United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of Kentucky National Guard and Association of Civilian Technicians Kentucky Long Rifle Chapter 83 and Bluegrass Chapter 69	Case No. 18 FSIP 003

DECISION AND ORDER

The Association of Civilian Technicians, Kentucky Long Rifle Chapter 83 and Bluegrass Chapter 69 filed a request for assistance with the Federal Services Impasses Panel (Panel) to consider a negotiation impasse over the remaining articles in a successor collective bargaining agreement (CBA) under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §7119, between it and the Kentucky National Guard.

Following an investigation of the Union's request for assistance, the Panel determined that it would assert jurisdiction over the matters involving Article 10 – Grievance Procedure; Article 11 – Arbitration; and Article 21 – Disciplinary and Adverse Actions and those matters would be resolved by Informal Conference[1]. The Informal Conference was held on March 19, 2018 in Louisville, KY. The parties were informed that if settlement was not reached during the Informal Conference on March 19, 2018, Chairman Carter would notify the Panel of the status of the dispute. The Panel would then take whatever action it deemed appropriate to resolve the impasse, which may include the issuance of a *Decision and Order*. Although the parties made substantial movement in package proposals, there remained outstanding issues after the Informal Conference. Chairman Carter ordered the parties to submit written submissions by

[1] The Panel declined jurisdiction over Article 28 - Dress Code because the Agency raised a colorable duty to bargain claim. The Agency argued that they had no duty to bargain the subject of Dress Code for Duel Status Technicians because it is a permissive subject.

April 6, 2018, including their last and best offer, any argument and authority relied upon, and any exhibits. The Parties were advised that the briefs and exhibits would go to all Panel members for consideration and final resolution. Both parties submitted timely submissions.

BACKGROUND

The Kentucky National Guard, including both the Army National Guard and the Air National Guard (the Agency or Management), enables the State of Kentucky to respond to domestic emergencies, combat missions, counter-drug efforts, and reconstruction missions. Whether the call is coming from the Kentucky State Governor or directly from the President of the United States, Kentucky National Guard Soldiers and Airman are ready to provide the Governor and the President with ready forces in support of state and federal authorities at home and abroad. The National Guard is not a full-time active force. The majority of the bargaining unit members are wage grade employees who are designated "duel status technicians." While they are civilian employees, they are required to become and remain active military members of the Guard unit in which they are employed, maintain the military grade specific to the positions, and they must wear their military uniforms while they are working[2]. As federal employees, the Guard's Civilian Technicians are entitled to engage in collective bargaining regarding certain subjects[3]. When called to active duty, those duel status Technicians lose their Civilian status and become members of the Armed Forces.

The Kentucky Long Rifle Chapter of the Association of Civilian Technicians (Chapter 83, ACT or the Union) represents approximately 411 Civilian Technicians of the Kentucky Army National Guard who perform various maintenance, training, and administrative functions in support of the day-to-day operations of the Kentucky National Guard throughout the Commonwealth of Kentucky. The Bluegrass Chapter of the Association of Civilian Technicians (Chapter 69, ACT or the Union) represents approximately 213 Civilian Technicians of the Kentucky Air National Guard who perform various maintenance, training and administrative functions in support of the Kentucky National Guard, primarily at the Louisville Air National Guard Base in Louisville, KY and at the Boone National Guard Center in Frankfort, KY.

The current Collective Bargaining Agreement (CBA), dated December 2012, expired in December 2015. The parties bargained ground rules in March 2016 to reopen and bargain a successor to the 2012 CBA. At that time, the parties agreed to roll over all of the terms of the 2012 CBA for one year. The terms of the parties' successor CBA is the subject of this impasse dispute. Negotiations ended in December 2016 with a tentative agreement between the parties. The ground rules included agreement to subject the provisions of the tentatively agreed upon successor

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[2] 32 U.S.C. 709 (b) (3) and (4)
[3] 5 U.S.C. §7102

agreement to the ratification process of the Union and to Agency Head Review process under 5 U.S.C. 7114 (c).

At the conclusion of the Union ratification process, the Union members declined to ratify certain portions of the CBA Articles 10, 11, 20 and 29. The Adjutant General (designated Agency Head) denied portions of the CBA Articles 1, 6, 9, 10, 11, 13, 18, 20, 21, 26, 28, 29 and 31. The parties re-engaged in negotiations over the non-ratified articles in July 2017. The parties were able to reach agreement on all of the outstanding articles, except for portions of Article 10, 11, 21 and 28. In September 2017, the parties engaged the services of the Federal Mediation and Conciliation Services. In September 2017, the Union filed their request for assistance with FSIP.

