United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF DEFENSE NATIONAL GUARD BUREAU MICHIGAN AIR NATIONAL GUARD LANSING, MICHIGAN and MICHIGAN STATE COUNCIL, ASSOCIATION OF CIVILIAN TECHNICIANS	Case No. 90 FSIP 85

DECISION AND ORDER

The Michigan State Council, Association of Civilian Technicians (ACT or Union), filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under section 7119 of the Federal Service Labor-Management Relations Statute (Statute) between it and the Department of Defense, National Guard Bureau, Michigan Air National Guard, Lansing, Michigan (Employer).

After investigation of the request for assistance, the Panel determined that the impasse should be resolved through an informal conference between Panel Member Daniel H. Kruger and the parties. If there were no settlement, Member Kruger was to notify the Panel of the status of the dispute, including the final offers of the parties and his recommendations for resolving it. Following consideration of this information, the Panel would take whatever action it deemed appropriate to resolve the impasse, including the issuance of a binding decision.

Member Kruger met with the parties on July 11, 1990, in Lansing, Michigan, but the parties were unable to reach agreement on the outstanding issue. On August 2, 1990, Member Kruger held a telephone conference call with the parties and requested that each side submit a statement containing its final position and arguments in support thereof. Member Kruger has reported to the Panel, and it has now considered the entire record.

BACKGROUND

The Michigan Air National Guard is administered by the National Guard Bureau, a joint activity of the Departments of the Army and Air Force which is located within the Department of Defense at the Pentagon. The mission of the Employer is to provide operational military units to support the United States Air Force. In that regard, it provides, at installations throughout the state of Michigan, trained men and women who can augment the active forces during national emergencies or war and provide assistance during natural disasters and civil disturbances. When National Guard units are in a nonmobilized status, they are commanded by the Governor of Michigan who is represented in the chain of command by the Adjutant General.

The Union represents approximately 350 employees located at Selfridge and Battle Creek Air National Guard bases. There are three separate bargaining units which consist primarily of Wage Grade civilian technicians who perform maintenance work on military aircraft, weapons, and communications systems; the bargaining units also include a small number of clerical and administrative personnel who are General Schedule employees. The main difference between civilian technicians and other Federal agency employees is that civilian technicians, who fall within the jurisdiction of the National Guard Technicians Act,[1/] must maintain military membership in a National Guard unit, and their military and civilian jobs must be compatible. The regulations which govern their conditions of employment are issued by the National Guard Bureau; by comparison, most other civilian employees are governed by regulations issued by the Office of Personnel Management (OPM).

The other group of employees affected by this dispute are Active Guard and Reserve (AGR) personnel. These individuals are usually part-time members of either the Army and Air National Guard or the Army and Air Force Reserve who have been placed on military active duty status to perform work in technician positions within their respective programs. When placed in this status, these employees are considered full-time members of the military; as such, they cannot be represented by a labor organization. They are provided military pay and benefits pursuant to Title 32 of the United States Code, and their terms and conditions of employment are established unilaterally by the Employer.

The instant impasse arose as a result of negotiations over a successor collective-bargaining agreement. The parties have reached agreement on all other issues; having agreed to sever the instant issue, they have implemented the new contract.

1/ 32 U.S.C. section 709 (1988).

ISSUE AT IMPASSE

The issue at impasse is the competitive area[2/] for job retention during a reduction in force (RIF).

1. The Employer's Position

The Employer proposes that the status quo be maintained and that each installation (Selfridge and Battle Creek) remain a separate competitive area for RIF purposes. Under the Employer's proposal, RIFs would continue to be conducted in accordance with National Guard Bureau Technician Personnel Regulation No. 300 (351) (February 27, 1986) or its successor. That regulation allows the Employer unfettered discretion to determine competitive areas in which employees compete during a reduction in force.

With respect to the Union's proposal, the Employer takes the position that it is nonnegotiable because it conflicts with the Employer's rights under section 7106(a)(2) of the Statute. In this regard, the Employer argues that the proposal violates management's right "to select personnel for positions in [its] organization." The Employer also alleges nonnegotiability on the ground that the proposal "seek[s] to limit a competitive area solely to bargaining-unit positions . . . [which is] inconsistent with [G]overnment-wide mandate." In support of its argument, the Employer relies on wording contained in Nuclear Regulatory Commission v. Federal Labor Relations Authority, 895 F.2d 152 (4th Cir. 1990) (NRC). In that case, the court stated that "[p]roposals seeking to limit a competitive area solely to bargaining [sic] positions have been found to be nonnegotiable because they are inconsistent with [G]overnment-wide mandate." NRC at 157 (citing National Treasury Employees Union and Department of Health and Human Services, Region X, 25 FLRA 1041 (1987) (DHHS)). In DHHS, the union attempted to establish a competitive area for bargaining-unit employees only. The Federal Labor Relations Authority (FLRA) found the proposal nonnegotiable as inconsistent with OPM regulations. In this regard, the FLRA, in citing 5 C.F.R. 351.402(b), stated that "current OPM regulations require that a competitive area 'be defined solely in terms of an agency's organizational unit(s) and geographical location, and it must include all employees within the

2/ A competitive area is the geographical and organizational limit within which employees compete for job retention.

competitive area so defined.'" (Emphasis in original) Id. at 1044. The FLRA went on to state that "a competitive area defined in terms of bargaining-unit membership does not meet this standard." Id. The Employer urges the Panel to apply the holdings of NRC and DHHS and to relinquish jurisdiction over the issue on the grounds that the Employer has no duty to bargain over the Union's proposal.

