72 FLRA No. 69

NATIONAL GUARD BUREAU
AIR NATIONAL GUARD READINESS CENTER
(Agency)

and

ASSOCIATION OF CIVILIAN TECHNICIANS
(Labor Organization)

WA-RP-18-0061

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DECISION AND ORDER

June 17, 2021

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and James T. Abbott, Members
(Member Abbott concurring; Chairman DuBester dissenting, in part)

I. Statement of the Case

The Labor Organization (Union) filed an application for review (application) of the attached decision and order of Federal Labor Relations Authority (FLRA) Regional Director Jessica Bartlett (RD). The RD dismissed the Union's representation petition, which asked the RD to order an election to determine whether a proposed nationwide bargaining unit of 104 social workers wished to have the Union recognized as its exclusive representative. The RD found that the proposed unit was not appropriate under § 7112(a) of the Federal Service Labor-Management Relations Statute (the Statute).[1] The Authority previously granted the application but deferred action on the merits.[2]

On the merits, we agree with the RD's decision to dismiss the petition, but for a more basic reason. Each of the social workers is an employee of both the National Guard Bureau and the Adjutant General of a particular state air national guard, and the social workers are located throughout all fifty states, as well as several U.S. territories. As explained further below, if the Authority were to recognize the Union's proposed nationwide unit, the bargaining obligations that would flow from that unit certification would infringe upon the sovereign immunity of every state in the union. Consequently, we dismiss the petition for lack of jurisdiction.

II. Background and RD's Decision

A. Background

The facts of this case are described in detail in the attached decision and are only briefly summarized here.

The Agency is a joint bureau of the Department of the Army and the Department of the Air Force. The Agency acts as a liaison between those departments and the states' national guards. Each state has a national guard headed by the state's governor-appointed Adjutant General. Within each state's national guard is an air national guard. The states' air national guards are further divided into wings, which are separate command units headed by a wing commander who reports to the state's Adjutant General. There are ninety wings nationwide.

In 2015, the Agency hired the social workers as part of the Agency's Director of Psychological Health Program (the Program).[3] The social workers are assigned to, and physically located at, each wing with at least one per wing. The social workers act as subject matter experts for psychological health matters in their wing, help integrate Department of Defense policies and initiatives regarding psychological health in military readiness, and perform a variety of other regular duties, such as providing outreach to the wing, mental health assessments, and counseling.

In 2017, pursuant to statutory authorization, the Agency designated the state Adjutants General to "appoint" and "employ" the social workers assigned to their respective states.[4] The Agency then transferred the administration of the social workers' employment to the states' wing commanders, under the supervision of the Adjutants General. The Agency remained the Program's "functional area manager,"[5] acting as the subject matter expert for the Program, and distributing any clinical guidance, policies, or initiatives to the air national guards.

The Union filed a representation petition with the FLRA seeking an election among the previously unrepresented social workers to determine whether they wished to have the Union serve as their exclusive representative, in a proposed nationwide bargaining unit.

[1] 5 U.S.C. § 7112(a).
[2] *See* 5 C.F.R. § 2422.31(f)-(g).
[3] The official title for the social workers' position is Director of Psychological Health, and the social workers are civilian employees under title 5 of the U.S. Code. RD's Decision & Order (Decision) at 3.
[4] 10 U.S.C. § 10508(b)(2).
[5] Decision at 4.

B. RD's Decision

The RD considered whether the proposed unit is appropriate under § 7112(a) of the Statute.[6] Specifically, the RD found that the social workers do not share the same general working conditions because each wing commander independently determines the working conditions of the social worker assigned to that wing, including: duty hours and location; time and attendance; hiring, removal, and discipline; salary and bonuses; and assignment of work. Although the RD acknowledged that the Agency manages the Program, provides clinical supervision, supports the credentialing and privileging process, and issues policy guidance and instructions governing conditions of employment, she determined that the wing commanders independently "command and control" the social workers' working conditions.[7] Consequently, she concluded that the social workers are "employed by the states . . . in separate organizational components."[8]

In making this determination, the RD found that the Agency's clinical supervision of the social workers – which includes support, guidance, and peer review by Agency specialists called "[r]egional [l]eads" – amounts to quality control of the Program rather than management and supervision of the social workers.[9] For example, the RD found that if a social worker fails to follow Program guidance, the Agency cannot compel compliance, but must contact the wing commander to ensure the social worker's compliance.

The RD made a similar finding regarding the training the Agency provides to the social workers, which the Agency cannot compel the social workers to attend. The RD also found that wing commanders evaluate the social workers' performance, and any peer review by the regional leads is not incorporated into such evaluations. And while the RD found that the Agency manages the social workers' credentialing and privileging process, it cannot reassign, discipline, or remove social workers if their credentialing or privileging is revoked. Rather, she found that this authority lies with the wing commander.

Further, the RD found that social workers are not governed by the same personnel offices or labor-relations policies, and the Agency does not supervise the national guards' labor relations officers. She also determined that the Agency does not represent the air national guards in collective bargaining. Rather, the RD found that each state air national guard has different labor relations personnel and collective-bargaining agreements.

The RD acknowledged that the social workers share the same title, operate under the same guidance, have similar job duties, are subject to the same credentialing and privileging process, and have the same clinical supervision. However, she also found that the social workers do not share the same geographic locations, chains of command, Equal Employment Opportunity programs, payroll systems, and personnel offices. Weighing the community-of-interest factors, the RD determined that the proposed unit would not be able to deal collectively with the Agency as a single group. And on this basis, she concluded that the social workers did not share a community of interest. Moreover, the RD determined that the proposed unit would not promote effective dealings with, and efficiency of the operations of, the Agency. Therefore, the RD found the proposed unit not appropriate and dismissed the Union's petition.

The Union then filed the application on October 28, 2019. The Agency did not file a timely opposition.[10]

III. Analysis and Conclusions

A. The RD's decision raises an issue for which there is an absence of precedent, but, apart from that issue, the RD did not commit clear and prejudicial error concerning a substantial factual matter.