ISSUES

- Article 10, Section 3 – Grievance Procedure, Exceptions
- Article 11 – Arbitration Fees
- Article 21 – Appeal of Disciplinary and Adverse Actions

RELEVANT AUTHORIES

This case involves the balancing of appeal rights to disciplinary actions for National Guard Technicians under a number of authorities:

- 5 USC Ch 71
- 32 USC Sec 709
- 5 USC Ch 75
- NDAA FY17
- DC Circuit Court Authority
- FLRA Authority

Under 5 USC 7121, with the exception of matters that are excluded by law (which cannot be negotiated into the grievance procedures), the Union has the right to include matters in its CBA appeal procedures. The procedures would become the exclusive administrative appeal procedures for bargaining unit employees for resolving grievances which fall within its coverage. Under 32 USC 709(f), the Adjutant General ("AG") is vested with the final decision on actions under the AG appellate authority (removal, RIF or adverse actions for more than 14 days). The right to appeal those actions cannot extend beyond the Adjutant General.

Under 5 USC 7502, a bargaining unit employee can appeal a disciplinary action of 14 days or less through an agency's administrative procedure or, if it is bargained by

the parties for inclusion in the negotiated grievance procedure, then the employee can utilize the grievance procedure. Under 5 USC 7511, certain bargaining unit employees can appeal an adverse action (suspensions of more than 14 days) to the Merit Systems Protection Board (MSPB), the agency administrative procedure or, if it is bargained by the parties for inclusion in the negotiated grievance procedure, through the grievance procedure. However, there are a number of positions that have been specifically excluded from appeal by this statute, including the National Guard Technicians (7511 (b)(5)); which means those appeals were also excluded from the negotiated grievance procedure under 7121. However, with the passage of the FY 17 NDAA (specifically, Section 512), the Technicians were included and therefore enjoy the right to appeal an adverse action to the MSPB and the EEOC.

POSITION OF THE PARTIES

Article 10 – Grievance Procedure

Section 3. Exceptions:

b. Matters specifically excluded from the negotiated grievance procedure are:

*(6) Any matter for which a statutory or regulatory appeal procedure exists except prohibited personnel practice: **[Union would like to remove this language]***

*(7) Equal Employment Opportunity complaints; **[Union would like to remove this language]***

*(9) Informal Communications that do not lead to disciplinary actions: i.e., verbal counseling, admonitions, letter of instructions. **[Agency would like to add this language]***

The negotiated grievance procedure is the exclusive procedure available to the Technicians in the bargaining unit for resolving grievances, unless the parties agree to exclude any matter from the application of the grievance procedures (5 U.S.C. 7121(a)(2)) or if the matter is excluded by statute (5 U.S.C. 7121 (c)[4]) These parties have negotiated a section under this article with an exhaustive list of those matters that cannot be grieved; the bargaining unit employee would have to pursue a complaint of

[4] The grievance procedure shall not include: (1) any claimed violation relating to prohibited political activity; (2) retirement, life insurance, or health insurance; (3) suspension or removal under 7532 (national security); (4) any examination, certification or appointment; or (5) the classification of a position.

those matters in another forum (e.g., statutory venue or internal administrative agency grievance procedure). The parties are in disagreement over the matters that should be excluded from the negotiated grievance procedure.

Union's Position

As an overall matter, the Union would like to remove the exclusion provisions in dispute, thereby, allowing bargaining unit employees the right to use the negotiated grievance procedure to resolve their complaints involving those matters. The Union presents a number of arguments. First, DC Circuit Court[5] and FLRA case precedent[6] provides that narrowing the scope of the negotiated grievance procedure (i.e., limiting the matters that can go through the grievance procedure) carries a high burden and, the Union argues, the Agency has failed to meet that high burden by providing a compelling reason to limit the grievance procedure. Second, under Section 512 of the National Defense Authorization Act of FY17 (NDAA), Congress lifted the restriction of the National Guard Technicians appealing personnel actions beyond the Adjutant General (AG); taking away the AGs authority as the final word on some personnel actions. The Union argues that this recent repeal of the AGs exclusive authority is an indication that Congress expects these employees to have the same rights of appeal that other federal employees have with similar personnel actions. Third, the Agency has failed to demonstrate that there is a "particular" reason to treat the Kentucky National Guard personnel differently from other agencies; therefore, the Agency fails to meet its high burden to narrow the grievance procedure. Fourth, the Union argues that the Agency's overly broad language would eliminate the employee's statutory right under 5 USC 7121(d)[7] to choose between filing under the negotiated grievance procedure and a statutory procedure; forcing only the statutory option. Fifth, the Agency is denying an employee an independent third-party review of some actions; providing for no real legitimate opportunity to appeal.

