement would be illegal and the Respondent has not repudiated the agreement within the meaning of §7116(a)(1) and (5) of the Statute.

The Respondent Did Not Bargain in Bad Faith

The General Counsel has correctly cited *U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 531 (1990) (*Wright-Patterson*) in support of the proposition that the Authority will consider the totality of circumstances in deciding whether a party has fulfilled its duty to bargain. In considering all of the circumstances surrounding the negotiation of the coveralls agreement, I have concluded that the Respondent did not violate its duty to bargain in good faith within the meaning of the Statute.

The General Counsel has emphasized the fact that Haulman continued to negotiate in spite of his awareness of the *Down-Filled Parkas* decision and of the concerns of the auditing department regarding the legality of the expenditure of funds to provide coveralls. However, he promptly notified the Union of the auditing department's concerns and both of the parties proceeded to negotiate on the assumption that the issuance of the coveralls would be legal under some circumstances. That assumption is correct and was eventually confirmed by the decision of the Comptroller General. The clear import of that decision is that the Respondent is not authorized to purchase the coveralls only because they have not been deemed necessary for OSHA compliance under the conditions set forth in the agreement.

It is significant to note that there is no blanket prohibition against the issuance of coveralls and none of the cited decisions of the Comptroller General suggests such a prohibition. Furthermore, neither Haskins nor Kalusche indicated that the coveralls would not be approved under any circumstances.

The evidence shows that both the Union and the Respondent knew or should have known that an agreement for the issuance of coveralls might be, but would not necessarily be, illegal. Therefore, the Union was not

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The Purpose Statute prohibits the use of appropriated funds for purposes other than those for which the funds were appropriated "except as otherwise provided by law."

misled by the fact that Haulman continued to negotiate.[16] Furthermore, Haulman's disclosure of the possibility of problems was tantamount to notice that he did not have the authority to determine the necessity of the coveralls for OSHA compliance. The General Counsel has not alleged that there is any basis other than OSHA necessity for determining the legality of the agreement.

The General Counsel's contention that the Respondent never intended to implement the agreement is effectively rebutted by the fact that Haulman arranged for the purchase of a number of coveralls and the installation of a thermometer in Hangar #4. The General Counsel has not advanced an alternate theory as to the reason that those actions were taken. I am unpersuaded by the argument that the fact that Haulman was not disciplined for arranging for the purchase of the coveralls indicates that the Respondent does not genuinely believe that the agreement is illegal. It is equally likely that the Respondent's failure to take action against Haulman reflects its agreement with Haulman's assumption that the coveralls could be issued under certain conditions. The timing of the purchase suggests that the coveralls were obtained in anticipation of reaching some agreement with the Union rather than the specific agreement which was executed several months later.

The General Counsel also maintains that Haulman misled the Union by falsely claiming that there had been in-depth research as to the available means of legally implementing the agreement. Felker's letter indicates that such research was eventually accomplished. Moreover, any research conducted before the execution of the agreement would have been inconclusive.

The General Counsel argues that the Respondent's bad faith is further established by its failure to implement the agreement, ". . . just by virtue of saying that insulated coveralls are reasonably necessary under OSHA" (GC brief, p. 29). Yet, the General Counsel has presented no evidence to rebut the testimony of Haskins and Kalusche to the effect that such a determination would have been inconsistent with the purpose of OSHA, which is to protect employees from hazardous conditions rather than from extremes in

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[16] There is no evidence as to when the parties agreed on a wind chill index of 35 degrees Fahrenheit as the standard for the issuance of the coveralls.

temperature.[17] The Respondent is under no duty to make an unjustified determination of OSHA necessity in order to salvage an agreement which, although negotiated in good faith, would require a violation of the Purpose Statute.

The General Counsel's reliance on *Department of the Air Force, Eielson Air Force Base, Alaska*, 23 FLRA 605, 610 (1986) is misplaced. The duty to bargain in good faith includes the obligation to empower representatives to negotiate on all issues. However, all negotiated agreements are subject to legal review just as they are often subject to approval by the agency head and ratification by union members. The General Counsel has cited no authority for the proposition that §7116(a)(5) of the Statute requires an agency to guarantee that a subsequent legal review will be favorable. The evidence proves that Haulman was fully authorized to negotiate the agreement and that he, in fact, did so. The weight of the evidence does not support the General Counsel's contention that the Respondent's subsequently stated concerns about the legality of the agreement were pretextual.

Even if Haulman had made an earlier inquiry into the legality of the agreement, the most that he would have learned was that the issuance of coveralls is legal under some circumstances and illegal under others. It was not until after the parties had completed negotiations that a definitive legal opinion could be obtained because only then could the Respondent have made a determination of necessity under OSHA. Both Felker and, later, the Comptroller General based their conclusions on the assumption that the Respondent had not determined that the coveralls were necessary for OSHA compliance. That assumption was correct. Furthermore, Haskins confirmed that, as the official responsible for making the OSHA determination on behalf of the Respondent, he had concluded that the coveralls were not necessary for OSHA compliance at a wind chill index of 35 degrees Fahrenheit.[18]

For the foregoing reasons I have concluded that the Respondent did not commit unfair labor practices in violation of §7116(a)(1) and (5) of the Statute by failing

[17] The General Counsel has not suggested that the opinions expressed by Haskins and Kalusche were motivated by the Respondent's desire to avoid the agreement.

[18] There is no evidence that either Haulman, Smith or any other representative of the parties inquired as to the conditions, if any, under which coveralls would be deemed necessary to OSHA compliance.

to implement the insulated coveralls agreement or by failing to negotiate in good faith with respect to the insulated coveralls agreement. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

IT IS HEREBY ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, October 28, 2004

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PAUL B. LANG
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-01-0305 were sent to the following parties:

_____

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Dated: October 28, 2004

Washington, DC