The Union contends that the RD erred in her appropriate-unit analysis by principally basing her determination that the social workers do not share a community of interest on the finding that the state air

[6] 5 U.S.C. § 7112(a).
[7] Decision at 7.
[8] *Id.*
[9] *Id.*

[10] The Authority's regulations permit a party to file an opposition to an application for review within ten days after the party is served with the application. 5 C.F.R. § 2422.31(d). The Authority's regulations give parties an additional five days to file a response if the application was served by "first-class mail or commercial delivery." *Id.* §§ 2429.21, 2429.22. On October 29, 2019, the Authority's Office of Case Intake and Publication issued an order directing the Union to cure procedural deficiencies in its application for review by November 12, 2019. Order at 1-2. The Union timely cured the deficiencies. *See* Union Response to Order (Response) at 3, 9-10. The Agency argues that its opposition is timely because the Union did not notify the Agency of compliance with the order by serving the Agency with its application for review. Opp'n at 1. But the Union provided evidence that it served the Agency with the application on November 1, 2019 by certified mail. Response at 10-11. Accordingly, under the Authority's Regulations, the Agency was required to file its opposition with the Authority by November 18, 2019. Because the Agency did not file its opposition until January 14, 2020, the opposition is untimely, and we do not consider it.

national guards, rather than the Agency, employ them.[11] In particular, the Union argues that the RD failed to recognize that, under 10 U.S.C. § 10508, *both* the Agency *and* the Adjutants General employ the social workers, and the Adjutants General exercise their employment authority due to a discretionary delegation of authority from the Agency.[12]

The Union is correct that the RD's finding the state air national guards, rather than the Agency, employ the social workers – when read literally and in isolation – conflicts with the text of 10 U.S.C. § 10508(b)(2) and (3).[13] That text states, in pertinent part, that

> the National Guard Bureau may program for, appoint, *employ*, administer, detail, and assign persons . . . within the National Guard Bureau and the National Guard of each State . . . to execute the functions of the National Guard Bureau and the missions of the National Guard. . . . The Chief of the National Guard Bureau may designate the adjutants general . . . to appoint, *employ*, and administer the National Guard employees authorized by this subsection[, including the social workers].[14]

But, in context, we read the RD's statement that the social workers are state employees as a reflection of the Authority's well-established "practice in representation cases [to] require[] an assessment of the record based on the *circumstances existing at the time of the hearing*."[15] Thus, the real-life employment circumstances of the social workers, and not solely the wording of the statutory text, reveal the character of the social workers' employment relationship with the states in which they are located. Nevertheless, we agree with the Union that the RD erred in this one narrow respect, by failing to recognize this recently established statutory authority, according to which the social workers are employed by their respective states and the Agency.

However, to the extent that the application challenges the RD's findings regarding the breakdown of day-to-day employment responsibilities between the Agency and the state Adjutants General, we reject those challenges as "mere disagreement[s] with the RD's findings of fact, evaluation of the evidence, and . . . conclusions based on that evaluation," which do not provide a reason to disturb the RD's findings.[16] As the RD detailed at length, the state Adjutants General, acting through their subordinate wing commanders, exercise "command and control" over the social workers' working conditions,[17] and the necessary involvement of the state Adjutants General gives rise to the jurisdictional concerns that we address in the next section.

B. The Authority lacks jurisdiction over the petition because any resulting certification would require continuous, nationwide interference in the employment decisions of the Adjutants General.

Even recognizing that the Agency exercises partial control over the employment of the social workers, the fact that the state Adjutants General exercise significant control raises serious jurisdictional concerns here.[18] The Adjutants General "perform the duties prescribed by the laws" of their respective states,[19] and the states pay the salaries of the Adjutants General. Although the Adjutants General must comply with the Agency's regulations and directives concerning the employment of social workers, those obligations do not alter the status of Adjutants General as state officers.[20] In

[11] Application at 3-5; *see id.* at 7.
[12] *Id.* at 3-4; *see id.* at 7.
[13] There is an absence of precedent regarding the relevant provisions of § 10508(b)(2) and (3) because the 2017 National Defense Authorization Act (NDAA) amended them. Decision at 4; National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-326, § 932, 130 Stat. 2000, 2363-64 (2016). The RD mentions that this change occurred in 2016 because the Fiscal Year 2017 NDAA became law in 2016.
[14] 10 U.S.C. § 10508(b)(2)-(3) (emphases added). The Union relies heavily on *Lipscomb v. FLRA*, 333 F.3d 611, 618 & n.7 (5th Cir. 2003), a case involving national guard dual-status technicians. Application at 5; *see id.* at 7. But as the Union acknowledges, dual-status technicians are employed under a different title of the U.S. Code, and the National Guard Technicians Act that applies to dual-status technicians does not apply to the social workers. *Id.* at 3-5.
[15] *U.S. Dep't of the Army, U.S. DOD, Fort Detrick, Md.*, 62 FLRA 407, 409 (2008) (*Fort Detrick*) (emphasis added).
[16] *U.S. Dep't of the Navy, Naval Station Ingleside, Tex.*, 46 FLRA 1011, 1025 (1992) (citing *U.S. DOL, Off. of Admin. Law Judges, Pittsburgh, Pa.*, 40 FLRA 1021, 1024 (1991)).
[17] Decision at 7.
[18] Recently, in *U.S. DOD, Ohio National Guard*, 71 FLRA 829 (2020) (*Ohio*) (Member Abbott concurring, in part; Chairman Kiko dissenting), the Authority confronted the jurisdictional implications of certain unfair-labor-practice proceedings that affected the employment decisions of a single state's Adjutant General. *See id.* at 832-33 (Concurring Opinion of Member Abbott); *id.* at 833-35 (Dissenting Opinion of Chairman Kiko). By contrast, here, the Union's petition raises even graver concerns because the petition aims to establish a nationwide unit that, in one fell swoop upon certification, would require federal interference in the employment decisions of the Adjutants General in *every state*.
[19] 32 U.S.C. § 314(a).
[20] *See Ohio*, 71 FLRA at 833 (Dissenting Opinion of Chairman Kiko).

their capacities as state officers, the Adjutants General undeniably "employ" the social workers, as mentioned above.[21] Moreover, as the RD noted, the states pay the social workers' salaries too,[22] thereby further reinforcing the state character of the employment relationship between the social workers and the Adjutants General.

