68 FLRA No. 151

UNITED STATES
DEPARTMENT OF THE AIR FORCE
WHITEMAN AIR FORCE BASE, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2361
(Union)

0-AR-4911

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DECISION

September 22, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

For several years, consistent with its collective-bargaining agreement with the Union, the Agency provided employees at its Air Force base in Missouri with cold-weather-protective clothing (cold-weather clothing). The Union filed a grievance alleging that the Agency violated the parties' agreement when it stopped the practice of purchasing the clothing. Arbitrator Mark W. Suardi sustained the grievance. In his award, the Arbitrator found that using appropriated funds to purchase cold-weather clothing was not contrary to federal appropriations law. There are three substantive questions before us.

The first question is whether the award is based on a nonfact. As parties may not challenge an arbitrator's evaluation of evidence as a nonfact – and the Agency's nonfact exception attempts to do so – the answer is no.

The second and third questions are, respectively, whether the award is contrary to law and the Arbitrator exceeded his authority by directing the Agency to continue to pay for cold-weather clothing, contrary to federal appropriations law. For the reasons discussed in Section IV.B. of this decision, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings regarding the contrary-to-law issue, and thus, we find it premature to resolve the exceeded-authority issue.

II. Background and Arbitrator's Award

For several years, the Agency used appropriated funds to purchase cold-weather clothing for bargaining-unit employees at its Air Force base in Missouri. The Agency purchased the clothing consistent with Article 28, Section 2 of the parties' agreement (Article 28-2). Article 28-2 provides that:

> Employees who are required to perform duties that may expose them to unsafe or hazardous conditions will be provided with necessary approved safety equipment and personal protective clothing. Necessary cold[-]weather[-]protective clothing will also be provided to [e]mployees who are routinely required to be exposed to cold stress while performing work.[1]

In March 2012, the Agency decided to stop purchasing cold-weather clothing, and issued a memorandum to that effect. The Agency explained that purchasing the clothing was contrary to federal appropriations law. The Union filed a grievance contesting the Agency's decision to stop purchasing the clothing. When the matter was not resolved, the parties submitted it to arbitration.

As relevant here, the issue before the Arbitrator was whether "Article 28[-2], [s]entence [two], [which states that] '[n]ecessary cold[-]weather [-]protective clothing will also be provided to employees who are routinely required to be exposed to cold[-]weather stress while performing work,' [is] contrary to law or government-wide rule? If not, what is the appropriate remedy?"[2]

The Arbitrator sustained the grievance. The Arbitrator directed the Agency to rescind its decision to stop purchasing cold-weather clothing, and to resume "the purchase of cold[-]weather[-]protective clothing" "as it has in the past."[3] The Arbitrator found two legal bases for the Agency to comply with its contractual obligation in Article 28-2 to make such purchases.

First, the Arbitrator found that such purchases "are consistent with . . . 5 U.S.C. § 7903."[4] Section 7903 provides that appropriated funds may be used "for the

[1] Award at 4 (citing Art. 28-2 of the parties' agreement).
[2] *Id.* at 5.
[3] *Id.* at 15.
[4] *Id.* at 11.

purchase and maintenance of special clothing . . . for the protection of personnel in the performance of their assigned tasks."[5]

The Arbitrator found that the Agency met the requirements of § 7903 because (1) "over the years[,] both sides have recognized the special nature of the Agency's mission at [the Air Force base] and the special nature of the cold[-]weather[-]protective purchases"; (2) the purchase of this clothing was "in furtherance of the Agency's mission and necessary to the accomplishment of recognized bargaining[-]unit work"; and (3) "the outside work involved was, and still is, properly characterized as hazardous duty under extreme cold[-]weather conditions."[6] The Arbitrator further elaborated that "the agreed-upon language of [the parties' agreement], the parties' pre-[memorandum] course of dealing[,] and the realities of the working environment at [the Agency] all combine to meet the requirements of . . . § 7903."[7] And the Arbitrator added: "the parties' [pre-memorandum] practice recognized the Agency's responsibility to provide cold[-]weather [-]protective clothing."[8]

Second, the Arbitrator found that such purchases are authorized by 29 U.S.C. § 668, which provides, in relevant part, that agencies "shall . . . acquire . . . personal protective equipment . . . reasonably necessary to protect employees."[9] The Arbitrator found that "the language of [Article 28-2] and the parties[']' past treatment of the issue clearly and unambiguously obligate the Agency to use [appropriated funds] to provide necessary cold[-]weather[-]protective clothing as it has in the past."[10] The Arbitrator also distinguished the case before him from Comptroller General precedent upon which the Agency relied.

