United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF DEFENSE NATIONAL GUARD BUREAU COLORADO AIR NATIONAL GUARD CENTENNIAL, COLORADO and LOCAL 48, ASSOCIATION OF CIVILIAN TECHNICIANS	Case No. 10 FSIP 137

DECISION AND ORDER

The Department of Defense, National Guard Bureau (NGB), Colorado Air National Guard, Centennial, Colorado (Employer) and Local 48, Association of Civilian Technicians (Union) filed a joint request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute).

Following an investigation of the request for assistance, arising from the parties' negotiations over a successor collective-bargaining agreement (CBA), the Panel determined that the dispute should be resolved through the issuance of an *Order to Show Cause* (*OSC*) why the Panel should not adopt the Union's proposal to resolve the matter. The parties were informed that, after considering the entire record, including their statements of position, the Panel would take whatever action it deems appropriate to resolve the impasse, which may include the issuance of a *Decision and Order*. Pursuant to this procedure, the parties submitted their final offers and written statements of position. The Panel has now considered the entire record.

BACKGROUND

The Employer operates at two locations; in Buckley, Colorado, where a fighter squadron is stationed, it performs maintenance on the F-16 aircraft and, in Greely, Colorado, the

Employer provides administrative support for a space and missile warning squadron. The Union represents approximately 375 General Schedule and Wage Board employees, the majority of whom are National Guard Technicians (NGT) whose positions are governed by Title 32 of the U.S. Code. As a condition of their civilian employment, NGTs must hold a military position in the National Guard. There are only 12 employees in the bargaining unit who are not required to maintain dual status and, accordingly, hold positions exclusively under Title 5. The parties are covered by a collective-bargaining agreement (CBA) that has been extended until April 2011.

Under the current CBA, as well as at least the two preceding agreements, disputes pertaining to performance ratings are specifically excluded from coverage under the parties' negotiated grievance procedure. Employees who wished to challenge their performance appraisals did so by filing an appeal with a military Review Board that makes recommendations to the state Adjutant General. For many years, this review board was the only recourse for NGTs to challenge their performance ratings. Pursuant to the National Guard Technicians Act, state adjutant generals have sole and exclusive authority with respect to certain personnel matters.[1/] This discretion, however, does not extend to disputes over performance appraisal matters. In this regard, Technician Personal Regulation (TPR)

1/ The National Guard Technicians Act, 32 U.S.C. § 709(f)(3) and (4) provides:

> (f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned-
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> (3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;
>
> (4) a right of appeal which may exist with respect to paragraph [] (3) shall not extend beyond the adjutant general of the jurisdiction concerned [].

430, issued on November 5, 2009, provides in Section 3-1, "Final Appellate Authority," that where a negotiated grievance procedure does not expressly exclude from its coverage grievances that challenge the accuracy of an appraisal, the grievance-arbitration process is the final appellate authority. The regulation, therefore, implicitly permits bargaining over the scope of the negotiated grievance procedure to include issues relating to performance ratings.

ISSUE AT IMPASSE

The parties disagree over whether their negotiated grievance/arbitration procedure should continue to exclude disputes over performance appraisal ratings.

POSITIONS OF THE PARTIES

1. The Employer's Position

The Employer argues that the Panel should decline to retain jurisdiction over the Union's proposal because it may result in a grievance over a performance appraisal rating that proceeds to arbitration. In this regard, it asserts that arbitrators have limited authority to alter a performance appraisal rating and they may do so only upon a finding of a violation of law or contract provision negotiated under 5 U.S.C. § 7106(b)(1) of the Statute. Thus, using a grievance process to appeal performance ratings actually may lessen an employee's ability to achieve the result intended since an arbitrator's ability to "disturb" a performance appraisal rating is legally limited. Moreover, the Union's proposal is contrary to 32 U.S.C. § 709(f)(3) and (4) of the Technicians Act, because it would eliminate the statutorily mandated authority of the Adjutant General, which is sole and exclusive, on matters involving "a reduction in force (RIF), removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or a reduction in rank or compensation." Since performance appraisals are an integral part of the process protected under 32 U.S.C. 709(f)(3), disputes concerning them are prohibited from being resolved under a negotiated grievance procedure.

