FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 16-03

MICHIGAN ARMY NATIONAL GUARD RESPONDENT AND LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 2132, AFL-CIO CHARGING PARTY	Case No. CH-CA-14-0475

Alicia E. Weber
For the General Counsel

LTC John J. Wojcik
For the Respondent

Tiffany Malin, Esq.
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

On November 10, 2014, the Regional Director of the Chicago Region of the Federal Labor Relations Authority (FLRA/Authority), issued a Complaint and Notice of Hearing, alleging that the Michigan Army National Guard (Respondent), violated § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute). The Complaint alleged that the Respondent interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by § 7102 of the Statute.

On November 25, 2014, the Respondent filed an answer admitting some of the facts alleged while denying that it committed an unfair labor practice (ULP) in violation of 5 U.S.C. § 7116(a)(1). On January 9, 2015, the Respondent filed a Motion for Dismissal and/or Summary Judgment contending that the FLRA lacks jurisdiction to adjudicate this

case. In support thereof, the Respondent filed a brief with Enclosures 1 through 10. (Resp't Exs. 1-10). On January 15, 2015, the General Counsel (GC) filed a Cross-Motion for Summary Judgment and a motion to indefinitely postpone the hearing. The motion to indefinitely postpone the hearing was granted on January 22, 2015, and the hearing was canceled.

On February 2, 2015, the GC filed a Cross-Motion for Summary Judgment in which it asserted that there were no issues of material fact in dispute and that it was entitled to judgment as a matter of law because the action alleged to be a violation of the Statute was admitted. In support of its motion, the GC provided a brief with Exhibits 1 through 7 which included an affidavit of Ben Banchs, Business Manager/Secretary for the Union. (GC Exs. 1-7). On February 13, 2015, the Respondent filed a response in which it agreed that there were no material facts in dispute, but contended that it was entitled to a summary judgment. In support, the Respondent filed additional exhibits (Resp't Ad. Exs. 1, 2) and a sworn statement from David J. Bedells, Deputy General Counsel for the Michigan Army National Guard.

STANDARDS FOR SUMMARY JUDGMENT

In considering motions for summary judgment submitted pursuant to § 2423.27 of the Authority's regulations, the standards to be applied are those used by United States District Courts under Rule 56 of the Federal Rules of Civil Procedure, *Nat'l Labor Relations Bd., Wash., D.C.*, 65 FLRA 312, 315 (2010). As the record demonstrates and the parties agree that there is no genuine issue of material fact in dispute, it is appropriate to resolve this case by summary judgment, and I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. The Michigan Army National Guard, Lansing, Michigan is an agency under § 7103(a)(3) of the Statute.

2. The Laborers' International Union of North America (LIUNA), Local 2132, AFL-CIO is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

3. The Union filed the charge in Case No. CH-CA-14-0475 with the Chicago Regional Director on June 6, 2014.

4. A copy of the charge was served on the Respondent.

5. At all material times, David J. Bedells occupied the position of Captain with the Respondent and has been a supervisor and/or management official of Respondent within the meaning of 5 U.S.C. § 7103(a)(10) and (11), as well as an agent acting on behalf of the Respondent.

6. On March 12, 2014, the Respondent, by Captain Bedells sent Ben Banchs, Business Manager/Secretary Treasurer for the LIUNA, National Guard District Council, a letter in which he stated:

> Please be advised that this office will represent the interests of the Michigan Department of Military and Veterans Affairs at the administrative hearing requested by your client. Accordingly, any and all communications with employees or representatives of the agency regarding this matter should be directed to this office. Any communications with employees or representatives of the agency outside the presence of an agency attorney are improper until such time as the administrative hearing examiner determines that further pre-hearing interviews are necessary.

7. On March 17, 2014, the Union, by Mr. Banchs responded, indicating that the letter announced a directive that would severely impede private communications between bargaining unit employees and the Union.

8. On March 20, 2014, Captain Bedells replied that "any and all communications with employees or representatives of the agency regarding this matter should be directed to this office." (GC Ex. 6). Captain Bedells further clarified that the agency's concern is communication with current employees of the agency that concern matters related to the subject of the administrative hearing.

9. On March 20, 2014, Mr. Banchs responded that the agency had no right to restrict communication between bargaining unit employees and the Union concerning employment matters. He further stated that the directive violated the Statute and encouraged Captain Bedells to rescind the directive. Mr. Banchs also expressed that if he needed to speak to bargaining unit employees, he would do so and nothing would prevent him from doing so.

10. The agency did not respond or rescind the directive issued by Captain Bedells.

DISCUSSION

In its motion the GC asserts that the Respondent violated § 7116(a)(1) of the Statute by issuing a ban that unlawfully interfered with employees protected union activity in their civilian capacity. The Respondent argues that summary judgment should be made in its favor because the Authority lacks jurisdiction to adjudicate the case since the dispute is military in nature. It is settled that "[a]lthough technician employment takes place in a military environment, the technician[s are] federal civilian employee[s] who [have] rights under the [Federal Service Labor-Management Relations] Statute." *Puerto Rico Air Nat'l Guard, 156th Airlift Wing (AMC) Carolina, P.R.*, 56 FLRA 174, 179 (2000) *aff'd, AFGE v. FLRA*, 239 F.3d 66 (1st Cir. 2001). The National Guard is not a full-time active force; it employs

civilian 'technicians' to perform administrative, clerical, and technical tasks. *Mississippi Army Nat'l Guard, Jackson, Miss.*, 57 FLRA 337, 339 (2001) (citing *U.S. Dep't of Def., Nat'l Guard Bureau, Rhode Island Nat'l Guard, R.I. v. FLRA*, 982 F.2d 577, 578 (D.C. Cir. 1993).