The Arbitrator noted a Union argument that the Agency could use non-appropriated funds to pay for the clothing. But, because he found that the Agency could use appropriated funds for that purpose, he found it unnecessary to resolve the Union's argument.

The Arbitrator sustained the grievance. As a remedy, he directed the Agency to comply with Article 28-2 by continuing to use appropriated funds, "as it has in the past," to purchase cold-weather clothing.[11]

The Agency filed exceptions to the award, and the Union filed an opposition to the exceptions.

[5] 5 U.S.C. § 7903.
[6] Award at 11-12.
[7] *Id*. at 12 n.1.
[8] *Id.* at 13.
[9] 29 U.S.C. § 668(a)(2).
[10] Award at 14.
[11] *Id*. at 15

III. Preliminary Matters

A. The Authority will consider the Agency's corrected exceptions and the attachments to the original exceptions.

The Agency filed both its exceptions, and a corrected copy of its exceptions, before the deadline for filing exceptions in this case. But the Agency did not resubmit the attachments to its original exceptions with its corrected exceptions. The Agency requests that the Authority consider the corrected exceptions and the attachments to the original exceptions.

As the Agency filed both the original and the corrected exceptions within the time limit for filing exceptions, the Authority will consider the corrected exceptions and the attachments to the original exceptions.

B. One of the Agency's exceptions fails to raise a recognized ground for review.

The Authority's Regulations enumerate the grounds upon which the Authority will review arbitration awards.[12] In addition, the Regulations provide that if exceptions argue that an arbitration award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[13] Furthermore, § 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c) of the Authority's Regulations, or "otherwise fails to demonstrate a legally recognized basis for setting aside the award."[14] Thus, an exception that does not raise a recognized ground is subject to dismissal.[15]

The Agency argues that the award is "contrary to the [parties' agreement] itself."[16] This argument does not raise a ground for review currently recognized by the Authority, and the Agency does not cite any legal authority that supports a conclusion that the argument raises a private-sector ground not currently recognized by the Authority.[17] As such, we dismiss this exception.

[12] 5 C.F.R. § 2425.6(a)-(b).
[13] *Id.* § 2425.6(c).
[14] *Id.* § 2425.6(e)(1).
[15] *AFGE, Local 738*, 65 FLRA 931, 932 (2011); *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part).
[16] Exceptions at 15.
[17] *NAIL, Local 17*, 68 FLRA 97, 99 (2014).

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency claims that the award is based on a nonfact.[18] To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[19] The Authority has long held that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient as based on a nonfact.[20]

In its nonfact exception, the Agency argues that "the Arbitrator . . . assumed the existence of facts not in evidence"[21] when he found that one of the Comptroller General decisions on which the Agency relied, *Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Engineers* (*Rock Island*),[22] did not support the Agency's position. According to the Agency, the Arbitrator improperly discounted the Agency's statement in its post-hearing brief that, as in *Rock Island*, the Agency had provided employees with "wind-protected hang[a]rs and heated shelters."[23] Instead, the Agency claims, the Arbitrator improperly "credited"[24] the Union's statement in its post-hearing brief that the Agency had not taken those actions.

