

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

TEXAS ARMY NATIONAL GAURD

and

ASSOCIATION OF CIVILIAN TECHNICIANS

Case No. 17 FSIP 050

DECISION AND ORDER

The Texas Army National Guard (Agency or Management) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse over a Successor Agreement under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Association of Civilian Technicians (Union).

Following an investigation of the Agency's request for assistance, the Panel declined to assert jurisdiction over the impasse concerning the Union's Access to Official Government Email Addresses. As a result of that same investigation, the Panel concluded that it would assert jurisdiction over the matters of Seniority and New Employee Orientation (or Newcomer Briefing). Under 5 C.F.R. §2471.6(a)(2) of its regulations, the Panel determined that it would resolve those impasse matters through a Written Submissions procedure process with the opportunity for rebuttal statements. The parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the dispute, which may include the issuance of a binding decision. The Panel has now considered the entire record, including the parties' final offers, written submissions, and the parties' rebuttal statement.

BACKGROUND

The Texas Army National Guard enables the State of Texas to respond to domestic emergencies, combat missions, counter-drug efforts, and reconstruction missions. Whether the call is coming from the Texas State Governor or directly from the President of the United States, the Texas Army National Guard is ready to provide the Governor and the President with ready forces in support of state and federal authorities at home and abroad. The Association of Civilian Technicians represents approximately 750 Title 32 wage grade and general schedule Civilian Technicians. The current CBA expired in 2006. The parties continue to operate under the terms of the current CBA until a new CBA has been executed. The parties are currently bargaining a successor CBA, which is the subject of this impasse dispute.

Bargaining began over the successor CBA in November 2015. The parties were able to get most of the issues resolved through face-to-face bargaining, as well as the exchange of proposals outside of the bargaining table. The parties engaged with the assistance of the mediation services of the Federal Mediation and Conciliation Services in July 2016. Neither of the parties filed a request for assistance with the Panel right away. Instead, in November 2016, the parties exchanged more proposals and engaged in more bargaining; but there remained outstanding issues. In April 2017, the Management representative filed the request for assistance with the Panel.

ISSUES

The parties disagree over: (1) Seniority - the selection criteria that will be used whenever additional tours or shifts are established; (2) Seniority; and (3) Newcomer Briefings.

POSITIONS OF THE PARTIES

A. Seniority - Selection Criteria for Tours and Shifts

Agency Final Offer and Position

Agency's Final Offer

17.1 The TXARNG will create and maintain a seniority list based on a bargaining- unit members service computation date (SCD National Guard Tech). Seniority procedures will be used as follows:

- a. Volunteers determined by management to be qualified (hereafter, "volunteers") will be selected first. If more employees volunteer than are needed, the most senior employee (by SCD National Guard Tech) will be selected first unless this procedure would preclude the accomplishment of the mission.
- b. If a sufficient number of volunteers cannot be obtained, assignment will be made on the basis of least seniority (by SCD National Guard Tech). The qualified employee with the least seniority will be selected.
- c. When fewer employees volunteer than are needed, non-volunteers will be selected from the roster. Employees completing the assignment will be placed at the bottom of the roster, least senior first. Volunteers desiring to stay on the assignment may remain, providing no one else will want to take his place and at Management's discretion.
- d. Will be applied in determining priority for granting competing or conflicting requests for annual leave or compensatory time off by employees deemed by the TXARNG, in its sole discretion, to be eligible for grant of such requests.
- e. Will be used as a tiebreaker when necessary.
- f. Will be used to set up rotations, if necessary.

- g. Management reserves the right to assign work and to make personnel decisions based on the individual job-related characteristics such as judgement and reliability to determine which employee to assign to particular assignments.

Article 16.7 involves the selection criteria that will be used whenever additional tours or shifts are established. Under the current CBA language, qualified volunteers (qualification to be defined by Management) will be selected first. If more employees volunteer than are needed, the most senior employee will be given the first schedule change, unless this procedure would preclude the accomplishment of the mission. If there aren't a sufficient number of volunteers, assignment will be made on the basis of least seniority among qualified employees.