In the event that the Panel determines to retain jurisdiction, however, the Employer proposes to continue excluding disputes over performance appraisal ratings from resolution under the parties' negotiated grievance procedure.

There is no demonstrated need to eliminate the exclusion, which has been part of the last three CBAs. Typically, disagreements over performance appraisal ratings are resolved voluntarily at lower levels without resorting to an appeals process. Technicians rarely exercise their right to appeal their performance appraisals under the current process and, therefore, it is unlikely that they would utilize the grievance procedure to do so. The Union has never complained that the current, long-standing review process for performance appraisal ratings is biased or unfair. On the single occasion during the last 3 years when an employee appealed a rating to the Adjutant General, the Review Board consisted of two bargaining-unit employees from another bargaining unit and one management official, thereby demonstrating that the Review Board was not "stacked" against employee interests; on that appeal, the Review Board recommended that the rating remain the same and the Adjutant General accepted the recommendation. Finally, utilizing a Review Board is effective, efficient and much less costly than arbitration proceedings which may be the end-result of employee grievances over performance appraisals.

As an alternative resolution, the Employer proposes that the exclusion of disputes relating to performance appraisal ratings from the negotiated grievance procedure be retained for two performance-rating cycles while the parties assess technician satisfaction with a recently updated TPR; the Agency regulation encourages greater employee participation in the creation and accomplishment of their performance standards. Thereafter, the parties would bargain mid-term, as needed. In the interim, should it become necessary to convene a Review Board, it would be composed of two bargaining-unit members of equal or higher grade as the technician appealing his/her rating and one non-bargaining unit member of equal or higher grade; one Review Board member would be an Army National Guard technician, one a non-dual status technician and one an Air National Guard technician. The composition of the Review Board should help assure technicians that their appeals would be given fair consideration.

2. The Union's Position

The Union proposes to eliminate the current exclusion in the parties' negotiated grievance procedure so that NGTs no longer would have to resolve disputes over performance ratings through the Employer's Review Board. The Union contends that

the Employer has failed to establish convincingly that performance appraisals should be a topic excluded from the grievance procedure; conversely, the Union has demonstrated the need to eliminate the exclusion in the parties' current CBA. Employees do not want to be restricted to using the state Review Board to resolve disputes over performance appraisal ratings because all decision makers in the current process are part of, or subject to, the Agency command structure. Consequently, employees have little confidence in an outcome that cannot be appealed beyond the Adjutant General. This fact also explains the low number of appeals in recent years. Allowing employees to use the negotiated grievance procedure would bolster employee confidence that the process is fair and impartial because the decision maker, a neutral arbitrator, would have no stake in the outcome, unlike the existing appeals procedure where the Review Board members and the State Adjutant General clearly do. A technician's performance rating has implications for retention standing during a reduction in force, promotion, demotion, or removal; these are important, complex matters that warrant adjudication by an independent, professional arbitrator, with availability of FLRA review.

Contrary to the Employer's allegation, there is no legal conflict between the arbitrability of appraisal grievances and the non-arbitrability of certain actions set forth in 32 U.S.C. § 709(f)(3) because appraisal is distinct from removal or grade reduction. Arbitral invalidation of an appraisal does not legally preclude the Adjutant General from removing or demoting a technician. Moreover, nothing in the Technicians Act prevents employees from utilizing a negotiated grievance procedure to resolve disputes over performance appraisal ratings. Furthermore, no case law exists which interprets the Technicians Act as prohibiting the use of a negotiated grievance procedure to resolve those issues. To the contrary, the Colorado Army National Guard has a contract with a different chapter of the Association of Civilian Technicians that permits technicians to use the negotiated grievance procedure to resolve disputes over performance appraisal ratings.