If we were to entertain the Union's petition for an election that could lead to the certification of a nationwide unit of social workers – whose conditions of employment are substantially dictated at the state level – then we would be applying the Statute in a manner that would require simultaneously and continuously interfering in the employment decisions of all fifty states' Adjutants General. We find that the Statute, when read with due regard for the constraints that the U.S. Constitution imposes,[23] does not grant us such sweeping powers.

For the foregoing reasons, we affirm the RD's decision to dismiss the Union's petition, but we do so because we lack jurisdiction to entertain it.[24]

IV. Order

We affirm the RD's dismissal of the Union's petition, but we do so on the bases set forth in this decision.

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[21] The Union makes much of the fact that the delegation of employment authority over social workers to state Adjutants General is *discretionary*, *see* 10 U.S.C. § 10508(b)(2) ("*may* designate the adjutants general" (emphasis added)), whereas, in cases involving dual-status national guard technicians, the delegation of employment authority to state Adjutants General is mandatory, *see* 32 U.S.C. § 709(d) ("*shall* designate the adjutants general" (emphasis added)). Application at 2-3, 19-20. But we do not find this distinction significant because, as already discussed, the "circumstances existing at the time of the hearing" control our decision, *Fort Detrick*, 62 FLRA at 409, and at the time of the hearing (and continuing through the present time), the social workers are employed by the state Adjutants General pursuant to delegated authority from the Agency.

[22] Decision at 4.

[23] *See Ohio*, 71 FLRA at 834 (Dissenting Opinion of Chairman Kiko).

[24] *See generally id.* at 833-35 (Dissenting Opinion of Chairman Kiko). Although we recognize that the social workers are not employed under the National Guard Technicians Act, the concerns regarding state sovereign immunity and the canon of constitutional avoidance that Chairman Kiko expressed in her dissenting opinion in *Ohio* apply in this case too because of the practical similarities between the Adjutant General's responsibilities under the Technicians Act in *Ohio* and the employer responsibilities of the Adjutants General in this case under 10 U.S.C. § 10508(b).

Member Abbott, concurring:

Once again, we are faced with a question concerning the outer edge of the Federal Service Labor-Management Relations Statute (the Statute). More specifically, we are once again called upon to determine the extent to which the Statute may or may not reach into the business of individual state national guards. Last year, in *U.S. DOD, Ohio National Guard* (*Ohio National Guard*),[1] we addressed how this question came about and the manner in which the Authority has extended the reach of the Statute to state employees who work for national guard units in every state.[2]

Then-Chairman Kiko made a compelling argument that the Statute does not, and should not, apply to personnel of state national guard units. I concurred in that case because I felt constrained by Circuit Court precedent.[3] However, I noted therein that I shared my colleague's concerns and that it was imperative that we revisit that question, particularly insofar as it raises Constitutional issues.[4] This case implicates the same issues.

As then-Chairman Kiko warned in *Ohio National Guard*, "[t]he Supreme Court has consistently struck down 'federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes.'"[5] Here, the state national guard is involuntarily subjected to federal administrative apparatus, but the employees who are most affected by our holding that we have no jurisdiction, have no mechanism by which they may avail themselves of those procedures, unfair labor practices, grievances, etc. The Union's petition aims to establish a nationwide unit that, in one fell swoop upon certification, would inject federal review on the employment decisions of the Adjutants General in *every state*. The Union's position to establish a nationwide unit would extend the Statute's reach even further than our decision in *Ohio National Guard*.[6] I now believe that the Constitutional concerns raised by then-Chairman Kiko in her poignant dissent in *Ohio National Guard* demand a re-examination of our precedent.

The Adjutants General "perform the duties prescribed by the laws" of their respective states,[7] and the states pay the salaries of the Adjutants General. Although they must comply with the regulations and directives of the Air National Guard Readiness Center that concern the employment of social workers, those obligations do not alter the status of Adjutants General as state officers.[8] As state officers, the Adjutants General "employ" and pay the salaries of the social workers,[9] facts that reinforce the *state* character of the employment relationship between the social workers and the Adjutants General. The Union argues that the delegation of employment authority for social workers and dual-status technicians to state Adjutants General is substantively different because the delegation for social workers is *discretionary*,[10] but the delegation for the technicians is mandatory.[11] That is, however, a distinction of no consequence.

Our Statute does not empower us to commandeer state operations involving state employees.

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[1] *See generally* 71 FLRA 829 (2020) (Member Abbott concurring, in part; then-Chairman Kiko dissenting).

[2] Besides the specific question raised here, I have repeatedly observed that the reach of our organic statute has an edge at which our jurisdiction ends. *See NLRB*, 71 FLRA 1149, 1153 (2020) (then-Chairman Kiko concurring; Member Abbott dissenting) (Dissenting Opinion of Member Abbott) (finding that the controversy was beyond the scope of the Statute because it did not meet the statutory definition of a grievance); *U.S. Dep't of VA, N. Cal. Health Care Sys.*, 71 FLRA 1127, 1129 n.21 (2020) (the-Member DuBester dissenting) (Member Abbott noting concerns about the outer limits of grievance procedures under the Statute) (citations omitted); *Dep't of VA, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428, 432 n.53 (2019) ("Member Abbott observes that he has expressed reservations about employees pursuing alleged Privacy Act violations as grievances through the negotiated grievance procedure because he questions whether the Privacy Act is a law, rule, or regulation affecting conditions of employment under 5 U.S.C. § 7103(a)(9)(C)(ii)."); *U.S. Dep't of VA, Veterans Benefit Admin., Nashville Reg'l Off.*, 71 FLRA 322, 324-25 (2019) (Member Abbott concurring; then-Member DuBester dissenting) (Concurring Opinion of Member Abbott) (stating that complaints arising under the Privacy Act are not grievable because they do not affect conditions of employment).

