UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-000

NATIONAL GUARD BUREAU Respondent	
and ASSOCIATION OF CIVILIAN TECHNICIANS Charging Party	Case No. WA-CA-80617

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 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 3, 2000**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 30, 2000
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 30, 2000

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: NATIONAL GUARD BUREAU

Respondent

and Case No. WA-CA-80617

ASSOCIATION OF CIVILIAN
TECHNICIANS

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
WASHINGTON, D.C.

OALJ 00-37

NATIONAL GUARD BUREAU Respondent	
and ASSOCIATION OF CIVILIAN TECHNICIANS Charging Party	Case No. WA-CA-80617

Ms. Andrea Krawczyk
Mr. Wilson E. Fisher
For the Respondent

Thomas F. Bianco, Esquire
For the General Counsel

Daniel M. Schember, Esquire
Gaffney & Schember, P.C.
On Brief for Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. 7101, et seq.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent violated its duty to consult when it unilaterally issued, admittedly without notice to the Charging Party, which has national consultation rights, a Position Description Release. Respondent asserts that it did not violate its duty because it changed no condition of employment and/or that the Release concerned a military aspect of technician employment and was not a "condition of employment", within the meaning of § 3(a)(14) of the Statute. This case was initiated by a

[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7113 will be referred to, simply, as, "§ 13".

charge filed on September 17, 1998 (G.C. Exh. 1(a)) which alleged violations of §§ 16(a)(1) and (8) of the Statute; the Complaint and Notice of Hearing issued July 30, 1999 (G.C. Exh. 1(b)), alleged violations of §§ 16(a)(1) and (8) of the Statute, and set the hearing for October 7, 1999, pursuant to which a hearing was duly held on October 7, 1999, in Washington, D.C. before the undersigned. At the conclusion of the hearing, November 8, 1999, was fixed as the date for mailing post-hearing briefs. Respondent, Charging Party and General Counsel each timely mailed a helpful brief, received on or before November 12, 1999, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

Preliminary Matter

Plainly, the charge alleged a breach of the duty to consult, the complaint alleges a breach of the rights granted by § 13 (National consultation rights), and the breach of the duty to consult was fully litigated, see, for example: General Counsel's Opening Statement, Tr. 8-11; Respondent's Opening Statement, Tr. 12).

The Complaint is defective because it fails to allege a violation of § 16(a)(5), which makes it an unfair labor practice for an agency -

> "(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;" (5 U.S.C. § 7116(a)(5)) (Emphasis supplied).

It is true that national consultation rights are set forth in § 13(b)(1) of the Statute; and a duty to consult is set forth in § 17(d) of the Statute; but, the unfair labor practice for the violation of a refusal to consult is § 16 (a)(5). The provision of § 16(a)(8),

> "(8) to otherwise fail or refuse to comply with any provision of this chapter." (§ 7116(a)(8)).

does not encompass a refusal to consult. In General Services Administration, 6 FLRA 430 (1981), the Authority stated,

> ". . . GSA failed to comply with its obligation to consult under section 7113(b)(1) and thus . . . violated section 7116(a)(1) and (5) of the Statute." (id. at 435).

See, also, Department of the Army, 12 FLRA 216, 217 (1983).

Executive Order 11491 provided for national consultation rights in Section 9 and unfair labor practices in Section 19 (19(a)(6) "refuse to consult, confer, or negotiate with a labor organization as required by this Order."). In Secretary of the Navy, Department of the Navy, Pentagon, A/SLMR No. 924, 7 A/SLMR 932 (1977), aff'd in part and rev'd in part, FLRC No. 77A-146, 6 FLRC 1228 (1978), both the Assistant Secretary and the Council held that a failure to meet Section 9(b) obligations to consult violated Section 19(a)(6) and (1). To like effect, see, also, Department of the Navy, Office of Civilian Personnel, A/SLMR No. 1012, 8 A/SLMR 364 (1978). In Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454, 4 A/SLMR 790 (1974), the Assistant Secretary noted,

> ". . . in situations where it is concluded that Sections 19(a)(2), (3), (4), (5), and or (6) have been violated . . . a violation of any of these foregoing subsections of Section 19(a) necessarily tends to interfere with, restrain, or coerce employees in the exercise of their rights assured by the Order and, therefore, also is a violation o f Section 19(a)(1) . . . Respondent's improper failure to meet and confer with the Complainant constituted a violation of Section 19(a)(6) and, derivatively, also violated Section 19(a)(1) of the Order." (id. at 792) (Emphasis supplied).