The Employer's alternative proposal to permit the current exclusion to continue for two rating cycles and bargaining-unit members to be included on the Review Board also is unsatisfactory because disputes which may involve complex matters should be decided by professional arbitrators who have the experience and training to handle them. Finally, in another

bargaining dispute, when a union proposed to include bargaining-unit members on a Review Board, the FLRA ruled that the proposal was nonnegotiable.[2/]

CONCLUSIONS

Having carefully reviewed the entire record in this case, we conclude that the Employer has failed to show cause why the subject of performance ratings should continue to be excluded from the negotiated grievance procedure. Preliminarily, the Employer's contention that the Union's proposal is contrary to law is not supported by either the plain meaning of the Technicians Act or case precedent. In this regard, unlike adverse actions, there is no provision within the Technicians Act which allows state Adjutant Generals to act as the sole arbiters of matters pertaining to performance appraisals. Therefore, nothing in the Technicians Act would prevent employees from utilizing a negotiated grievance procedure to resolve disputes over performance appraisals. Furthermore, no case law has been cited by the Employer, nor are we aware of any, which interprets the Technicians Act as prohibiting the use of a negotiated grievance/arbitration procedure to resolve those issues. To the contrary, the NGB, which reviews all CBAs with labor organizations, has approved similar contract wording with respect to another state National Guard activity.

Turning to the merits of the parties' impasse, we note first that under § 7121(c) of the Statute certain matters must be excluded from resolution under negotiated grievance procedures.[3/] Performance ratings/evaluations, however, are not

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2/ The Union cites Association of Civilian Technicians, Columbine Council and The Adjutant General, Colorado, 28 FLRA 969 (1987) to support this claim.

3/ Section 7121(c) of the Statute states as follows:

> The preceding subsections of this section shall not apply with respect to any grievance concerning-
>
> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
> (2) retirement, life insurance, or health

subjects that are required, by law, to be excluded from the scope of negotiated grievance/arbitration procedures. Rather, under FLRA case precedent, other than the required statutory exclusions from the grievance procedure, the scope of a negotiated grievance procedure has been determined to be a mandatory subject of bargaining. In Vermont Air National Guard, Burlington, Vermont, 9 FLRA 737, 742 (1982), the FLRA found that the party seeking to narrow the scope of the negotiated grievance procedure bears the burden of justifying exceptions. Moreover, as the Court of Appeals for the D.C. Circuit has stated, where an impasse is reached in bargaining over the scope of the negotiated grievance procedure, the Panel "is to impose a broad scope grievance procedure unless the limited scope proponent can persuade it to do otherwise."[4/] In this case, because the Employer is proposing to narrow what otherwise would be a broad-scope grievance procedure, consistent with our *OSC*, it bears the burden of proof. In our view, however, the Employer has not met its burden. We are not persuaded that its proposed procedures, and modifications to the composition of the Review Board, would restore employee confidence in a process which permits management to retain final decision-making authority on performance appraisal matters. Instead, employees should be permitted to utilize the negotiated grievance/arbitration procedure which culminates in a decision rendered by a neutral arbitrator selected by the parties, either of whom is entitled to seek administrative review of the award.

> insurance;
> (3) a suspension or removal under section 7532 of this title;
> (4) any examination, certification, or appointment; or
> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

4/ See American Federation of Government Employees v. Federal Labor Relations Authority, 712 F.2d 640, 649 (D.C. Cir. 1983), where the court stated:

> We would expect the Panel . . . to rule against a proponent of a limited scope procedure who fails to establish convincingly that, in the particular setting, its position is the more reasonable one.

Accordingly, the parties shall be ordered to adopt the Union's proposal to resolve their impasse.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the parties' failure to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel, under § 2471.11(a) of its regulations, hereby orders the following:

The parties shall adopt the Union's proposal.

By direction of the Panel.

H. Joseph Schimansky

H. Joseph Schimansky
Executive Director

February 14, 2011
Washington, D.C.