69 FLRA No. 56

MICHIGAN ARMY NATIONAL GUARD
(Respondent)

and

LABORER'S INTERNATIONAL
UNION OF NORTH AMERICA
LOCAL 2132, AFL-CIO
(Charging Party/Union)

CH-CA-14-0475

DECISION AND ORDER

May 25, 2016

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

This unfair labor practice (ULP) case comes before the Authority on exceptions to the attached decision by Chief Administrative Law Judge Charles R. Center (Judge) filed by the Respondent. In his decision, the Judge determined that the Respondent violated § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute)[1] when, in anticipation of an upcoming internal-Agency administrative hearing, the Respondent issued a directive that restricted any communications between any bargaining-unit employees and their Union representative without Agency counsel present. We must decide three substantive questions.

First, the Respondent argues that the Judge erred in exercising jurisdiction over this matter because the underlying dispute was military in nature and was therefore not justiciable before the Authority. Because the employees involved in this dispute had dual status as both civilian and military employees, and because this dispute relates only to the civilian aspect of their employment, we deny this exception.

Second, the Respondent argues that the ULP charge was barred by § 7116(d) of the Statute[2] because the Union failed to allege any difficulty procuring witnesses or documents during the internal-Agency administrative hearing held months after the charge was filed. Because both the factual and legal issues disputed during this internal-Agency administrative process are distinct from the factual and legal issues underlying the ULP charge, we deny this exception.

Third, the Respondent argues that the Judge erred in finding that the Respondent's directive violated § 7116(a)(1) of the Statute.[3] Because bargaining-unit employees have protected rights under § 7102 of the Statute[4] to engage in union activity, and, viewed objectively, the directive tended to interfere with these rights, we deny this exception.

For the foregoing reasons, we deny the Respondent's exceptions.

II. Background and Judge's Decision

A. Background

The Respondent employs technicians who serve in both a federal civilian capacity and a military capacity. Two such technicians were terminated from their civilian positions for misconduct. They appealed their removals through an internal-Agency administrative process that would culminate in evidentiary hearings. The Union represented the two technicians. Soon after the technicians filed their administrative appeals, but months prior to the administrative hearings themselves, an attorney for the Respondent sent a letter to the Union representative stating the following:

> Please be advised that this office will represent the interests of the [Respondent] at the administrative hearing requested by your client. Accordingly, any and all communications with employees or representatives of the [Respondent] regarding this matter should be directed to this office. Any communications with employees or representatives of the [Respondent] outside the presence of a[] [Respondent] attorney are improper until such time as the administrative hearing examiner determines that further pre-hearing interviews are necessary.[5]

The Union replied that the Respondent had no right to restrict communication between bargaining-unit employees and the Union concerning employment

[1] 5 U.S.C. § 7116(a)(1).
[2] *Id*. § 7116(d).
[3] *Id*. § 7116(a)(1).
[4] *Id*. § 7102.
[5] Judge's Decision at 3 (quoting the Respondent's directive).

matters, asserted that the directive violated the Statute, and requested that the Respondent rescind the directive. The Respondent did not respond, nor did it rescind its directive.

The Union then filed a ULP charge against the Respondent alleging that the directive illegally interfered with bargaining-unit employees' rights under § 7102 of the Statute to communicate with their exclusive representative.[6] After investigating the charge, the Regional Director of the Chicago Region of the Federal Labor Relations Authority (FLRA) issued a complaint on behalf of the FLRA's General Counsel (GC) asserting that the Respondent had violated § 7116(a)(1) of the Statute by prohibiting bargaining-unit employees from communicating with Union representatives outside the presence of a Respondent attorney.

B. Judge's Decision

Before the Judge, the parties agreed that there was no genuine issue of material fact in dispute, and both parties filed motions for summary judgment.

The GC argued that the Respondent's directive interfered with bargaining-unit employees' rights protected under § 7102 of the Statute; namely, the right for an employee to act as a union representative, and the right for employees to freely communicate with their exclusive representative. The GC further argued that the directive was overly broad because it applied to *any* communications between the Union representative and *all* bargaining-unit employees, regardless of the subject matter of those communications or when they occurred.

The Respondent argued that the Judge lacked jurisdiction to adjudicate the case because the underlying dispute – the removal of the technicians for misconduct – was military in nature. However, the Judge noted that technicians are federal civilian employees who have rights under the Statute, and found that this matter "relates to the civilian aspect of technician employment."[7] Accordingly, the Judge found that he had jurisdiction to hear this case.