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[5] *American Federation of Government Employees v. FLRA*, 712 F2d 640, 649 (D.C. Cir. 1983). Under the DC Circuit Standard (followed by the FLRA and FSIP) for excluding matters from the negotiated grievance procedure, if impasse is reached on limiting the scope of the negotiated grievance procedure, the FSIP is advised that it is to impose a broad scope grievance procedure, unless the limited-scope proponent can persuade it to do otherwise. The FSIP is to rule against the proponent of a limited procedure who fails to establish convincingly that, in the particular setting, its position is the more reasonable one.

[6] Vermont Air National Guard, Burlington Vermont, 9 FLRA 737, 742 (1982)

[7] 5 USC 7121(d) indicates that the employee has a right to choose between using the statutory procedure or the grievance procedure.

Agency Position

The Agency argues that the parties have always agreed to the practice of settling grievances at the lowest possible level. Allowing matters to be further appealed to a third party (i.e., challenged through the grievance process) after the AG makes their final decision, essentially removes the final approval authority of the AG and dishonors the long standing practice and agreement to resolve grievances at the lowest level. Secondly, while the Agency recognizes that Congress intended for some personnel actions to be appealable outside of the Agency to MSPB and EEOC (a determination that the AG would not be the final arbiter on certain actions), the Agency interprets the language in the National Defense Authorization Act to be a very limited exception to a long standing practice of the AG making the final decision. The Agency relies on 32 USC 709 to support the continued empowerment of the AG in all other personnel matters. They also rely on a long standing FLRA case (14 FLRA 38, decided in 1984), which reinforced the Authority's finding that Section 709(e) gives the AG decision-making authority that cannot be negotiated away in the negotiated grievance procedure. Specifically, Section 709(e) of the Technicians Act (32 USC 709) expressly reserves to the AG jurisdiction over the right to take certain personnel actions (e.g., adverse actions or removals). In Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984), the Authority held that inclusion in a negotiated grievance and arbitration procedure of a grievance concerning an AG's decision to take specific actions enumerated in section 709(e) is precluded by that provision of the Technicians Act. That case continues to be relied upon by the FLRA as it relates to those specific actions enumerated in section 709(e).

The Agency is arguing that the Union's attempt to include personnel actions (other than those actions specifically enumerated in 709(e) and recently addressed by the NDAA) within the coverage of the parties' negotiated grievance procedure conflicts with section 709 of the Technicians Act and, therefore, is outside the duty to bargain. The Agency provided case law that address the treatment of the negotiations of actions specifically enumerated in Section 709(e) (i.e., adverse actions, RIF, and removals). However, the Agency provided no cases to support its argument over the treatment of other actions (e.g., disciplinary actions of 14 days or less). Finally, the Agency argues that grievances are costly and matters should be resolved at the lowest possible level. The Agency has proposed to exclude the admonishments and reprimands from the grievance procedure, but instead allow the supervisors the ability to manage these more simple issues at the lower level.

Article 11 – Arbitration

Union proposal – If the arbitrator findings are completely in favor of one party, that party pays 25% of the fees and the to the party pays the remaining 75%

Agency proposal – Arbitration fees shall be evenly divided by the Technician Association and the Employer.

The Union offers language that provides for a smaller payment by the substantially prevailing party. The Union argues that their language should be adopted because it gives both parties a strong incentive to carefully examine the merits of their respective positions before demanding decision of matters by an arbitrator. The Agency offers language that would provide for an even 50/50 split of an arbitrators fee at all times. The Agency argues that their proposal should be adopted because it is definitive and fair, and could lead the parties to resolve their matters at a lower level because both parties are equally invested.

Article 21 – Disciplinary and Adverse Action

Section 5. Adverse Action:

(4) Appeals: There are three (3) possible appeals available: appellate review, administrative hearing, and MSPB appeal.

(i) If the technician decides to appeal through an appellant review by TAG or an administrative appeal, the appeal request must be submitted within twenty (20) calendar days (appeals may be made by or on behalf of the technician, at the technician's option, but are not required);

(ii) If the technician decides to file an appeal through the MSPB, the appeal must be filed within thirty (30) calendar days of the original decision effective date.