The same analysis applies to the wholly like provisions of § 16(a) of the Statute. Thus, a violation of a refusal to consult under § 16(a)(5) would, also, constitute a derivative violation of § 16(a)(1); but a refusal to consult is not an independent violation of § 16(a)(1). Because the duty to bargain or consult is enforced by § 16(a)(5), and not by § 16(a)(1) or (8), the Complaint is defective vis-a-vis any remedy for a failure to consult. However, because a refusal to consult was charged and was fully litigated, on my own motion, I hereby amend the Complaint to allege a violation of §§ 16(a)(5) and (1) of the Statute. The Complaint thereby is amended to conform to the proof.

Findings

1. The National Guard Bureau (hereinafter, "NGB" or "Respondent") is a joint Bureau of the Department of the Army and the Department of the Air Force. It provides liaison and coordination between the National Guard units in each state, the District of Columbia, Puerto Rico and the Virgin Islands, and the respective Department of Defense components. The chief military officer of each state is an Adjutant General who is appointed by the governor, although the President appoints the Adjutants General for the District of Columbia and for Puerto Rico.

2. Traditionally, the Adjutants General have been empowered by federal law to employ personnel to train and administer the National Guard and maintain its equipment, and to pay such personnel with Federal funds. Pursuant to the National Guard Technicians Act of 1968, these employees were brought into federal employment as excepted service employees with the title of "technicians". The overwhelming majority of technicians must be members of the National Guard and must maintain that membership in order to retain their civilian employment as technicians. These technicians are referred to as, "dual service" and/or "excepted" technicians. Only about four or five percent of the technicians, primarily secretarial or administrative, were in the Federal competitive service and they are referred to as, "non-dual service" or "competitive" technicians.

3. The Association of Civilian Technicians (hereinafter, "ACT" or "Union") represents more than 50% of eligible bargaining unit employees in the Army National Guard and has been granted national consultation rights by the NGB pursuant to § 13(a) of the Statute.

4. Currently, there are about 38,000 technicians in bargaining units employed by Army and Air Force National Guards and there are approximately 1,940 non-dual status technicians in the Army National Guard. ACT represents some of these 1,940 competitive employees, including some in the United States Property and Fiscal Office, Supply and Services Division, in 29 states (G.C. Exh. 2).

5. In the National Defense Authorization Act for fiscal year 1996, all future hires in the National Guard technician program were required to be military members, that is, dual status technicians.

6. In the National Defense Authorization Act for fiscal year 1998, it is required that: (a) the number of non-dual status technicians (competitive technicians) be

reduced by fifty percent by September 30, 2002; and (b) that all non-dual status technicians (competitive technicians) be eliminated by September 30, 2007, i.e., on and after September 30, 2007 all technicians are to be dual status technicians without exception.

7. On February 12, 1998, Mr. Stephen P. Stine, Chief, Policy Division, Directorate for Human Resources, NGB, issued a memorandum for the Adjutants General of All States, Puerto Rico, Virgin Islands, and the District of Columbia re: "All States Log Number (P98-0018) Policy on Elimination of Title 32 Non-Dual Status Technicians Resulting from the National Defense Authorization Act for FY98" which stated, in part, as follows:

> "1. The National Defense Authorization Act (NDAA) for FY 98, enacted 18 Nov 97, requires the number of non-dual status technicians that held military technician positions as of 30 Sep 97 be reduced by 50 percent by 30 Sep 2002, and that on and after 30 Sep 2007, all military technician positions be held by dual status technicians. The legislation requires a plan for achieving the reduction, to include alternative recommendations for accomplishing the work performed by non-dual status technicians. In order to comply with the requirements of the legislation, it is our policy that each state and territory reduce their number of non-dual status technicians that were on the rolls as of 30 Sep 97 by 50 percent by 30 Sep 2002. Decisions regarding the numbers of reductions per year from now until 30 Sep 2002, will be made by individual states and territories. The primary method to achieve the 50 percent reduction is to offer voluntary early retirement authority (VERA) and voluntary separation incentive pay (VSIP) to the affected non-dual status technicians. . . .
>
> "2. A projection of the number of non-dual status technicians who would leave the program each fiscal year through 30 Sep 2002 is required NLT 31 Mar 98 using the attached format. . . .
>
> "3. There will not be a freeze on merit promotion actions to existing non-dual status positions at this time; however, moving technicians to positions from one service to the other continues to be prohibited. The policy contained in our 13 Aug 97 letter requiring that

all newly established positions be dual status and require military membership remains in effect.

. . .” (G.C. Exh. 3).

8. On June 29, 1998, NGB, by Mr. Roger M. Parrish, Personnel Management Specialist, NGB-HRF-Western Center, issued to all states a “Position Description Release” for, “Immediate Implementation by HRO”; identification “CRA 98-1008", which provided, in pertinent part, as follows:

> “POSITION DESCRIPTIONS (PDs): 70146000 - 70159000 & 70165000 - 70166000.
>
> “The enclosed classification package is for use in the Supply & Services Division, USPFO. The position descriptions applicable to this organization are a mixture of updates of old position descriptions, existing descriptions (i.e., Secretary, Materials Handler Supervisor & Motor Vehicle Operator), and new descriptions developed expressly for this organization. <u>These descriptions are to be used in the standard Supply and Services Division</u> as specified by NGB-ARL and <u>will replace all existing exception and standard position descriptions</u>. This release represents the most efficient and effective way to organize the work. Variations must be reviewed and approved by the Office of Primary Responsibility (NGB-ARL) and ARNG Manpower. Proper utilization of these positions depends on the interrelationship of all positions and the integrity of the organization. <u>Existing exception and standard position descriptions may be used for competitive employees as current restrictions will not allow placement of these employees on new position descriptions</u>. . . .” (G.C. Exh. 4) (Emphasis supplied).

Accompanying the Position Description Release and the new position descriptions were various documents including: (a) a chart which showed, <u>inter alia</u>, in one column the Abolished PDs and in the next column, the New PDs (G.C. Exh. 4, Attachment). Thus Supply Management Officer Old PD 70011000 (GS 12) became New PD 70146000 (GS 12) now called, “Supervisory Logistics Management Specialist” (G.C. Exhs. 4, Attachment, 9); Supply Systems Analyst, Old PD 70110000 (GS 11) because New PD 70147000, same title and same grade

(G.C. Exhs. 4, Attachment, 12)[2]; Transportation Assistant (GS 7) Old PD R8993000 became New PD 70158000, same title and grade (G.C. Exhs. 4, Attachment, 21) Shipment Clerk Old PD 70017000 (GS 5) became New PD 70159000, now called, "Transportation Assistant", same grade (G.C. Exhs. 4, Attachment, 23); Materials Handler, Old PD R9594000 (GS 6) became New PD 70165000, same title and same grade (G.C. Exhs. 4, Attachment, 25); Materials Examiner and Identifier, Old PD R953000 (GS 7) became New PD 70166000, same title and grade (G.C. Exhs. 4, Attachment, 27); Supervisory Supply Systems Analyst, Old PD 70013000 (GS 9) became New PD 70150000, same title and grade (G.C. Exhs. 4, Attachment, 29, 29A); and (b) a "NOTE" on the last page of the Chart which provided, in part, as follows:

> "NOTE: . . .
>
> "Positions abolished in this release (CRA 98-1008) may no longer be used in the USP&FO, Supply and Services Division, except as required for competitive employees who may not be moved to any new position description due to current National Guard policy affecting competitive employees. Competitive employees on positions upgraded by this release must be restricted to performing duties at their current grade level and should be left on the description they presently occupy.
>
> . . ." (G.C. Exh. 4, Attachment)(Emphasis supplied).

