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/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. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 2, 2002**, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 29, 2002
Washington, DC

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

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: October 29, 2002

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
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 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 transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-01
WASHINGTON, D.C.

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

Lewis H. Burke, Esquire
For the Respondent

Mr. Rudy Smith
For the Charging Party

Brent S. Hudspeth, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

· The American Federation of Government Employees, Local 3310 (hereinafter, "Union") is the exclusive representative of an appropriate unit of employees of the U.S. Army Corps of Engineers, Waterways Experiment Station, ERDC, Vicksburg, Mississippi (hereinafter, "Respondent") (G.C. Exhs. 1(b), 1(c) ¶ 2 and 3).

· From December, 1999, until June, 2000, the Union and Respondent met and negotiated the provision of insulated coveralls. On, or about, June 16, 2000, the parties entered into a written agreement entitled, "Insulated Coveralls Agreement" (G.C. Exhs. 1(b) and 1(c), ¶ 9 and 11).

· On December 6, 2000, Respondent repudiated the Agreement (G.C. Exhs. 1(b) and 1(c), ¶ 3); on, or about, December 11, 2000, Respondent provided the Union a Memorandum explaining that Respondent would not implement the, "Insulated Coveralls Agreement", because the proposed agreement required the purchase of special clothing and was, pursuant to the decision of the Comptroller General in 63 Comp. Gen. 245 (1984), illegal (G.C. Exhs. 1(b) and 1(c), ¶ 14 and Affirmative Defense, G.C. Exh. 1(c)).

· The Union filed the charge herein on February 20, 2001 (G.C. Exh. 1(a)) which asserted,

> "Since on or about December 6, 2000 and continuing to date, the above named agency, through its Chief Negotiator (David Haulman), committed an act of bad faith bargaining, failing to implement the insulated coveralls agreement which he signed (No. 00-FSIP-105), 'For the Employer'".

· The Complaint and Notice of Hearing issued on May 25, 2001, and set the hearing for August 22, 2001. The Complaint, in pertinent part, provided:

> "13. On December 6, 2000, the Respondent repudiated the agreement described in paragraphs 11 and 12.
>
> "14. On or about December 11, 2000, the Respondent, through Haulman, provided the Charging Party a memorandum explaining that the Respondent would not implement the agreement described in paragraphs 11 and 12 due to the Comptroller General's decision in Matter of Down-Filled Parkas, 63 Comp. Gen. 245 (1984).
>
> "15. By the conduct described in paragraph 13, the Respondent committed an unfair labor practice in violation of U.S.C. § 7116(a)(1) and (5).
>
> "16. By the conduct described in paragraphs 9 through 14, the Respondent has failed to negotiate in good faith and thereby has committed an unfair labor practice in violation of U.S.C. § 7116(a)(1) and (5)." (G.C. Exhs. 1(b), ¶ 13, 14, 15 and 16).

· At the pre-hearing conference call in this matter the parties agreed that resolution of the case depended on the legality, or illegality, of the Settlement Agreement

negotiated and signed on, or about, June 16, 2000, and further agreed, as set forth in, "Order Confirming Pre-Hearing Conference Agreement (G.C. Exh. 1 (d) to General Counsel's Opposition to Respondent's Motion to Dismiss and General Counsel's Motion for Summary Judgment), as follows:

> "1. The hearing now scheduled for August 22, 2001, is postponed.
>
> "2. Because the determination of this case turns on the legality, or illegality, of the Settlement Agreement negotiated and signed on, or about June 16, 2000, Respondent will, forthwith, seek decision by its Headquarters as to whether it will seek a ruling by the Comptroller General on the legality of the Settlement Agreement.
>
> "3. Respondent will notify all parties by COB August 28, 2001, whether a ruling by the Comptroller General will be sought.
>
> "4. If the decision is <u>not</u> to seek a ruling by the Comptroller General, the hearing in this case will be held on August 30, 2001, commencing at 9:00 a.m., at a place to be determined, in Vicksburg, Mississippi.
>
> "5. If the decision is to seek a ruling by the Comptroller General, Respondent shall promptly, and in no event later than September 11, 2001, without the express concurrence of General Counsel and Local 3310, submit the request to the Comptroller General. Respondent understands and agrees that any submission, to be meaningful, must present to the Comptroller General <u>all</u> the facts of the Settlement Agreement. Respondent will furnish General Counsel and Local 3310 each a copy of its submission to the Comptroller General.
>
> "6. If a ruling by the Comptroller General is sought, this case will be postponed indefinitely pending the ruling of the Comptroller General."
>
> . . . ." (G.C. Exh. 1(d)

· Respondent did seek a ruling by the Comptroller General; the case was postponed indefinitely; and on October 3, 2002, the Comptroller General, File No. B-288828 "Matter of Purchase of Insulated Coveralls, Vicksburg, Mississippi" held that,

"CONCLUSION

> "ERDC appropriations are not available to purchase the insulated coveralls. Absent statutory authority, appropriated funds are not available to purchase articles of clothing for federal employees. There are three statutes that permit agencies to use appropriations, in varying circumstances, for this purpose. None of the three statutes authorize ERDC to purchase insulated coveralls in the circumstances presented herein." (G.C. Exh. 1(e) to General Counsel's Opposition to Respondent's Motion to Dismiss and General Counsel's Motion for Summary Judgment; Exhibit A to Respondent's Motion to Dismiss) (Emphasis supplied).