The Agency's nonfact exception does not provide a basis for finding the award deficient. The Arbitrator relied on the record, not on the parties' statements in their post-hearing briefs, when he distinguished *Rock Island*. Citing the record, the Arbitrator found that unlike *Rock Island*, "[i]n the present case, there was no testimony as to any warm-up or cold-reducing efforts available to the rank and file."[25] The Arbitrator then acknowledged both the Agency's "allu[sion] to wind-protected hang[a]rs and heated shelters in its brief," and the Union's statement "that the Agency made a conscious decision [not to] expend[] funds on heated enclosures."[26] Referring to the parties' assertions in their post-hearing briefs, the Arbitrator concluded: "At best, the competing arguments on this point result in a stalemate."[27]

The Agency's nonfact exception challenges the Arbitrator's evaluation of the evidence in the case's record, including the weight to be accorded such evidence. Because such a disagreement does not provide a basis for finding an award deficient as based on a nonfact, we deny the Agency's nonfact exception.[28]

B. We remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

The Agency claims that the Arbitrator's award violates federal appropriations law because the Agency's use of appropriated funds to purchase cold-weather clothing does not meet the requirements of 5 U.S.C. § 7903 and 29 U.S.C. § 668(a).[29] In support, the Agency relies on, among other things, decisions of the Comptroller General.[30]

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and award de novo.[31] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[32] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[33] unless a party demonstrates that the findings are nonfacts.[34] Absent a nonfact, challenges to an arbitrator's factual findings cannot demonstrate that an award is contrary to law.[35]

We note that decisions of the Comptroller General are not binding on the Authority.[36] In that regard, "[a]lthough a Comptroller General opinion serves as an expert opinion that should be prudently

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[18] Exceptions at 2, 15.
[19] *AFGE, Local 2382*, 66 FLRA 664, 667 (2012) (*Local 2382*).
[20] *Id.* at 668.
[21] Exceptions at 14; *see id.* at 15.
[22] *Purchase of Cold Weather Clothing, Rock Island Dist., U.S. Army Corps of Eng'rs*, B-289683, 2002 WL 31521355 (Comp. Gen. Oct. 7, 2002).
[23] Exceptions at 14.
[24] *Id.*
[25] Award at 13.
[26] *Id.*
[27] *Id.*
[28] *Local 2382*, 66 FLRA at 668.
[29] Exceptions at 6-9, 11-15.
[30] *E.g., id.* at 12-15.
[31] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[32] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[33] *Id.; NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[34] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[35] *See AFGE, Local 1547*, 65 FLRA 624, 626 (2011).
[36] *See, e.g., U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*NOAA*); *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Operating Div.*, 65 FLRA 23, 26 n.5 (2010) (citing *AFGE, Local 1458*, 63 FLRA 469, 471 (2009) (*Local 1458*)).

considered," it is not one to which the Authority must defer.[37] Nevertheless, in cases where the parties and the arbitrator have examined Comptroller General precedent to address legal questions raised by a grievance, the Authority has assumed the applicability of that precedent when assessing contrary-to-law exceptions to the resulting arbitral award.[38]

Here, the parties cited Comptroller General precedent to the Arbitrator,[39] who relied upon that precedent in his award.[40] Similarly, in the Agency's exceptions to that award, the Agency relies on Comptroller General precedent,[41] and the Union's opposition does not argue that the Authority should not apply Comptroller General precedent. Therefore, consistent with the principles set forth above, we assume the applicability of Comptroller General precedent here.

One of the statutes that the Arbitrator relied on is 5 U.S.C. § 7903. Section 7903 provides, in pertinent part, that "[a]ppropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks."[42] The Comptroller General has found that in order for an item to be authorized by § 7903, it must satisfy three requirements: "(1) the item must be 'special' and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide for himself; (2) the item must be for the benefit of the government, that is, essential to the safe and successful accomplishment of the work, and not solely for the protection of the employee, and (3) the employee must be engaged in hazardous duty."[43]

The Agency argues that the award is contrary to § 7903 because the Arbitrator erred by finding that the cold-weather clothing is "special" under § 7903's first requirement.[44]

As relevant here, the Comptroller General has generally been unwilling to hold that cold-weather clothing is compensable under § 7903.[45] This is based on the notion that employees generally are required to present themselves for duty properly attired according to the requirements of their positions.[46] The Comptroller General has recognized an exception when employees have been assigned to temporary duty in a region for which they could not be expected to own clothing for extreme conditions.[47] But the Comptroller General has limited an exception to those "unique circumstances."[48] In this case, although the Arbitrator adverted to the special nature of the cold-weather- protective clothing purchased in the past, and "extreme cold[-]weather conditions,"[49] it is not clear that the Arbitrator found that the circumstances required by Comptroller General precedent are present. Therefore, on the record that is currently before us, we cannot determine whether § 7903 supports the Arbitrator's conclusion that the Agency may be required to spend appropriated funds on the cold-weather clothing at issue here.