(5) Appeal procedures will follow the appropriate regulation; and

(6) Final decision letter (mandatory if technician appeals through TAG)

e. In an instance when a technician requests an appellate review, and the technician or their representative wants to give an oral response to TAG, they may request a meeting, in writing, through the HRO. TAG may approve this meeting but is not required to do so.

f. If an appeal is processed through TAG, the final decision is rendered by the Adjutant General. The Adjutant General's decision is final.

g. If an appeal is filed through the MSPB process, the MSPB decision is final unless the technician appeals to the actual Merit System Protections Board, or through the Circuit Court.

While this article addresses the appeal of both disciplinary actions[8] and adverse actions[9], the dispute continues to be whether disciplinary actions at 14 days or less can be appealed through the negotiated grievance procedure. As discussed above under Article 10, the Union relies on its argument that the grievance procedure must be broad and inclusive. The Agency argues that the NDAA doesn't cover the review of disciplinary actions at 14 days and less, and, 32 USC 709 does not allow for review of any AG's final decisions in the negotiated grievance procedure.

CONCLUSION

Having carefully considered the relevant authorities, evidence and arguments presented in support of the parties' positions, we find as it relates to disciplinary actions and the negotiation grievance procedure, the Parties will not exclude disciplinary actions from the grievance procedure. In this case, there is no statutory reason for excluding disciplinary action under 7121. Additionally, the Panel finds, consistent with the standard established by DC Circuit precedent and FLRA precedent, the Agency's reason offered in this case for wanting to exclude disciplinary action (i.e, long standing practice) does not meet the high burden to exclude those actions; the Agency's position is not the more reasonable one.

We find as it relates to adverse actions and the negotiated grievance procedure, while the NDAA now allows some matters to be appealed to MSPB and EEOC, 32 USC 709 still applies to appeals outside of MSPB (i.e, the AG continues to have exclusive authority over those matters in 709, except as provided in the NDAA). Therefore, consistent with 5 USC 7121, adverse actions cannot be included it in the negotiated grievance procedure.

We find as it relates to EEO matters and the grievance procedure, the Parties will not exclude EEO matters in the negotiated grievance procedure. In this case, there is no statutory reason to exclude EEO matters under 7121. Additionally, the Panel finds, consistent with DC Circuit precedent and FLRA precedent, the Agency's reason offered in this case for wanting to exclude disciplinary action (i.e, confusion caused from having two different time frames in the grievance procedure versus the statutory procedure, and EEO counselors being better trained in this area of dispute) does not meet the high burden to exclude; the Union's proposal is the more reasonable one.

We find as it relates to Informal Communications that don't lead to discipline and the grievance procedure, those matters should be excluded from the grievance procedure. The cost of grievance-arbitration litigation can be very high.
By definition and agreement, those informal communications can't be relied upon and

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[8] Disciplinary actions are suspensions for 14 days or less.

[9] Adverse actions are suspensions for more than 14 days (including indefinite suspensions, reductions in Grade or Pay, and removal from the Federal Service).

don't lead to discipline. The cost[10] to resolve appeals over those low- and no-impact disputes through litigation is not justified and in the taxpayer interest. We find that the Agency's proposal is the more reasonable one.

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 failure of the parties 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 parties to adopt the following to resolve the impasse:

- Article 10, Section 3, b - Remove exclusion 6 and exclusion 7. Keep exclusion 9. Add new language - Any adverse action (i.e., suspension for more than 14 Days, Reduction in Force, and removals from the Federal Service)).

- Article 11 - Arbitration fees shall be divided by the Technician Association and the Employer. If the arbitrator findings are split, the fees are divided evenly between the Technician Association and the Employer. If the arbitrator findings are completely in favor of one party, that party pays 25% of the fees and the other party pays the remaining 75%.

  Article 21 - Article 21 (f) For a disciplinary action (i.e., suspension of 14 days or less), the employee may grieve that action through the negotiated grievance procedure. If the employee is alleging that the disciplinary action was imposed on a legally prohibited basis such as age, gender or race, the employee may alternatively file an EEO complaint challenging the disciplinary action, but not both. An employee may also seek corrective action with the U.S. Office of Special Counsel (OSC) if he or she believes the action was taken because of a prohibited personnel practice.

  For an adverse action (i.e., suspension for more than 14 Days, Reduction in Force, and removals from the Federal Service), the employee may not grieve those actions through a collective bargaining agreement.

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[10] Under Article 11, the cost of that litigation is a shared cost.

By direction of the Panel.

Mark Carter
Chairman

May 3, 2018
Washington, D.C.