Further, "the Technicians Act provides the guard technicians' dual status as federal civilian employees and as members of the States' national guards/militia." These technicians are federal employees. *See* 5 U.S.C. § 2105. When a National Guard administers the technicians program, it is acting in its federal capacity. *See also* Technicians Act, 32 U.S.C. § 709(d) ("the Secretary of the Army or the Air Force, as the case may be, shall designate the adjutants general . . . to . . . employ and administer the technicians authorized by this section.") 57 FLRA at 339. Nothing in the Respondent's argument demonstrates that the Respondent "is in any way exempted from or excluded from the Technicians Act while administering the technicians program." (*Id.* at 337). This case involves unit employees communicating freely and privately with their exclusive bargaining representative without any interference, restrain, or coercion and the matter relates to the civilian aspect of technician employment. The Michigan National Guard is an executive agency and not exempted from the Statute. As the technicians are entitled to the protections provided by the Statute, the Authority has jurisdiction to adjudicate alleged violations related thereto, and the Respondent's argument that the military aspect of the position precludes Authority jurisdiction is without merit. The issue in this case is not the termination of two technicians, it is a communication made by Respondent's agent which precluded communication between a Union representative and bargaining unit employees, and neither the fact that the communication was related to termination actions, nor that it applied to technicians with a duel military function, serves to bar the Authority's jurisdiction over a ULP complaint that alleges the Respondent violated the Statute.

The Respondent also contends that the Union waived its right to file an ULP when the Union appealed the termination of the two bargaining unit employees in an internal administrative hearing. The Respondent cites to § 7116(d) under the Statute which limits unit employees from raising an issue as a ULP when the issue can properly be raised under an appeals procedure. The Respondent argues that the ULP concerns access to witnesses during the elected internal appellate process. As a consequence, the Respondent asserts that the complaint is barred by application of § 7116(d).

The Authority will decline to assert jurisdiction over a ULP when "the factual predicate and the legal theory underlying an unfair labor practice complaint and a[n] . . . appeal are the same." *Wildberger v. FLRA*, 132 F.3d 784, 789 (D.C. Cir. 1998). In this case, the matter and the legal theories advanced in the internal administrative hearing in comparison to the matter and legal theory underlying the ULP are entirely distinct. The internal administrative hearing concerns two unit employees' appeal of their termination, while the ULP arose from a prohibition upon all bargaining unit employees' right to speak privately with a Union representative. The Authority has found even if the circumstances underlying the two proceedings are "related" or "clearly bound up" it is not enough to bar an ULP claim and there is nothing more present in this case. *U.S. Dep't of the Army, Human Res. Command, St. Louis, Mo.*, 64 FLRA 140, 143 (2009).

The Respondent's final argument is that the summary judgment should be granted in its favor because the Union admitted that it would ignore the restriction imposed by the Respondent's agent, which rendered the issue moot. However, the violation alleged is not an actual denial of access to witnesses. The act that gave rise to the ULP complaint arose from the restriction announced by Captain Bedells prohibiting the Union's representative from communicating privately with bargaining unit employees. That ban was not rescinded and its relative ineffectiveness does not render the act of issuing it moot. The standard to determine whether a statement or conduct violates § 7116(a)(1) is an objective one. *U.S. Envtl. Prot. Agency, Region 2, N.Y., N.Y.*, 63 FLRA 476, 478 (2009). "[T]he question is whether, under the circumstances, the statement or conduct [would] tend[] to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement." *See U.S. Dep't of Transp., FAA*, 64 FLRA 365, 370 (2009) (finding violation where employer's conduct linked employee's protected activity with treatment adverse to employee's interest). The intended coercion and intimidation presented by such an outright restriction is not negated by virtue of the recipient's failure to comply. The directive issued by Captain Bedells was objectively coercive under the Statute even if it was ineffective. Whether the directive was disregarded or not is irrelevant. The violation occurred when the directive was issued because the subjective intent and the objective interpretation was one of precluding bargaining unit employees from the exercise of rights provided by the Statute. In restricting the bargaining unit employees ability to communicate privately and freely with their exclusive representative, the Respondent violated § 7116(a)(1) of the Statute. Therefore the Respondent's motion for summary judgment is denied.

CONCLUSIONS OF LAW

For the reasons set forth in this decision, I recommend that the Authority grant the General Counsel's Cross-Motion for Summary Judgment and adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Michigan Army National Guard, shall:

1. Cease and desist from:

(a) Prohibiting private communication between bargaining unit employees and their union representatives.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Adjutant General, and shall be posted and maintained for sixty (60) consecutive days thereafter, in

(b) In addition to physical posting of paper notices, Notices shall be distributed electronically, on the same day, as posting of the physical notices, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with bargaining unit employees.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to the steps taken to comply.

Issued, Washington, D.C., October 23, 2015

CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Michigan Army National Guard, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

The Statute gives employees of the Michigan Army National Guard the following rights:

To form, join, or assist any labor organization;
To act for a labor organization in the capacity of a representative;
To present the views of the labor organization, as a representative of a labor organization, to heads of agencies and other officials of the executive branch of the Government, Congress or other appropriate authorities;
To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under the Statute; and
To refrain from any of the activities set forth above, freely and without fear of penalty or reprisal.

The Michigan Army National Guard will not violate any of these rights. More specifically:

WE AFFIRM that bargaining unit employees' have the right to privately communicate with their union representatives about their conditions of employment, including disciplinary matters.

WE WILL NOT require that communications between union representatives of the Laborers' International Union of North America, Local 2132, AFL-CIO and bargaining unit employees be conducted in the presence of an agency attorney.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

_____
(Michigan Army National Guard)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.