[3] *See Ohio Nat'l Guard*, 71 FLRA at 832 & n.3 (Concurring Opinion of Member Abbott) (citing *Mich. Army Nat'l Guard*, 69 FLRA 393, 395 (2016), *enf'd as modified by FLRA v. Mich. Army Nat'l Guard*, 878 F.3d 171, 178 (6th Cir. 2017); *In re Sealed Case*, 551 F.3d 1047, 1049 (D.C. Cir. 2009); *Lipscomb*, 333 F.3d at 618 & n.7; *Gilliam v. Miller*, 973 F.2d 760, 762 (9th Cir. 1992); *NeSmith v. Fulton*, 615 F.2d 196, 198-99 (5th Cir. 1980); *Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3d Cir. 1974)).

[4] *Id.* at 832-33.

[5] *Id.* at 834 (Dissenting Opinion of then-Chairman Kiko) (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012)).

[6] *Id.* at 832 (Concurring Opinion of Member Abbott) ("I share [then-Chairman Kiko's] concerns regarding the existing judicial and Authority precedent which applies the Statute to the Adjutant General as though it were a federal agency.").

[7] 32 U.S.C. § 314(a).

[8] *See Ohio Nat'l Guard*, 71 FLRA at 833 (Dissenting Opinion of then-Chairman Kiko).

[9] RD's Decision & Order (Decision) at 4.

[10] *See* 10 U.S.C. § 10508(b)(2) ("*may* designate the adjutants general" (emphasis added)).

[11] *See* 32 U.S.C. § 709(d) ("*shall* designate the adjutants general" (emphasis added)).

Below, the Regional Director concluded a unit of social workers would not be "an appropriate unit," in part, because the social workers worked for separate commands and different human resources offices.[12] In light of that determination and because the National Guard Units are controlled by State Adjutant Generals, I do not agree that national guard units *can or should be* covered by our Statute.

In sum, I do not believe that the Statute permits the FLRA to organize state employees, even when the alleged employer is a federal agency.

[12] Decision at 7 (finding that each state command "determine[s] the day-to-day conditions of employment of [social workers]"); *id.* (finding that social workers "are employed by the states, and are, therefore, in separate organizational components"); *id.* (finding that social workers "are not administered by the same personnel offices").

Chairman DuBester, dissenting in part:

As the majority notes, the Regional Director (RD) found that the petitioned-for unit of social workers is not appropriate under § 7112(a) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Upon reviewing the extensive factual findings upon which the RD based her decision, I believe she correctly applied Authority precedent to conclude that the social workers do not share a community of interest.

Not content to simply evaluate the RD's decision under the standards applicable to unit determinations under our Statute, the majority dismisses the Union's petition "because we lack jurisdiction to entertain it."[2] In previous decisions, my colleagues have emphasized the Authority's responsibility to bring clarity to its decisions.[3] Today's decision falls well short of this mark.

The majority explains that the Authority lacks jurisdiction over the Union's petition because the Statute, "when read with due regard for the constraints that the U.S. Constitution imposes, does not grant us such sweeping powers."[4] But it bases this conclusion upon concerns expressed by my colleague in her dissenting opinion in *U.S. DOD, Ohio National Guard* (*Ohio National Guard*),[5] a decision in which the Authority – in accordance with overwhelming judicial precedent – found it *had* jurisdiction over a state Adjutant General.[6]

As one might expect, the majority struggles mightily to reconcile *Ohio National Guard* with its conclusion in today's decision. For instance, it asserts that the Union's petition "raises even graver concerns" than those "implicat[ed]" in *Ohio National Guard* because the proceedings in *Ohio National Guard* "affected the employment decisions of a single state's Adjutant General," while the Union's petition "would require federal interference in the employment decisions of the Adjutants General in *every state*."[7] But the majority fails to explain how this distinction, standing alone, would impede our jurisdiction in this case. Nor does it cite to any Authority or judicial precedent supporting this premise.

The majority further asserts that the same concerns "regarding state sovereign immunity and the canon of constitutional avoidance" it found were implicated in *Ohio National Guard* "apply in this case too because of the practical similarities" between the Adjutant General's "employer responsibilities" under 32 U.S.C. § 709 (the Technicians Act) and 10 U.S.C. § 10508(b), the statute at issue in this case.[8] But even while relying upon these similarities to find that we lack jurisdiction over the Union's petition, the majority ignores long-standing precedent affirming the Authority's jurisdiction over Adjutants General in their exercise of employer responsibilities under the Technicians Act.[9]

In sum, I agree with the RD's finding that the social workers do not share a sufficient community of interest to be certified as a bargaining unit under the Statute. But I cannot join the majority's ill-reasoned and unsupported effort to bootstrap this finding into a jurisdictional impediment to considering the Union's petition in the first instance.

Accordingly, I dissent.

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[1] 5 U.S.C. § 7112(a).

[2] Majority at 6.

[3] *SSA*, 71 FLRA 205, 206 n.10 (2019) (Member Abbott concurring; then-Member DuBester dissenting) ("Without question it is this Authority's privilege and responsibility to bring clarity and correction when existing precedent has been so woefully inadequate and only lent itself to even more confusion and uncertainty.").

[4] Majority at 6.

[5] 71 FLRA 829 (2020) (Member Abbott concurring, in part; then-Chairman Kiko dissenting).