The Arbitrator also found that 29 U.S.C. § 668(a) supported his award. The Agency argues that this finding is contrary to law because the Arbitrator erred in determining that cold-weather-clothing purchases at the Agency meet § 668's requirement that an item be "necessary."[50]

Under § 668, an agency may furnish protective clothing if the agency determines that it is necessary under the Occupational Safety and Health Act (OSHA)[51] and its implementing regulations.[52] An authorized official of an agency may make a determination that certain clothing is required pursuant to OSHA

[37] *Local 1458*, 63 FLRA at 471 n.5.
[38] *E.g. NOAA*, 67 FLRA at 358; *see U.S. Dep't of the Navy, Naval Underseas Warfare Ctr., Newport, R.I.*, 54 FLRA 1495, 1499 n.2 (1998) (and cases cited therein).
[39] *E.g.*, Award at 7, 9.
[40] *Id.* at 12-14.
[41] Exceptions at 12-15.
[42] 5 U.S.C. § 7903.
[43] *E.g., Rock Island*, 2002 WL 31521355 at *3.
[44] Exceptions at 11-13 (citing *Rock Island* and *Purchase of Insulated Coveralls, Vicksburg, Miss.*, B-288828, 2002 WL 31242199 (Comp. Gen. Oct. 3, 2002)) (*Vicksburg*).
[45] *Rock Island*, 2002 WL 31521355 at *3; *Vicksburg*, 2002 WL 31242199 at *3; *Mr. Anthony Stapon, P.O. Box 964 Patchogue, N.Y. 11772*, B-230820, 1988 WL 227445 at *1 (Comp. Gen. Apr. 25, 1988) (*Stapon*); *Matter of: T. Michael Dillon*, B-223741, 1987 WL 101526 at *1-2 (Comp. Gen. Feb. 24, 1987) (*Dillon*).
[46] *Rock Island*, 2002 WL 31521355 at *2; *Vicksburg*, 2002 WL 31242199 at*2; *Dillon*, 1987 WL 101526 at *1-2.
[47] *See Matter of: Purchase of Down–Filled Parkas*, 63 Comp. Gen. 245, 247 (1984) (*Parkas*).
[48] *Stapon*, 1988 WL 227445 at *1.
[49] Award at 12.
[50] *Id.* at 14.
[51] 29 U.S.C. § 668(a).
[52] *Rock Island*, 2002 WL 31521355 at *4; *Vicksburg*, 2002 WL 31242199 at *3; *Parkas*, 63 Comp. Gen. at 246.

regulations.[53] Absent such a designation, parties cannot reach an enforceable agreement to provide such clothing.[54]

Here, it is unclear whether the Arbitrator found that an authorized official of the Agency made a determination that the cold-weather clothing was required pursuant to OSHA regulations. Therefore, consistent with the above principles and based upon the current record before us, we are unable to determine whether § 668 authorizes the Agency to use appropriated funds to purchase the cold-weather clothing at issue.

But our discussion of §§ 7903 and 668 does not end the matter. As noted previously, before the Arbitrator, the Union argued that non-appropriated funds could be used to pay for the clothing.[55] Because the Arbitrator found that appropriated funds were available, he did not resolve the Union's claim regarding non-appropriated funds.[56] In our view, additional findings from the Arbitrator on this point are needed before we can determine whether the Agency can be required to pay for the clothing at issue. Accordingly, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings on the non-appropriated-funds issue. On remand, the Arbitrator also may make findings that clarify his reasoning regarding the §§ 7903 and 668 issues, under the legal standards set forth above.