9. Mr. Stephen Paul Stine, Director of Human Resources (Tr. 16) (hereinafter, "Director") testified that the Position Description Release was mandatory (Tr. 49) but personnel actions pursuant to it are guidance, ". . . because there are so many variations of the situations that exist at State level. . . ." (Tr. 49). As the Release stated, ". . . These descriptions [Position Descriptions] . . . will replace all existing exception and standard position descriptions. . . ." (G.C. Exh. 4) and the Director emphasized that the, ". . . statutory requirement . . . is that all positions must require military membership from that point forward." (Tr. 50). The Director stated that the Technicians Act of 1968, ". . . requires that all positions be occupied by people who must maintain military membership, with exception (sic)." (Emphasis supplied) and the exceptions permitted

---

[2] G.C. Exh. 13 does not indicate whether Old PD 7006300 was "Competitive" or "Excepted" or both but New PD 70063000 shows the job, "Supply Technician" (GS 7) is now "Excepted".

employment of the non-dual status (competitive) employees (Tr. 26). He stated that each exception is peculiar, or personal, to that employee (Tr. 26-27, 48).

10. Nevertheless, before June 29, 1998, many Position Descriptions, specifically at least General Counsel Exhibits 11, 12, 21, 23, 25, 27 and 29, provided that the, "Position Status", was, "Competitive", or, "Excepted". Before June 29, 1998, if a position designated "Competitive" or "Excepted" became vacant and was to be filled, non-dual status, i.e., competitive, employees could bid for the position, as, of course, could dual status, i.e., excepted, employees (Tr. 46-47). After June 29, 1998, all position descriptions which permitted "Competitive" or "Excepted" status were abolished and every new Position Description now required, "Excepted" status only (G.C. Exhs. 4, Attachment; G.C. Exhs. 10, 12, 14, 15, 21, 23, 25, 27, 29A). Now, non-dual service, i.e., "Competitive", employees could not bid for any open position because all Position Descriptions now required "Excepted", i.e., dual status, employees, (see, for example, G.C. Exhs. 4 (". . . current restrictions will not allow placement of these employees [competitive employees] on new position descriptions. . . ." Note: "Competitive employees on positions upgraded by this release must be restricted to performing duties at their current grade level and should be left on the description they presently occupy.") (Emphasis supplied), 5; Tr. 47, 48, 54). While "competitive" employees could not bid for open positions, they could be promoted to a higher position if, but only if: (a) a higher grade became open; and (b) that position when it came open had been occupied by a Competitive employee (Tr. 39, 50). Otherwise, a Competitive employee can be "promoted" only if duties of his, or her, current position have accreted to reflect that the changed duties already being performed, as identified by desk audit by an HRO Classification Specialist, demonstrate performance at the higher grade (G.C. Exh. 5; Tr. 33, 34, 35, 36).

Although the Director testified that the various State National Guards had authority to "promote" competitive service technicians, vis-a-vis changed duties by accretion, without a waiver, he conceded that he had never informed them that waivers were unnecessary and he said, ". . . the States felt they [waivers] were necessary because they were

asking to put non-dual status in dual status jobs. We were not able to do that." (Tr. 50)[3]

Conclusions

ACT has had national consultation rights, pursuant to § 13(a)(1) of the Statute since at least 1986, National Guard Bureau, 24 FLRA 577 (1986), and § 13(b) of the Statute provides as follows:

> "(b)(1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall -
>
> "(A) be informed of any substantive change in conditions of employment proposed by the agency, and
>
> "(B) be permitted reasonable time to present its views and recommendations regarding the changes.
>
> "(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization-
>
> "(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and
>
> "(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action."
>
> (5 U.S.C. § 7113(b)(1) and (2)).