· On October 8, 2002, Respondent filed a Motion to Dismiss, grounds being, ". . . that the Comptroller General has issued a Decision that appropriated funds could not be expended for the purchase, which was the basis of the Unfair Labor Practice. A copy of the Decision is attached hereto as Exhibit 'A'". (Respondent's Motion to Dismiss was received on October 8, 2002).

· On October 16, 2002, General Counsel filed an Opposition to Respondent's Motion to Dismiss and General Counsel's Motion for Summary Judgment which was received by facsimile mail on October 16, 2002.

CONCLUSIONS

· Allegation of bad faith bargaining unsupported

Paragraph 10 of the Complaint (G.C. Exh. 1(b) alleged, and Respondent admitted (G.C. Exh. 1(c), that Respondent's Chief Negotiator, Mr. David Haulman, Director of Public Works, was aware of the Comptroller General's decision in Matter of Down-Filled Parkas, 63 Comp. Gen. 245 (1984), from which the General Counsel argues,

> ". . . Haulman was clearly aware of the Comptroller General decision in Matter of Down-Filled Parkas, . . . and continued to bargain despite his concerns over the lawfulness of this appropriation of funds based on that decision. Instead, Haulman continued to negotiate; entered into the agreement; and repudiated the agreement based upon this same Comptroller General decision. Under these circumstances . . . General Counsel contends that the Respondent never had any intention of complying with the agreement. . .

> ". . . General Counsel asserts . . . that the Respondent acted in a manner designed to avoid an agreement and negotiated in bad faith in violation of section 7116(a)(1) and (5)." (G.C. Brief at 10-11).

General Counsel's argument, while imaginative, does not bear close scrutiny and is unsupported by the record. First, the decision of the Comptroller General did authorize the furnishing of down-filled parkas, stating, in part, "The Office of Surface Mining (OSM), Department of Interior, may furnish down-filled parkas to employees temporarily assigned to Alaska or the high country of the Western States during the winter months . . . ." (63 Comp. Gen. 245). It would be easy for anyone reading the decision to assume, without appreciating or undertaking the limited scope of the decision, that if down-filled parkas were permissible then down-filled coveralls must also be permissible. The Charging Party, whose demand for down-filled coveralls appears directly based on the Comptroller General's decision, obviously so viewed the Comptroller General's decision as did Mr. Haulman. The parties did reach agreement.

Second, nothing indicates, or even suggests, that Mr. Haulman ever had any reservations about the legality of the Agreement he signed on, or about, June 16, 2000.

Third, it was not Mr. Haulman who declared the Agreement illegal; rather; it was legal counsel for Headquarters ERDC.

Fourth, while Paragraph 13 of the Complaint alleged (G.C. Exh. 1(b)) and Respondent admits (G.C. Exh. 1(c)), that, "On December 6, 2000, the Respondent repudiated the agreement . . . .", there is no contention that Mr. Haulman did anything on December 6, 2000, and the allegation of Paragraph 14 of the Complaint (G.C. Exh. 1(b)), admitted by Respondent (G.C. Exh. 1(c)), that, "On or about December 11, 2000, the Respondent, through Haulman, provided the Charging Party a memorandum explaining that the Respondent would not implement the agreement . . . ." because the purchase of special clothing, i.e. insulated coveralls, was illegal (G.C. Exh. 1(c), Affirmative Defense), asserts no more than that Mr. Haulman acted as a conduit for the furnishing of Respondent's memorandum.

Accordingly, because there is no support for the allegation that Respondent bargained in bad faith, the allegation of Paragraph 16 of the Complaint (G.C. Exh. 1(b)) is dismissed.

· The Complaint alleges only Repudiation

Paragraph 13 of the Complaint (G.C. Exh. 1(b)), as noted above, alleges that, "On December 6, 2000, the Respondent repudiated the agreement . . . ." and Paragraph 15 of the Complaint (G.C. Exh. 1(b)), alleges, "By the conduct described in paragraph 13, the Respondent committed an unfair labor practice in violation of U.S.C. § 7116(a)(1) and (5)." There is no allegation that Respondent failed or refused to bargain.