[6] Majority at 6 n.23 (citing *Ohio Nat'l Guard*, 71 FLRA at 834 (Dissenting Opinion of then-Chairman Kiko)), *pet. for review docketed*, *Ohio Adjutant Gen. Dep't v. FLRA*, No. 20-3908 (6th Cir. Aug. 28, 2020); s*ee also FLRA v. Mich. Army Nat'l Guard*, 878 F.3d 171, 178 (6th Cir. 2017) (finding Statute's protections apply to technicians despite the military authority of state adjutants general); *Lipscomb v. FLRA*, 333 F.3d 611, 618 & n.7 (5th Cir. 2003) (rejecting constitutional arguments that Authority did not have jurisdiction over adjutant general based on adjutant general's state character) (citing *Gilliam v. Miller*, 973 F.2d 760, 762 (9th Cir. 1992) (finding adjutant general acted in capacity of federal agency); *NeSmith v. Fulton*, 615 F.2d 196, 198-99 (5th Cir. 1980) (holding that adjutant general is a federal agency, despite its status as a state office); *Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3d Cir. 1974) (finding "no doubt" that the adjutant general is an "agency or agent of the United States" under the Act and subject to federal jurisdiction)).

[7] Majority at 6 n.18 (emphasis in original).

[8] *Id.* at 6 n.24.

[9] *See supra* note 6.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGION

NATIONAL GUARD BUREAU, AIR NATIONAL GUARD READINESS CENTER
(Agency)

and

ASSOCIATION OF CIVILIAN TECHNICIANS
(Labor Organization)

WA-RP-18-0061

DECISION AND ORDER

I. Statement of the Case

On July 30, 2018, The Association of Civilian Technicians (ACT or Union) filed a petition seeking an election for all Social Workers employed by the National Guard Bureau (NGB or Agency). The Agency objected to the petition on the basis that it does not employ the Social Workers.

On July 10, 2019, A hearing was held in this matter before a Hearing Officer of the Authority. The issue at the hearing was whether the Union's petitioned-for unit constitutes an appropriate unit under Section 7112(a) of the Federal Service Labor Management Relations Statute (Statute). I have reviewed the rulings made by the Hearing Officer and find that they are free from prejudicial error. Accordingly, the Hearing Officer's rulings are affirmed.

After consideration of the entire record, including the parties' post-hearing briefs, I find that the Union's petitioned-for unit is not appropriate because the Agency does not employ the Social Workers, and, therefore, the Social Workers do not share a community of interest, the proposed unit would not promote effective dealings with the Agency, and the proposed unit would not promote efficiency of the Agency's operations. Accordingly, I dismiss the Union's petition.

II. Findings

In its petition, the Union describes the unit it seeks as a stand-alone unit that includes "all non-supervisory, non-managerial social worker GS-0185 employees."[1]

ACT represents many nonprofessional bargaining units in the state National Guards.[2] Because social workers are professional employees, they do not fall within the certification of other units that ACT currently represents.[3] The record indicates that the social workers have not been previously represented by another labor organization.[4]

NGB is a joint bureau of the Department of Army and the Department of Air Force.[5] As such, it provides liaison and coordination between the National Guard units in each state and the respective Department of Defense components.[6] The NGB acts as the resource manager for federal money, material, and manpower allocated to the National Guard and it implements federal military policy as it affects the National Guard.[7] The NGB is headed by a Chief (CNGB) who reports to the Chiefs of Staff of the Army and the Air Force concerning National Guard matters. NGB is not a higher headquarters for the state National Guards.[8]

The National Guard is established in the 54 states and territories (hereafter referred to collectively as the 'states').[9] The chief military officer of each state is known as the Adjutant General (TAG) of that state's National Guard.[10] The TAG is usually appointed by the state's governor.[11] Only the governor has the power to remove a TAG.[12] Each state has an Air National Guard. Within the state Air National Guards are separate command units called Wings.[13] There are 90 Wings within the states.[14] Each Wing is headed by a Wing Commander that reports to the TAG.[15]

As part of its mission, NGB issues policy guidance and instruction to the states.[16] This policy guidance is

[1] Authority Ex. 1a
[2] Tr. 21: 15-24
[3] Tr. 24: 14-24
[4] Tr. 22: 1-2
[5] Jt. Ex. 17
[6] *Id.*
[7] Tr. 41: 1-19
[8] Tr. 62: 4-7
[9] Jt. Ex. 17; Tr. 85: 1-2
[10] Tr. 40: 18-20
[11] Tr. 40: 18-22
[12] Tr. 55: 3-8
[13] Tr. 53: 17-23
[14] Tr. 57: 13-17
[15] Tr. 62: 8-15; 62: 10-11
[16] Tr. 43: 9-13

specific to various career fields.[17] The guidance establishes qualifications and job duties for positions.[18] The NGB also issues Chief National Guard Bureau Instructions (CNGBI) regarding conditions of employment for state employees – including topics such as leave and awards.[19] The states are required to follow CNGBI.[20] If a TAG chooses not follow the guidance, the NGB would not have the authority to remove them from office.[21] The states can supplement CNGBI in collective bargaining agreements.[22]

The NGB does not review the states' collective bargaining agreements.[23] While NGB provides training and advisory services to labor relations specialists in the Wings, it does not negotiate with unions on the state level.[24] Similarly, the NGB does not respond to grievances filed at the state level, but may provide guidance if requested by the state.[25] The NGB does not supervise Labor Relations Officers or Human Resources Officers in the states.[26] Payroll servicing is done at the state level.[27] Equal Employment Opportunity programs are on the state level.[28] Conditions of employment vary throughout the 54 states and territories.[29]

The Department of Defense, Directors of Psychological Health Program (Program) is guided by Department of Defense Instruction 6490.09.[30] The purpose of the Program is "to build unit and community capacity by promoting and empowering the creation of a culture of mental fitness, as well as providing active outreach and networking with [Air National Guard] leadership and local resources."[31] The official title of the social workers at issue here is Director of Psychological Health (DPH).[32] DPHs are required to be independently licensed.[33] DPHs perform a variety of duties to support the mission of the Program. DPHs are subject matter experts for psychological health matters found in their Wing.[34] In this role, DPHs consult with and provide periodic reports to Wing leadership.[35] Further, DPHs help integrate Department of Defense policies and initiatives regarding psychological health in military readiness.[36] As part of their regular duties, DPHs provide outreach to the Wing, and conduct diagnostic mental health assessments, counseling, annual mental health assessments, fitness for duty assessments, training, and line of duty determinations.[37]