Finally, the Agency argues that the Arbitrator exceeded his authority when he ordered the Agency to continue purchasing cold-weather clothing with appropriated funds, because such a remedy is contrary to federal appropriations law.[57] If the award is not authorized by § 7903 or § 668, then it would be unnecessary to separately assess whether the Arbitrator exceeded his authority in this regard. Conversely, if the award is authorized by § 7903 or § 668, then the premise of the Agency's exceeded-authority exception is incorrect. Moreover, if the Arbitrator finds on remand that non-appropriated funds are available to purchase the clothing, then the Agency's exceeded-authority argument is without consequence. Because we are remanding to the Arbitrator for further findings regarding non-appropriated funds, and he may also make further findings regarding § 7903 or § 668 on remand, we find that it would be premature, at this time, to separately resolve the Agency's exceeded-authority exception.[58]

V. Decision

We dismiss the Agency's exceptions in part, deny the nonfact exception, and remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings regarding the lawfulness of cold-weather-clothing purchases.

[53] *Rock Island*, 2002 WL 31521355 at *4; *Vicksburg*, 2002 WL 31242199 at *3; *cf. Matter of: IRS—Purchase of Safety Shoes*, 67 Comp. Gen. 104, 106 (1987) (purchase of safety shoes authorized where authorized official administratively determined that shoes were necessary for employee safety); *Parkas*, 63 Comp. Gen. at 246-47 (purchase of down-filled parkas permissible where parkas were administratively determined to be necessary personal protective equipment under appropriate authority).

[54] *See U.S. Army Corps of Eng'rs, Waterways Experiment Station, ERDC, Vicksburg, Miss.*, 61 FLRA 258, 261-62 (2005) (collective-bargaining agreement that required agency to provide insulated coveralls was not enforceable because it was not shown that agency chief negotiator had authority to make necessary OSHA determination to provide coveralls).

[55] Award at 5.

[56] *Id.* at 11.

[57] Exceptions at 13.

[58] *See, e.g., U.S. DHS, U.S. Citizenship & Immigration Servs.*, 68 FLRA 272, 275 (2015) (finding it premature to resolve essence claim when it essentially restated contrary-to-law claim, and legal issue was being remanded for further findings).

Member Pizzella, dissenting:

The question of when and under what circumstances a federal agency may use appropriated funds to purchase cold-weather clothing for its employees is defined in 5 U.S.C. § 7903 and that statutory provision has been interpreted by the Comptroller General. Therefore, I do not agree with the majority that there is any need to further delay the disposition of this case, which began in April 2012,[1] and remand the matter to the parties for further proceedings.

Section 7903 of Title V authorizes agencies to purchase items of clothing provided the following conditions are satisfied: "(1) the item must be '*special*' and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide for himself; (2) the item must be for the benefit of the government, that is, essential to the safe and successful accomplishment of the work, and not solely for the protection of the employee, and (3) the employee must be engaged in hazardous duty."[2] The Comptroller General "ha[s] generally been unwilling to hold that cold weather gear meets these standards."[3]

But here, the Union does not identify even the particular articles of clothing it thought the Agency should provide and for which jobs those articles of clothing were required.[4] Without any indication what the clothes are and how they differ from what a typical Missourian would have in his or her personal wardrobe, there is no basis for concluding that the clothes are "special"[5] and that the Agency should pay for them.

Arbitrator Mark Suardi's analysis is flawed on this point. He notes the "special nature of the Agency's mission" and the "special nature" of past cold-weather purchases[6] but never finds that "the item" itself is "special and not part of the ordinary and usual furnishings an employee may reasonably be expect to provide for himself."[7] His focus on the Agency's mission and past purchases is not consistent with the plain wording of § 7903 nor the relevant Comptroller General interpretations of that provision, including *Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Engineers (Rock Island)*.[8]

I also do not agree with the majority that the Agency's argument − that the award is "contrary to the [parties' agreement]" – "does not raise a ground for review currently recognized by the Authority."[9] Contrary to the Arbitrator's interpretations of Article 28 of the parties' labor-management agreement (LMA),[10] however, the Agency specifically argues how his interpretations of Article 28 is flawed:

> *Article 28* is only a generic obligation. It states only a general requirement for the Agency to provide cold[-]weather[-]protective clothing to employees who are determined to need it. *Article 28* does not state which employees, or types of employees, or numbers of employees might qualify for such clothing, or what exposure criteria the Agency should apply in meeting this obligation. The LMA does not even specify what sort of protective clothing might be required.[11]

The United States Court of Appeals for the D.C. Circuit (the court) found last year that "a party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority."[12] On repeated occasions I have reminded my colleagues of the court's direction on this issue and have noted that arguments, such as those made by the Agency here, even though they

[1] Award at 2.
[2] B-289683, 2002 WL 31521355 (Comp. Gen. Oct. 7, 2002) (*Rock Island*) (emphasis added).
[3] *Id.*
[4] *See* Award at 6 (listing job duties of some employees, but not clothing they needed).
[5] 5 U.S.C. § 7903.
[6] Award at 11.
[7] See 5 U.S.C. § 7903.
[8] *Rock Island*, 2002 WL 31521355.
[9] Majority at 4.
[10] *See* Award at 11 ("[F]rom a *contractual* standpoint, [the Agency's] position cannot be sustained. This is so not only because of *the express language found in Article 28, Section 2* . . . .") (emphasis added), 12 ("[T]he parties unquestionably have agreed to *the language found in Article 28, Section 2*. This is *an extremely important aspect* of the case.") (emphasis added) (citing *Navy v. FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) ("[A]n agency's *obligations* under federal collective bargaining law are circumscribed *by the limitations imposed by federal appropriations law*." (emphasis added)) , 12 n.1 ("[E]ven if there were *no specific language in Article 28, Section 2* on the topic of necessary protective clothing purchases (which there is), *collateral language found elsewhere in Article 28* could be relied upon to establish such an *obligation*. Coming full circle then, *the language of Article 28, Section 2* and the parties[']' past treatment of the issue clearly and unambiguously *obligate the Agency* to use [appropriated funds] to provide necessary cold[-]weather[-]protective clothing as it has in the past.") (emphasis added), 14.
[11] Exceptions at 12-13.
[12] *NTEU v. FLRA*, 754 F.3d 1031, 1040 (2014).

do not use the precise words "fails to draw its essence" nonetheless raise an unmistakable essence exception.[13]

On another matter relevant to this case, I have also cautioned my colleagues about their pattern of ignoring the court's caution against injecting our "organic statute [into] another statute . . . not within [the Authority's] area of expertise."[14] In this respect and for far too long, the Authority has perpetuated the perception that the Authority may simply ignore opinions of the Comptroller General and the Government Accountability Office (GAO).

While I welcome the majority's recognition today that decisions of the Comptroller General "serve[] as an expert opinion that should be prudently considered,"[15] I do not agree, insofar as the majority perpetuates the perception that such decisions are ones which may simply be ignored.[16] I would adopt instead the approach of the U.S. Court of Federal Claims which accords "persuasive weight" to decisions of the Comptroller General and GAO and recognize them as experts in matters concerning fiscal issues, appropriations law, and federal employee salary, benefits, and reimbursements.[17]

Thank you.

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[13] *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, 68 FLRA 189, 196-97 (2015) (Dissenting Opinion of Member Pizzella) (citing *U.S. Dep't of the Air Force, Space & Missile Sys. Ctr., L.A. Air Force Base, El Segundo, Cal.*, 67 FLRA 566, 572-73 (2014) (Dissenting Opinion of Member Pizzella) (quoting *NTEU v. FLRA*, 754 F.3d at 1040)); *see also AFGE, Local 1897*, 67 FLRA 239, 243 (2014) (Concurring Opinion of Member Pizzella).

[14] *Navy*, 665 F.3d at 1348 ; *see also AFGE, Local 1547*, 67 FLRA 523, 532 (2014) (Dissenting Opinion of Member Pizzella); *U.S. DHS, U.S. ICE*, 67 FLRA 501, 508 (2014) (Dissenting Opinion of Member Pizzella).

[15] Majority at 6.

[16] *Id*.

[17] *See Hawaiian Dredging Constr. Co. v. United States*, 59 Fed. Cl. 305, 311 (Fed.Cl. 2004).