2. The Union's Position

The Union proposes that "nonbargaining-unit employees will not compete with bargaining-unit employees for bargaining-unit positions." With respect to jurisdiction, the Union contends that the Employer's allegation of nonnegotiability is without merit. In this regard, the Union argues that neither case cited by the Employer is controlling because section 709(e) of the National Guard Technicians Act[3/] exempts civilian technicians from the OPM regulations which are relied upon in those cases.[4/] Moreover, the Union cites the FLRA's holding in Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984) (Pennsylvania State Council) in which a proposal identical to the one presented by the Union was found to be negotiable. The Union urges the Panel to exercise its authority under Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, 31 FLRA 620 (1988) (Carswell), and decide the jurisdictional issue in its favor.

On the merits, the net effect of the Union's proposal would be to create, at each installation, separate competitive areas for bargaining-unit and nonbargaining-unit employees. That is, should a RIF affecting bargaining-unit positions occur, AGR technicians and civilian technician supervisors would not be able to displace bargaining-unit employees with lower retention standing.[5/] Thus, under the Union's proposal, a bargaining-unit employee could only be displaced by another bargaining-unit employee with higher retention standing. Stated another way, should there be a need to conduct a RIF affecting bargaining-unit positions, all AGR personnel performing bargaining-unit work who have been designated as

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3/ Supra note 1.

4/ See 5 C.F.R. Chapter 351 (1990).

5/ Retention standing is based on a combination of factors, including tenure group, technician performance appraisal score, military appraisal score, service computation date, and technician service date.

filling civilian technician positions would have to be released from those positions before any bargaining-unit technicians could be reached.

The Union's proposal is justified because the civilian technicians it represents have a historical claim to technician work, and its adoption would protect such employees from being displaced by AGR technicians and civilian technician supervisors in the event of a RIF. According to the Union, the civilian technician program traces its beginnings to about 1916 when civilian "caretakers" were employed to help maintain horses and supplies for the Army during World War I. After World War II, when modern combat and support equipment was issued to the Army and Air National Guard and Reserve military units, the caretakers became known as "technicians." These employees were paid with Federal funds but were administered by the various states Adjutants General with neither the Federal government nor the respective states wanting to claim responsibility for the technicians as employees. In 1968, however, Congress passed the National Guard Technicians Act[6/] which gave technicians Federal employee status. Civilian technicians have participated in, and have provided support for, the Berlin Airlift, the Korean and Vietnam Conflicts, as well as recent operations in Granada and Saudi Arabia.

The Union points out in its written statement that during the latter part of the 1980's, a freeze on hiring of new Federal civilian employees prevented the National Guard from hiring civilian technicians for both new and existing programs. To maintain a sufficient number of technicians, the National Guard assigned AGR personnel to what had traditionally been bargaining-unit positions. Because AGR personnel were in active-duty status and were provided military pay and benefits, the Guard was able to comply with the civilian hiring freeze yet maintain an adequate number of technicians. The result was a steady influx of AGR personnel.[7/] Thus, although AGR personnel and civilian technicians currently work side by side and routinely perform the same types of duties, according to

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6/ Supra note 1.

7/ Although AGR personnel have, for the most part, filled positions which are designated as "civilian technician" positions, they also have been placed in positions which have been designated as "AGR positions." These latter positions are outside the bargaining unit and have never been filled by civilian technicians.

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the Union, civilian technicians, by virtue of their long-standing support of the National Guard on a day-to-day basis, have a greater claim to bargaining-unit technician jobs than do AGR personnel.

CONCLUSIONS

In addressing the Employer's allegations of nonnegotiability, the Panel is guided by the FLRA's decision in Carswell. In that case, the FLRA concluded that the Panel may apply existing case law to resolve an impasse where a duty-to-bargain issue arises. In this regard, the Panel's retention of jurisdiction over the instant case is supported by a prior decision in which the FLRA found an identical proposal to be negotiable.8/ Accordingly, the issue is properly before the Panel, and we shall decide it on its merits.

Having considered the evidence and arguments in this case, we conclude, on balance, that the issue should be resolved by adopting the Union's proposal. In this regard, we are persuaded that separate competitive areas are necessary to protect the jobs of civilian technicians. At bottom, the issue involves the traditional union concern that the integrity of bargaining units be maintained. In our view, the importance of this concern to the Union outweighs whatever benefits may accrue by having a single competitive area which also includes AGR personnel and supervisory civilian technicians. Morever, the historical relationship between bargaining-unit civilian technicians and nonbargaining-unit AGR personnel further convinces us that civilian technicians, by virtue of their long-standing support of the National Guard on a day-to-day basis, have a greater claim to bargaining-unit technician jobs than do AGR personnel. Finally, the record indicates that if a RIF becomes necessary, AGR personnel, in accordance with National Guard Bureau policy, may be transferred to another military installation,9/ while civilian technicians do not enjoy similar job security. Since the overall level of

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8/ Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984).

9/ During the August 2, 1990, conference call, the Employer representative indicated that National Guard Bureau policy allows for the reassignment of AGR personnel to other installations in the event of a RIF. There are, however, no formal procedures to govern such reassignments.

expertise of AGR personnel is no greater than the skill level of civilian technicians, there is no reason to give them additional protections by including them in the same competitive areas with bargaining-unit employees.

ORDER

Pursuant to the authority vested in it by section 7119 of the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to section 2471.6(a)(2) of the Panel's regulations, the Federal Service Impasses Panel under section 2471.11(a) of its regulations hereby orders the following:

The parties shall adopt the Union's proposal.

By direction of the Panel.

Linda A. Lafferty
Executive Director

December 6, 1990
Washington, D.C.