DPHs were originally hired as contract employees.[38] When the contract expired, the NGB then hired the DPHs as Title 5 civilian employees in 2015.[39] At the time, the NGB did not have the authority to place Air Force Title 5 employees under the TAGs.[40] Consequently, the DPHs were administratively placed under NGB.[41] DPHs were duty stationed in Wings with approximately one per Wing.[42] During this time, the Wing commanders had operational control of the DPHs while NGB supervised and provided clinical guidance for them.[43] DPHs reported directly to the Regional Leads at NGB.[44] The Regional Leads report to the Chief of Psychological Health, the head of the Program.[45]

In 2016, the National Defense Authorization Act gave the CNGB power to delegate the TAGs as the agency heads for everyone assigned to their states.[46] In February 2017, the CNGB signed a memo formally delegating the TAGs as the agency heads within their states.[47] Shortly thereafter, the NGB began to transfer Title 5 employees to the states by groups.[48] In June 2018, the NGB began to transfer the DPHs to state control.[49] The transfer was done on a rolling basis.[50] As of the day of the hearing, all but three of the DPHs had been transferred to the states.[51] The NGB still intends to transfer these DPHs.[52] There are currently 104 DPH positions throughout the country with approximately one DPH assigned per Wing.[53]

Since the transfer, the Wing Commanders have administrative control of the DPHs.[54] The state pays the

[17] Tr. 43: 13-18
[18] Tr. 43: 9-18
[19] Tr. 46: 1-22; 47: 1-12
[20] Tr. 46: 22-23
[21] Tr. 54: 25; 55: 1-5
[22] Tr. 85: 10-22
[23] Tr. 71: 21-23
[24] Tr. 72: 22-24; 72: 13-21
[25] Tr. 72: 25, 73: 2-7
[26] Tr. 76: 24-25; 77: 1
[27] Tr. 74: 18-21
[28] Tr. 75: 1-3
[29] Tr. 84: 18-25; 85:1-9
[30] Tr. 97: 1-3
[31] Jt. Ex. 5
[32] Tr. 174: 23-25; 175: 1-5
[33] Tr. 147: 9-12
[34] Tr. 97: 6-8
[35] Tr. 97: 4-7; 98:14-17; 146: 4-8
[36] Tr. 97: 9-11
[37] Tr. 138: 22-24; 98: 5-10; 145: 20-23; 146: 1-5
[38] Tr. 33: 4-9
[39] Tr. 48: 9-13; 98: 21-25; 115:5-24
[40] Tr. 33: 12-15
[41] Tr. 99: 3-9
[42] Jt. Ex. 3
[43] Tr. 99: 7-17; 99: 13-15
[44] Tr. 99: 7-9
[45] Jt. Ex. 3
[46] Tr. 33: 23-25; 34: 1-3
[47] Tr. 34: 4-7; 35: 1-10
[48] Tr. 35: 1-10
[49] Tr. 37: 1-12
[50] Tr. 38: 15-22; 39: 7-15
[51] Jt. Ex. 2
[52] Tr. 61: 8-12
[53] Jt. Ex. 3
[54] Tr. 100: 2-4

DPHs' salaries.[55] While the Wing Commander can designate supervision, most DPHs work directly for the Wing Commander or Vice Wing Commander.[56] The Wing Commander hires, removes, and disciplines DPHs.[57] The Wing Commander determines the duty hours and location for DPHs.[58] The Wing Commander oversees DPHs' time and attendance including leave, overtime, and comp time.[59] The Wing Commander determines whether DPHs receive a bonus.[60] The Wing Commander assigns work to DPHs and evaluates their performance.[61]

After the transfer, NGB is still the Program's "functional area manager."[62] As functional area manager, NGB is the subject matter expert for the Program and distributes any clinical guidance, policies, or initiatives from the CNGB to the states.[63] NGB has an operations guide (guide) for the Program.[64] The guide provides information about how the DPHs can set up their psychological health program in the states.[65] While it is not mandatory that DPHs follow the guide, it establishes the standard of care for the overall program.[66] NGB continues to provide annual training, but training is not mandatory for DPHs to attend.[67]

NGB continues to provide clinical oversight and operational guidance to DPHs.[68] DPHs are still assigned to four Regional Leads for clinical supervision and guidance.[69] A clinical supervisor assists with clinical questions and evaluates clinical performance.[70] In addition to the Regional Lead, other DPHs can also provide clinical supervision.[71] If they have a high risk or high interest case, DPHs are required to contact their Regional Lead.[72] In the event of a high risk case, the Regional Lead, DPH, and, sometimes, DPH peers, will discuss it weekly.[73] If a DPH failed to contact their Regional Lead for support in a high risk case, the Chief of Psychological Health would contact the Wing Commander to ensure the DPH complied with the process.[74] The Program also requires that, once a quarter, ten percent of DPH's cases are peer reviewed.[75] Peer review can be conducted by another DPH in the field or a Regional Lead.[76] When conducting a peer review, the Regional Lead or DPH fills out a checklist that is then sent to NGB.[77] The DPH chooses which cases will be reviewed.[78] Peer review is for quality assurance purposes.[79] The reviewer may give suggestions about how a DPH could improve their work, but it is not incorporated into performance evaluations at the Wing level.[80]