The Agency proposes to move the language from Article 16.7 into a new Article 17 - Seniority, allowing the employees and supervisors to have a centralized place to review the requirements of seniority. Additionally, the Agency has proposed a new provision (i.e., Article 17.1 (g)), which would allow the Agency to make selection decisions among qualified volunteers, and based upon judgement and reliability of the employees. The Agency is seeking to use these criteria, in addition to seniority, in making the select from among the qualified employees.

Union Final Offer and Position

Union Final Offer

17.1 The TXARNG will create and maintain a seniority list based on a bargaining- unit members service computation date (TX SCD Civilian). Seniority procedures will be used as follows:

- a. Volunteers determined by management to be qualified (hereafter, "volunteers") will be selected first. If more employees volunteer than are needed, the most senior employee (by TX SCD Civilian) will be selected first unless this procedure would preclude the accomplishment of the mission.
- b. If a sufficient number of volunteers cannot be obtained, assignment will be made on the basis of

least seniority (by TX SCD Civilian). The qualified employee with the least seniority will be selected.

- c. When fewer employees volunteer than are needed, non-volunteers will be selected from the roster. Employees completing the assignment will be placed at the bottom of the roster, least senior first. Volunteers desiring to stay on the assignment may remain, providing no one else will want to take his place and at Management's discretion.
- d. Will be applied in determining priority for granting competing or conflicting requests for annual leave or compensatory time off by employees deemed by the TXARNG, in its sole discretion, to be eligible for grant of such requests.
- e. Will be used as a tiebreaker when necessary.
- f. Will be used to set up rotations, if necessary.

The Union has no concern about moving the language in the current Article 16.7 into a new Article 17 - Seniority. In moving the language, the Union desires to keep the current CBA language. While the Union recognizes that the Agency has the right to establish the qualifications, the Union believes that should be done up front and then selection should be made from among the volunteers using just one other criteria - seniority. The Union rejects the Agency's proposal to add a provision to the selection procedures that would allow the Agency to select from qualified volunteers based upon seniority, as well as based upon judgement and reliability.

Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. In this regard, we agree with the Agency that the selection of the tour an employee serves or the shift an employee will work based upon negotiated criteria such as seniority, the employees' judgement and the employee's reliability is appropriate. The Union expressed concern that the criteria (except for seniority) are too nebulous and, therefore, subject to abuse by Management. But in the interest of good

management, the Agency must consider these criteria in a way that is fair and equitable to its employees, or the parties both recognize that its application will be subject to challenge and interpretation through the negotiated grievance process.

Based on the foregoing, we shall impose the Agency's proposal concerning the selection criteria for tour and shift changes.

B. Seniority

Agency Final Offer and Position

Agency's Final Offer

17.1 The TXARNG will create and maintain a seniority list based on a bargaining-unit members service computation date (SCD National Guard Tech). Security procedures will be used as follows:

In defining Seniority (Article 17), the Agency proposes to use the National Guard Tech Service Computation Date (SCD National Guard Tech) date - which includes the time an employee has been employed as a Technician in the National Guard (either in the State of Texas or in any State). Using the National Guard Tech SCD date will allow for Technicians and Supervisors in the field to create their seniority list from information that is readily available to them on site. The Defense Civilian Personnel Data System allows users (technicians and supervisors) to access the MyBiz+ system on site through the Human Resource Office; allowing them to obtain SCD information at their worksite. Further the National Guard Tech SCD date only includes the time that an employee has been employed by the National Guard. It does not include other types of service time, such as other federal service or military duty time.

Union Final Offer and Position

Union Final Offer

17.1 The TXARNG will create and maintain a seniority list based on a bargaining-unit members service computation date (TX SCD Civilian). Security procedures will be used as follows:

In defining seniority (Article 17), the Union proposes that the Agency use the Texas National Guard Service Civilian Computation Date (TX SCD Civilian) - which includes only time spent in the Texas National Guard (not in other States). The TX SCD Civilian is the date that a Technician came into service with the Texas National Guard. The Union argues that the data is also easily accessible to employees and their supervisors because all employee actions are recorded on a SF50 and that information has been loaded onto the employee's MyBiz+ account. The Union would prefer to use this date to ensure that Technicians that have served in Texas have the benefit of that service time in calculating seniority for things such as shift bidding, leave requests, or overtime work.

Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Agency's proposal is the better alternative to resolve the impasse. In this regard, we agree with the Agency that it should consider time spent in service to all of the National Guard (i.e., SCD National Guard Tech) in matters such as shifts, tours, overtime, and the granting of annual leave, not just time spent serving in the National Guard in the State of Texas (TX SCD Civilian).

According to its mission, the Technicians are at the service of not just the Governor of the State of Texas and the citizens of Texas, but they are also at the service of the President of the United States and the people of the United States. The same is true for a Technician that serves in another state. The Panel is interested in honoring all of the service of the Technician throughout the United States, not just their time spent in Texas.

Based on the foregoing, we shall impose the Agency's proposal concerning Seniority.

C. Newcomer Briefings

Agency Final Offer and Position

Agency's Final Offer

20.6. The parties agree that if the new employees are engaged in an in-person new employee orientation, the

Agency notify the President who will assign a local representative to attend with official time consistent with the rights and procedures under Article 20. Should the Agency determine to conduct a non-interactive (e.g., not in person, web-based) orientation, the Agency will negotiate with the Union over the procedures, format and the Union's involvement.

Article 20.6 addresses Newcomers Briefings. The parties are very close in agreement on their language, except as it relates to whom the Union will assign as a Union representative to attend the Newcomer Briefings. The Agency has proposed that they will notify the Union President of an in-person new employee orientation, and the President will assign a local representative to attend the orientation.

Pursuant to 5 U.S.C. §7131, a representative of the bargaining unit employees is entitled to be released from duty to represent the bargaining unit interest on "official time", time on the clock performing representational duties. In accordance with Article 20 - Official Time for Labor Organization Representatives, the parties have established the right to official time for a number of representational circumstances. The parties have agreed that official time is available for union representatives to attend formal meetings¹ (Section 20.1(a)) and official time is available for union representatives to travel to and from formal meetings scheduled by the Agency (Section 20.1(d)). Further, the parties have agreed that the union representative, who has been granted official time for one of the contractually agreed upon circumstances, will use that official time in a way that is reasonable, necessary and in the public interest.

¹ The Federal Labor Relations Authority (FLRA) has long since determined that New Employee Orientations are formal meetings under 7114 (a)(2)(A) and, therefore, the Union must be given an opportunity to be represented at that meeting, on official time. See *Dept, of Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, CA and AFGE, Local 1857*, 29 FLRA 594 (1987) for the analytical framework for determining a formal meeting.

The remaining issue between the parties is where the Agency has proposed that the Union representative assigned by the President to attend the New Employee Orientation must be a local representative. Management believes that requiring that the representative be someone local would cut down on unnecessary Official time and travel expenses² by the Union.

Union Final Offer and Position

Union Final Offer

20.6. The parties agree that if the new employees are engaged in an in-person new employee orientation, the Agency notify the President who will assign a representative to attend with official time consistent with the rights and procedures under Article 20. Should the Agency determine to conduct a non-interactive (e.g., not in person, web-based) orientation, the Agency will negotiate with the Union over the procedures, format and the Union's involvement.

The Union seeks to maintain its statutory right to select the representative of their choosing. The FLRA established its original precedent on the issues of notice and opportunity for the Union to assign its own representative to attend a formal meeting as far back as 1981. In *Norfolk Naval Shipyard*,

² The parties have agreed in Article 20.5 - Travel Expenses, that government authorized travel and transportation allowances apply when a Union Representative is in travel to attend labor management meetings. It is not clear if the Union is even authorized travel expenses to attend formal meetings (and not just Labor Management Forum Meetings under Section 20.1 (b)). If the Union has no entitlement under the Contract to travel expenses for formal meetings, then the Agency's rational that limiting representation to the local representative will save time and travel expenses is inconsistent with the contract. There may not be travel expenses even authorized under the CBA. Regardless of how the parties interpret the entitlement to travel expenses under Article 20.5, that section is not at impasse before the Panel, and neither party has proposed language in this section at impasse (i.e., 20.6) that would create a new entitlement to travel expenses for attendance at New Employee Orientations.