Thus, § 13(b)(1) of the Statute requires an agency to inform a labor organization having national consultation rights with the agency of any substantive changes in conditions of

[3] While somewhat ambiguous, Mr. Stine unquestionably meant that a non-dual status employee could not be placed into a dual status job. Rather, as he testified (Tr. 29, 31-32), and as stated in General Counsel Exhibit 5, the non-dual status employee's current Position Description would continue to be used with a ". . . pen and ink" (Tr. 29) change to reflect the changed duties.

employment proposed by the agency and to provide the labor organization with reasonable time to present its views and recommendations and to consider such views and recommendations before taking final action.

In order for the obligation to consult to apply, there must be a substantive change in conditions of employment and whether it concerns a military aspect of technician employment is immaterial. Under the Statute, the only qualification is that it be a substantive change in conditions of employment. National Guard Bureau, 22 FLRA 836, 839 (1986). Here, it is plain that NGB's June 29, 1998, issuance of its mandatory Classification Release 98-1008 made substantive changes in conditions of employment. This Release abolished all existing Position Descriptions providing for "Competitive" or "Excepted" status and established new Position Descriptions which required "Excepted" status only. The result was, inter alia, that competitive status employees could no longer bid for job openings for "Competitive" or "Excepted" jobs; the release specifically stated, "Competitive employees on positions upgraded by this release must be restricted to performing duties at their current grade level and should be left on the description they presently occupy" (G.C. Exh. 4, Attachment); competitive status employees thereafter could be "promoted" in only two narrow situations: (a) if a higher grade position became vacant and if, when it became open, it was occupied by a classified status employee, then another classified employee could be moved into the position; or (b) by accretion of duties so that a desk audit would demonstrate that the duties of the incumbent had changed to encompass the duties of the higher grade; and to "promote" a classified employee under situation (a), above, a waiver would be required because, "competitive employees . . . may not be moved to any new position description. . . ." (G.C. Exh. 4, Attachment, "Note") (Emphasis supplied). Further, State National Guard officials had never been advised that a waiver was not required to "promote" in situation (b), above, for accretion of duties and ". . . the States felt they [waivers] were necessary because they were asking to put non-dual status in dual status jobs. . . ." (Tr. 50). Accordingly, whether waivers were required to "promote" by accretion, the State Adjutants General believed waivers were necessary and the practice was to request waivers, which NGB acted upon (G.C. Exh. 5).

Therefore, NGB's June 29, 1998, issuance of its mandatory Classification Release constituted a substantive change in personnel policy. Because ACT had national consultation rights, NGB was obligated to comply with the

provisions of § 13(b)(1) of the Statute before finalizing the changes. Thus, NGB was required to notify ACT and provide ACT with the opportunity to present its views and recommendations and to consider such views or recommendations before it issued the June 29, 1998, Release. This it did not do and NGB thereby failed to comply with its obligation to consult under § 13(b)(1) of the Statute, 5 U.S.C. § 7113(b)(1), and thereby violated § 16(a)(5) and (1) of the Statute, 5 U.S.C. §§ 7116(a)(5) and (1).

REMEDY

General Counsel does not seek a status quo ante remedy although he does seek,

> "The remedial relief . . . to accord ACT the consultation rights it was denied, and to post an appropriate Notice To All Employees" (General Counsel's Brief, p. 10).

General Counsel does seek nationwide posting and does request that the Order be signed by the Chief of the National Guard Bureau.

However, ACT does seek a status quo ante remedy. Thus ACT states,

> ". . . The agency should be ordered to (1) rescind the Release pending implementation of the union's national consultation rights, and (2) announce again and rerun any placement actions from which non-dual status employees were excluded from consideration due to the Release. . . ." (Brief For Charging Party, p. 2).