· Agreement became final subject to applicable law

The Agreement was signed by the parties on, or about, June 16, 2000. The head of the agency neither approved, nor disapproved, the agreement within the 30 day period as provided by §7114(c)(2) of the Statute, and §7114(c)(3) provides as follows:

> "(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation." (5 U.S.C. § 7114(c)(3)).

The agreement of June 16, 2000, became effective; subject, however, ". . . to the provisions of this chapter and any other applicable law, rule, or regulation." (Emphasis supplied), which would include illegality under governing statutes. The legal Office at Respondent's Headquarters determined that implementation of the Agreement would be unlawful and the Union was informed on December 6, 2000, that Respondent would not implement the Agreement; and on, or about, December 11, 2000, Respondent gave the Union a memorandum explaining why it would not implement the Agreement.

· Pursuant to the Pre-Hearing Conference Agreement, the Comptroller General has issued his decision and concluded that purchase of insulated coveralls would be unlawful

The Comptroller General issued his decision in the "Matter of: Purchase of Insulated Coveralls, Vicksburg, Mississippi" on October 3, 2002, and concluded,

> "ERDC appropriations are not available to purchase the insulated coveralls. Absent statutory authority, appropriated funds are not available to purchase

> articles of clothing for federal employees. There are three statutes that permit agencies to use appropriations, in varying circumstances, for this purpose. None of the three statutes authorize ERDC to purchase insulated coveralls in the circumstances presented herein." (File No. B-288828, October 3, 2002).

By so ruling, the Comptroller General, like Respondent's legal Office, has found that implementation of the June 16, 2000, Insulated Coveralls Agreement would be unlawful. Consequently, Respondent's repudiation, by refusing to implement the Agreement, on December 6, 2000, did not violate §7116(a)(5) or (1) of the Statute because implementation would have been unlawful. Department of Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA 543 (1982); U.S. Department of the Interior, Bureau of Reclamation, 20 FLRA 587, 588-89 (1985); Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 49 FLRA 1522, 1527-28 (1994). Of course, as the Authority has made clear,

> "When management is required to correct an unlawful practice once discovered, there is nonetheless an obligation to give notice of the change and, upon request, bargain to the extent consistent with law and regulation concerning the impact of the required change and, if possible, concerning its implementation. See Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 49 FLRA 1522, 1527-28 (1994) and Department of Interior, U.S. Geological Survey, Conservation Division and AFGE, Local 3457, 9 FLRA 543 (1982)." 24th Combat Support Group, Howard Air Force Base, Republic of Panama, 55 FLRA 273, 275, 290 (1999) (Emphasis supplied).

Here, Respondent gave the Union notice on December 6, 2000, that it would not implement the Insulated Coveralls Agreement; and on, or about, December 11, 2000, gave the Union a memorandum explaining why it would not implement the Agreement, namely that implementation would be unlawful. At no time did the Union request to bargain on the impact or implementation of the Respondent's decision; the charge, filed by the Union on February 20, 2001, did not allege a refusal to bargain; nor does the Complaint allege a refusal to bargain. Therefore, because the Union had notice and ample opportunity to request bargaining on the impact and/or implementation of Respondent's decision but did not do so, Respondent did not violate §7116(a)(5) or (1) of the Statute by not bargaining on impact and implementation.

Because the Complaint alleges solely that Respondent, on December 6, 2000, repudiated the agreement by refusing to purchase insulated coveralls (Par. 13) and thereby (Par. 15) violated §7116(a)(5) and (1); but because, the Comptroller General has determined that purchase of insulated coveralls would be unlawful, Respondent's repudiation of the Agreement on December 6, 2000, by refusing to purchase insulated coveralls, did not violate section 7116(a)(5) or (1) and I shall recommend that the Complaint be dismissed.

Nothing in this decision shall be construed, in any manner, to prevent the Union requesting negotiations with respect to matters of safety and health, as the Comptroller General has noted,

> "Although we conclude that ERDC may not purchase the coveralls under authority of section 7903, we do not read section 7903 to bar negotiations between an agency and a union with respect to matters of safety and health. See 57 Comp. Gen. 379, 382 (1978). An agency may provide protective clothing regardless of whether the purchase satisfies the three tests of section 7903 if the agency determines that the clothing is necessary to satisfy Occupational Safety and Health Act (OSHA) requirements . . . ." (B-288828, p. 3).

The Comptroller General having determined that Respondent's purchase of insulated coveralls would have been unlawful, Respondent's repudiation of the Agreement on December 6, 2000, by refusing to implement the Agreement, did not violate section 7116(a)(5) or (1) of the Statute and it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. AT-CA-01-0305 be, and the same is hereby, dismissed.

_____

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 29, 2002
Washington, DC,

CERTIFICATE OF SERVICE

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

CERTIFIED MAIL: **CERTIFIED NOS**:

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_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: OCTOBER 29, 2002

WASHINGTON, DC