In order to work in any Air National Guard medical service, providers must be credentialed and privileged.[81] Through credentialing, NGB ensures that an individual DPH is qualified to perform their job duties.[82] As part of the credentialing process, the NGB verifies education and that state licensures are valid.[83] A provider's privileges determine the scope of practice within the Air National Guard.[84] The Regional Leads receive a copy of all peer review checklists in order to support the credentialing and privileging process.[85] Regional Leads sign off on credentials and privileges for DPHs.[86] DPHs must be credentialed and privileged every two years.[87] If there are complaints from clients or from a Wing Commander, NGB would determine whether there is a potential safety issue.[88]If so determined, the NGB could hold the DPH's credentials and privileges in abeyance.[89] At that point, a peer would conduct a quality review of the DPH's work and submit a report to a credentials committee at the NGB level.[90] The committee can then reinstate that person's credentialing and privileging, reinstate credentialing and privileging with monitoring, or convene a peer review panel that consists of three DPHs.[91] The panel would review the allegations, the report, and a statement from the DPH.[92] The panel would then recommend reinstating, reinstating with monitoring, or revoking the DPH's

[55] Tr. 42: 25; 43:1-4
[56] Tr. 97: 24-25; 100: 10-12
[57] Tr. 42: 15-17; 100:13-15
[58] Tr. 42: 6-10
[59] Tr. 42: 13-19; 159: 15-16
[60] Tr. 42: 11-12
[61] Tr. 139: 16-24; 140: 1-8; 141: 21-25; 143: 1-7; 100: 5-8
[62] Tr. 127: 8-11
[63] Tr. 127: 14-25
[64] Jt. Ex. 22
[65] Tr. 106: 18-25; 107: 1-5
[66] Tr. 107: 8-9; 111:17-21
[67] Tr. 133: 3-12; 134: 1-10
[68] Tr. 101: 3-13
[69] Tr. 104: 23-25; 104: 1-2; Jt. Ex. 4
[70] Tr. 112: 12-23
[71] Tr. 113: 1-7
[72] Tr. 113: 11-23
[73] Tr. 113: 11-23
[74] Tr. 114: 13-23
[75] Tr. 116: 5-11
[76] Tr. 116: 12-15
[77] Tr. 116: 23-25; 117: 1-5
[78] Tr. 118: 12-15
[79] Tr. 118: 19-20
[80] Tr. 118: 16-23
[81] Tr. 102: 9-12
[82] Tr. 102: 13-19
[83] Tr. 102: 13-19
[84] Tr. 102: 20-23
[85] Tr. 117: 5-15; 119: 18-24
[86] Tr. 119: 20-24
[87] Tr. 120: 3-7
[88] Tr. 121: 13-20
[89] Tr. 121: 21-22
[90] Tr. 122: 1-11
[91] Tr. 122: 19-25
[92] Tr. 123: 1-4

credentials and privileges.[93] If a DPH's privileges were revoked, the DPH could not see patients or provide care.[94] At that point, the Wing Commander would determine whether or not to reassign the DPH to another job, discipline, or remove them.[95] If a DPH's credentials were reinstated with monitoring, the NGB would provide enhanced clinical guidance or training.[96]Any clinical reviews from this process would be reported to the credentialing committee not the Wing Commander.[97]

III. Analysis and Conclusions

In determining whether a unit is appropriate under § 7112(a) of the Statute, the Authority considers whether the unit would: "(1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved." *U.S. Dep't of Commerce, U.S. Census Bureau*, 64 FLRA 399, 402 (2010) (*Commerce*). Determinations as to each of these three criteria are made on a case-by-case basis. *Id.* The Authority has set out factors for assessing each criterion but has not specified the weight of individual factors or a particular number of factors necessary to establish an appropriate unit. *AFGE, Local 2004*, 47 FLRA 969, 972 (1993). Additionally, an appropriate unit need not be the most appropriate unit or the only appropriate unit in order to nonetheless be an appropriate unit. *U.S. Dep't of the Air Force, Lackland Air Force Base, San Antonio, Tex.*, 59 FLRA 739, 741 (2004) (*Lackland AFB*).

Community of Interest

With regard to community of interest, this criterion ensures that it is possible for employees "to deal collectively [with management] as a single group." *U.S. Dep't of the Navy, Fleet and Indus. Supply Ctr., Norfolk, Va.*, 52 FLRA 950, 960 (1997) (internal quotation mark omitted). To determine whether employees share a clear and identifiable community of interest, the Authority considers such factors as whether employees: "are part of the same organizational component of the agency; support the same mission; are subject to the same chain of command; have similar or related duties, job titles, and work assignments; are subject to the same general working conditions; and are governed by the same personnel and labor relations policies administered by the same personnel office." *U.S. Dep't of the Army, Army Corps of Eng'rs, Directorate of Contracting Sw. Div., Fort Worth Dist., Fort Worth, Tex.*, 67 FLRA 211, 214 (2014). Additionally, the Authority examines such factors as "geographic proximity, unique conditions of employment, distinct local concerns, degree of interchange between other organizational components, and functional or operational separation." *Commerce*, 64 FLRA at 402.

Here, I find that the DPHs do not share an identifiable community of interest. While the NGB provides clinical supervision and issues instruction governing conditions of employment, it retains no authority over the day-to-day employment of the DPHs. The Wing Commanders within the states determine the day-to-day conditions of employment of DPHs including: their duty hours and location; time and attendance; hiring, removal, and discipline; salary and bonuses; and assignment of work. Consequently, the DPHs are not subject to the same conditions of employment. Thus, I find that DPHs are employed by the states and are, therefore, in separate organizational components.

The Union argues that NGB retains sufficient control over DPHs through clinical supervision as well as credentialing and privileges to render its petitioned-for unit appropriate. However, this assertion overlooks the simple, but crucial, fact that command and control lies with the Wing Commanders. The record establishes that clinical supervision is primarily for quality control of the Program rather than management of the DPHs. While the Regional Leads provide support, guidance and peer review for DPHs, this is not equivalent to line supervision. The NGB cannot compel a DPH to comply with Program guidance. Indeed, if a DPH does not adhere to program requirements, the NGB will contact the Wing Commander so the Wing Commander could ensure compliance. Similarly, the NGB does provide training for DPHs, but cannot mandate that DPHs attend. Further, Wing Commanders evaluate DPHs' performance, and information from NGB is not incorporated into such evaluations. NGB does manage the credentialing and privileging of DPHs and the peer reviews conducted by the Program are utilized in this process. However, if a DPH's credentialing and privileges were suspended or revoked due to quality issues, the NGB would not have the power to reassign, discipline, or remove the employee. Instead, that authority lies with the Wing Commander. Thus, while NGB manages the Program, the Wing Commanders in each state manage the day-to-day conditions of employment for DPHs.