While I am not aware of any case in which the Authority has granted a status quo ante remedy for violation of § 13 (b)(1) of the Statute, plainly the Authority would favorably entertain such a remedy in an appropriate case. In General Services Administration, 6 FLRA 430 (1981), which involved contemplated government-wide paid parking, the Authority stated that, for various reasons, including pending litigation before the courts relating to the validity of the paid parking plan, ". . . we believe that a status quo ante remedy would be inappropriate." (id. at 435); in National Guard Bureau (NAGE), 18 FLRA 475 (1985) (no request by either General Counsel or NAGE for status quo ante remedy), ". . . no such remedy is warranted." (id. at 478 n.4); and in National Guard Bureau (NAGE), 22 FLRA 836 (1986); National Guard Bureau (ACT), 24 FLRA 577 (1986), both of which grew out the same "Mix-of-the-Force" policy, status

quo ante had not been sought in either case by any party and the Authority concluded in each case that, ". . . in the circumstances of this case, that no such remedy is warranted." 22 FLRA at 840, n.2; 24 FLRA at 580 n.3). In Secretary of The Navy, Department of the Navy, Pentagon and American Federation of Government Employees, AFL-CIO, A/SLMR

No. 924, 7 A/SLMR 933 (1977)[4], I had recommended a status quo ante remedy, id. at 945, which the Assistant Secretary found was not warranted in the particular circumstances of that case, because, ". . . Rescission of the new policy by implication would require abrogation of any contractual commitments already made to contract out. In my opinion,

[4] Aff'd in part, rev'd in part and remanded, 6 FLRC 1228 (1978). Section 9 of Executive Order 11491 provided for national consultation rights and Section 9(b) was substantially like § 13(b) of the Statute, except that Section 9(b) contained a limitation not found in § 13 of the Statute, as follows:

> ". . . An agency is not required to consult with a labor organization on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition." (Executive Order 11491, Section 13 (b)).

The Assistant Secretary had held, in part, that,

> ". . . This limitation [i.e., not required to consult on any matter it would not be required to negotiate, if it were entitled to exclusive recognition], however, does not, in my view, affect the right of an organization possessing national consultation rights to comment, as distinguished from consult, upon substantive changes in personnel policies proposed either by the agency or by the organization. . . ." (7 A/SLMR at 934).

The Council held that the Assistant Secretary's determination in this regard was inconsistent with the purposes of the Order, 6 FLRC at 1231, and further stated, in part, as follows:

> ". . . under the last sentence of section 9(b) of the Order, the union's rights to notification and comment under the first sentence are limited to matters which fall within the scope of negotiation. . . ." (6 FLRC at 1232).

Nevertheless, the Council held, in agreement with the Assistant Secretary, that, ". . . the union has a right to be notified of such a decision, once made, and to consult (including comment) as to the impact and implementation of such change." (6 FLRC at 1233 n.5). See also, Department of The Navy, Office of Civilian Personnel, A/SLMR No. 1012, 8 A/SLMR 364 (1978).

the potential disruption of the Respondent's operations that would be created by such an order outweighs the need for a status quo ante remedy. . . ." (id., at 935).

I fully agree with the position of the Charging Party that in order to give ACT the consultation rights it was denied a status quo ante remedy is both necessary and appropriate. General Counsel fully agrees that ACT should be accorded the consultation rights it was denied. With full recognition that Congress has mandated that by September 30, 2002, fifty percent of the number of non-dual status [competitive] technicians on the rolls as of September 30, 1997, be eliminated and that on and after September 30, 2007, there may be no non-dual status (competitive) technicians, the accomplishment of that statutory mandate did not require the elimination of all Position Descriptions permitting employment of non-dual status (competitive) technicians. Nor would withdrawal of the new Position Descriptions unilaterally implemented on June 29, 1998, and the reinstatement of the Position Descriptions that were in effect before June 29, 1998, cause any disruption of Respondent's operations. For the most part, the "new" Position Descriptions (PD) were unchanged from the "old" Position Descriptions except that in each instance the optional, "Classified" or "Excepted" status of each PD was changed to require "Excepted" status only, and restoration of the old PDs would simply restore the right of Classified (non-dual status) technicians to bid for jobs with PDs permitting employment of Classified technicians. To the extent that any PD was substantively modified, plainly such modification can remain in abeyance pending compliance with Respondent's duty to consult. Finally, to withdraw placement actions from which classified (non-dual status) employees were excluded from consideration due to the Release of June 29, 1998, and to re-announce and re-run such placement actions, would not cause undue disruption of Respondent's operations. Indeed, such disruption as might occur is simply that which normally results from any other unlawful personnel action upon correction.