Portsmouth, Virginia, 6 FLRA 74 (1981) the FLRA stated that "Section 7114(a)(2)(A) requires that a [u]nion 'be given the opportunity' to be represented in formal discussions involving conditions of employment. This clearly contemplates prior notice to the [u]nion so that... the [u]nion will have an opportunity to select representatives OF ITS OWN CHOOSING to be present." (emphasis added) Thus, the FLRA has clearly established that the Union has the right under 7114 (a)(2)(A) to designate its own representative. As the parties have already agreed (under Section 20.1 (d)) that the Agency will grant official time for the travel to and from the formal meeting (including a new orientation session), the Agency is asking the Union to negotiate away its rights under §7114 (a)(2)(A) to identify its own representative to attend the formal meeting by requiring that the President select only a local representative. The Union is unwilling to waive their statutory right to select its own representative.

The Union acknowledges that the use of that time (as with all official time), must be reasonable, necessary and in the public interest. The Union also notes that the Agency controls the scheduling of that time and can help to manage the reasonable use of that time through its schedule practices. Finally, the Union notes that the Agency has already indicated that they are moving toward a non-face-to-face orientation session in the future. The Union has already agreed to engage in bargaining over that format when the Agency is ready.

Conclusion

Having carefully considered the evidence and arguments presented in support of the parties' positions, we find that the Union's proposal is the better alternative to resolve the impasse. The Union is unwilling to negotiate away its rights under §7114 (a)(2)(A) to select its own representative and the Panel is not inclined to compel the waiver of a bargaining position which could implicate a statutory right. The Union has already agreed that it will not abuse their entitlement to Official time and will use that time in a way that is reasonable, necessary and in the public interest. In addition, the Agency shares in the responsibility of the use of that official time for Newcomer Briefings as the Agency manages the scheduling of those briefings. Further, the parties have already begun discussions regarding changing the delivery of those briefings to a more efficient non-face-to-face format,

which will inevitably lead to more efficient use of official time.

Based on the foregoing, we shall impose the Union's proposal concerning Newcomer Briefings.

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:

- * 17.1 The TXARNG will create and maintain a seniority list based on a bargaining-unit member's service computation date (SCD National Guard Tech). Seniority procedures will be used as follows:
 - a. Volunteers determined by management to be qualified (hereafter, "volunteers") will be selected first. If more employees volunteer than are needed, the most senior employee (by SCD National Guard Tech) will be selected first unless this procedure would preclude the accomplishment of the mission.
 - b. If a sufficient number of volunteers cannot be obtained, assignment will be made on the basis of least seniority (by SCD National Guard Tech). The qualified employee with the least seniority will be selected.
 - c. When fewer employees volunteer than are needed, non-volunteers will be selected from the roster. Employees completing the assignment will be placed at the bottom of the roster, least senior first. Volunteers desiring to stay on the assignment may remain, providing no one else will want to take his place and at Management's discretion.
 - d. Will be applied in determining priority for granting competing or conflicting requests for annual leave

or compensatory time off by employees deemed by the TXARNG, in its sole discretion, to be eligible for grant of such requests.

- e. Will be used as a tiebreaker when necessary.
- f. Will be used to set up rotations, if necessary.
- g. Management reserves the right to assign work and to make personnel decisions based on the individual job-related characteristics such as judgement and reliability to determine which employee to assign to particular assignments.

- * 20.6. The parties agree that if the new employees are engaged in an in-person new employee orientation, the Agency notify the President who will assign a representative to attend with official time consistent with the rights and procedures under Article 20. Should the Agency determine to conduct a non-interactive (e.g., not in person, web-based) orientation, the Agency will negotiate with the Union over the procedures, format and the Union's involvement.

By direction of the Panel.



Mark A. Carter
FSIP Chairman

October 30, 2017
Washington, D.C.