I also note that the Union made similar arguments regarding dual status technicians in *U.S. Dep't of Def. Nat'l Guard Bureau and Assoc. of Civilian Technicians*, 55 FLRA 657 (1999). In that case, the Union sought to consolidate bargaining units between the states, and then, as in now, the Authority held that the employees did not share a community of interest, in part, because they were under state control. *Id*. at 662.

[93] Tr. 123: 5-6
[94] Tr. 124: 20-23
[95] Tr. 123: 22-25; 144: 6-12
[96] Tr. 125: 2-22
[97] Tr. 125: 9-17

The evidence further establishes that the DPHs are not administered by the same personnel offices. The NGB does not set labor relations policy and has no authority to represent the states in collective bargaining. Accordingly, the states have different labor relations personnel and collective bargaining agreements are negotiated at the state level. *Id*. at 658-9.

While the DPHs share the same title, operate under the same guidance, have similar job duties, are subject to the same credentialing and privileging process, and have the same clinical supervision, this is not enough to overcome the fact that the NGB is not the employer. Additionally, DPHs are in different physical locations, have different chain of commands, have different EEO programs, have different payroll servicing systems, and are serviced by different personnel offices. Therefore, employees in the petitioned for unit would be unable deal collectively with NGB. Accordingly, I find that the DPHs do not share a clear and identifiable community of interest.

Effective Dealings

With respect to effective dealings with the Agency, this criterion "pertains to the relationship between management and the exclusive representative selected by unit employees in an appropriate [-]bargaining unit." *Def. Logistics Agency, Fort Belvoir, Va.*, 60 FLRA 701, 706 (2005) (*DLA*) (Member Cabaniss dissenting). In assessing this criterion, the Authority examines various factors, such as: the parties' past experience with collective bargaining; "the locus and scope of authority of the responsible personnel office administering personnel policies covering employees in the proposed unit; the limitations, if any, on the negotiation of matters of critical concern to employees in the proposed unit; and the level at which labor relations policy is set in the agency." *Id.*

Here, I find that, in addition to not sharing a community of interest, the proposed bargaining unit would not promote effective dealings between the Union and Agency. ACT argues that, because NGB maintains control over credentialing, privileging, and clinical work, the petitioned-for unit is appropriate. As discussed above, those arguments are not enough to overcome the fact that the DPHs are employed by the states rather than NGB. As a result, DPHs are subject to different conditions of employment and are serviced by different personnel policies and offices across the across the 54 states and territories, each location with its own labor relations program.

Above all, NGB does not have the authority to negotiate or administer a collective bargaining agreement on the state level. While the NGB offers guidance to the states' labor relations programs, it does not have knowledge of the states' specific conditions of employment and, even if it did, NGB is not authorized to bargain on the states' behalf. Placing the NGB in the position of negotiating for the states without having the authority to do would not promote effective dealings. *U.S. Dep't of Def. Nat'l Guard Bureau*, 55 FLRA at 664. Accordingly, it is apparent that the proposed unit would create unnecessary limitations on the Agency's ability to negotiate over issues of critical concern to employees, and, therefore, would not promote effective dealing with the Agency.

Efficiency of Operations

With respect to the efficiency of the Agency's operations, this criterion addresses "whether the structure of the bargaining unit bears a rational relationship to the operational and organizational structure of the agency." *Lackland AFB*, 59 FLRA at 742. In order to assess the efficiency of the agency's operations, the Authority looks at "the effect of the proposed unit on operations in terms of cost, productivity, and use of resources." *Commerce*, 64 FLRA at 404 (internal quotation marks omitted).

Here, I find that, in addition to not sharing a community of interest and not promoting effective dealings between the Union and Agency, the proposed unit would not allow for efficient agency operations. Specifically, the proposed unit does not bear a rational relationship to the organizational structure of the Agency. As discussed above, while NGB retains control over the Program through clinical supervision and credentialing, it does not control the DPHs' day-to-day conditions of employment. Again, this is because DPHs are employed by the states rather than the NGB. As such, the proposed unit does not reflect the organizational structure of the Agency nor its relationship to the states.

Additionally, the proposed bargaining unit would not lead to the efficient use of resources. Granting the proposed bargaining unit would essentially require NGB to fundamentally change its relationships to the states. Currently, NGB operates as liaison between the Department of Defense and the states. In this role, it implements policy and allocates resources, but does not operate as a higher headquarters to the states. In the event that the Union's proposed bargaining unit were granted, NGB would need to be authorized to and then actually negotiate on the states' behalf. Of course, these negotiations would require that the NGB learn the particular conditions of employment in each of the 54 states and territories. Further, after reaching an agreement, the states would then need to administer the agreement which would require the NGB to assume the role of a higher headquarters. Accordingly, the proposed unit would require restructuring costs, in terms of money, productivity, and resources, which would not promote the efficiency of Agency operations.

IV. Order

In view of the above findings and conclusions, it is ordered that the Union's petition be dismissed.

V. Right to File an Application for Review

Under Section 7105(f) of the Statute and Section 2422.31(a) of the Authority's Regulations, a party may file an application for review with the Authority within sixty (60) days of this Decision. The application for review must be filed with the Authority by October 28, 2019, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, DC 20424–0001. The parties are encouraged to file an application for review electronically through the Authority's website, www.flra.gov.

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Jessica S. Bartlett
Regional Director, Washington Region
Federal Labor Relations Authority

Dated: August 29, 2019