General Counsel's request for nation-wide posting wherever employees represented by ACT are located is wholly appropriate inasmuch as the June 29, 1998, unilateral implementation of the Release affected all classified (non-dual service) employees of Respondent wherever located. General Counsel's request that the Notice be signed by the "Chief of the National Guard Bureau" is also fully warranted as the National Guard Bureau is the entity which failed and refused to comply with its obligations under § 13(b) of the Statute and is the entity which unilaterally implemented its June 29, 1998, Release.

Having found that the National Guard Bureau failed and refused to comply with its obligations under § 13(b) of the Statute, 5 U.S.C. § 7113(b), and thereby violated §§ 16(a)(5) and (1) of the Statute, 5 U.S.C. §§ 7116(a)(5) and (1), it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.41 of the Authority's Rules and Regulations and 5 C.F.R. § 2423.41, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the National Guard Bureau, shall:

1. Cease and desist from:

(a) Failing to consult with the Association of Civilian Technicians before replacing position descriptions that allow non-dual status technicians to occupy the positions with position descriptions that make membership in the National Guard a prerequisite to occupying the positions.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Withdraw the new Position Descriptions it unilaterally implemented on June 29, 1998.

(b) Reinstate the Position Descriptions it abolished on June 29, 1998, and which were in effect before June 29, 1998.

(c) Withdraw all placement actions from which Classified (non-dual service) employees were excluded from consideration due to the Release of June 29, 1998, re-announce and re-run all such placement actions.

(d) Consult with the Association of Civilian Technicians about any decision to replace position descriptions that permit non-dual status technicians to occupy the positions in the Army National Guard, United States Property and Fiscal Office; Supply and Services Division.

(e) Post wherever employees represented by the Association of Civilian Technicians 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 Chief of the National Guard Bureau, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(f) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Washington Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Issued: May 30, 2000
Washington, DC

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the National Guard Bureau violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to consult with the Association of Civilian Technicians before replacing position descriptions that allow non-dual status technicians to occupy the positions with position descriptions that make membership in the National Guard a prerequisite to occupying the positions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL withdraw the new Position Descriptions we unilaterally implemented on June 29, 1998.

WE WILL reinstate the Position Descriptions we abolished on June 29, 1998, and which were in effect before June 29, 1998.

WE WILL withdraw all placement actions from which Classified (non-dual service) employees were excluded from consideration due to the Release of June 29, 1998; and WE WILL re-announce and re-run all such placement actions.

WE WILL consult with the Association of Civilian Technicians about any decision, to replace position descriptions that permit non-dual status technicians to occupy the positions in the Army National Guard, United States Property and Fiscal Office, Supply and Services Division.

Date: By:

CHIEF
NATIONAL GUARD BUREAU

This Notice must remain posted for 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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Washington Regional Office, whose address is: Tech World Plaza, 800 K Street, NW, Suite 910N, Washington, DC 20001, and whose telephone number is: (202) 482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. WA-CA-80617, were sent to the following parties in the manner indicated:

CERTIFIED MAIL & RETURN RECEIPT NUMBER **CERTIFIED**

Thomas F. Bianco P 726 680 964
Counsel for the General Counsel
Federal Labor Relations Authority
Tech World Plaza North
800 K Street, NW, Suite 910N
Washington, DC 20001
Phone: 202-482-6702 ext.22
Fax: 202-482-6724

Ms. Andrea Krawczyk P 726 680 965
Mr. Wilson E. Fisher
National Guard Bureau
1411 Jefferson Davis Hwy., Suite 9100
Arlington, VA 22202-3132
Phone: 703-607-5980
Fax: 703-607-1316

Daniel M. Schember, Attorney P 726 680 966
Gaffney & Schember, P.C.
1666 Connecticut Avenue, NW, Suite 225
Washington, DC 20009
Phone: (202)328-2244
Fax: (202)797-2354

Dated: May 30, 2000
Washington, DC