The Respondent then argued that § 7116(d) of the Statute barred this charge because, according to the Respondent, it concerns access to witnesses during the internal adjudicatory process in connection with the internal Agency hearing. The Judge found that the factual and legal matters at dispute in the administrative hearing, which was of a disciplinary nature and arose out of the misconduct of the two technicians, were "entirely distinct" from the factual and legal matters underlying the ULP charge, which alleged a violation of the Statute as a result of issuing the directive.[8]

Finally, the Respondent argued that summary judgment should be granted in its favor because the Union admitted that the Respondent's directive did not impede its ability to communicate with the two technicians, therefore rendering the case moot. The Judge noted that the directive was still in place and that "its relative ineffectiveness does not render the act of issuing it moot."[9] The Judge further found that "[t]he intended coercion and intimidation presented by such an outright restriction is not negated by virtue of the recipient's failure to comply."[10] Accordingly, the Judge rejected this argument, and concluded that the Respondent violated § 7116(a)(1) of the Statute by restricting bargaining-unit employees' rights under § 7102 of the Statute to engage in union activity.

The Respondent filed exceptions to the Judge's decision, and the GC filed an opposition to those exceptions.

III. Preliminary Matter: Section 2429.5 of the Authority's Regulations bars two of the Respondent's arguments.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the Judge.[11] The Respondent raises two arguments in its exceptions that were not raised before the Judge. First, the Respondent argues that the directive should be treated as lawful because it was drafted by an attorney of record during a contested case proceeding.[12] Second, the Respondent argues that the Union was bound by rules of professional responsibility – "the rules affecting communications with a party represented by counsel."[13] The record does not reflect that these specific points were articulated before the Judge, nor is there any indication that the Respondent could not have raised them below. Accordingly, these arguments are barred under § 2429.5 of the Authority's Regulations, and we dismiss them as such.[14]

[6] 5 U.S.C. § 7102; *see generally U.S. Dep't of Commerce, Bureau of the Census*, 26 FLRA 719, 725 (1987).
[7] Judge's Decision at 4.
[8] *Id.*
[9] *Id.* at 5.
[10] *Id.*
[11] 5 C.F.R. § 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014) (*DOL*); *AFGE, Local 3448*, 67 FLRA 73, 73 (2012) (*Local 3448*).
[12] Exceptions at 6-8.
[13] *Id.* at 6.
[14] 5 C.F.R. § 2429.5; *DOL*, 67 FLRA at 288; *Local 3448*, 67 FLRA at 73-74.

IV. Analysis and Conclusions

A. The Judge did not err in exercising jurisdiction over this matter.

The Respondent argues that the Judge erred in exercising jurisdiction over this matter because the dispute is a military matter that cannot be heard by the Authority.[15] The Respondent further claims that "[e]very court having occasion closely to consider the capacity of National Guard technicians has determined that capacity to be irreducibly military in nature."[16]

In support of this assertion, the Respondent cites case law from the U.S. District Courts of the Northern District of Ohio and the Western District of Michigan, as well as the U.S. Court of Appeals for the Sixth Circuit.[17] In these decisions, the courts dismissed claims brought individually by dual-status technicians, seeking various remedies under assorted statutes other than the Statute, because of the National Guard's military nature.[18] These cases are inapposite, because the decisions considered the individual appellants' claims for redress against the Guard, but did not consider the Agency's own federal labor obligations vis a vis the exclusive representative and the employees it represents, as imposed upon the Agency by the Statute.

Although military matters are generally nonjusticiable before the Authority,[19] not all aspects of technician employment are, as the Respondent argues, "irreducibly military in nature."[20] To the contrary, "the technician's dual status has been recognized by virtually every court and administrative forum to address the issue," including the Authority.[21] As the Judge noted in his decision, it is well-settled that "[a]lthough technician employment takes place in a military environment, the technician[s are] federal civilian employee[s] who [have] rights under the Statute."[22] Moreover, the National Guard Technician Act expressly designates technicians as "dual status" civilian and military employees.[23]

Accordingly, although the Authority does not have jurisdiction over military matters arising out of technician employment, it does have jurisdiction over civilian matters of technician employment that arise under the Statute.[24] To accommodate this dual nature of technician employment, the Authority determines whether an issue relates to the civilian aspect of that employment – and is therefore within the protection of the Statute – or whether the issue relates to the military aspect, which is outside the Statute's coverage.[25]

Here, the Respondent claims that this dispute is military in nature because it arises out of an administrative process concerning the discipline of two technicians.[26] The Respondent asserts that "the hearings requested by the . . . employees in this case . . . [are] irreducibly military in nature," and that "any conduct that occurred within the context of said hearings" is outside the jurisdiction of the Authority.[27]

However, the ULP charge does not stem from the subject matter of the administrative hearing. Rather, it concerns only the Respondent's directive prohibiting the Union representative from engaging in "[a]ny communications with employees or representatives of the [Respondent] outside the presence of a[] [Respondent] attorney."[28] This complete and unqualified ban on communications extends beyond any military aspect of the administrative hearing and into the civilian realm of bargaining-unit employees' employment. For example, this directive would extend to off-duty communications between the Union representative and the two technicians. The Authority has previously held that

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[15] Exceptions at 3.

[16] *Id.* at 3 (quoting *Leistiko v. Sec'y of the Army*, 922 F. Supp. 66, 73 (N.D. Ohio 1996) (*Leistiko I*)).

[17] *Id.* at 4.

[18] *Id.* at 3-4 (citing *Bowers v. Wynne*, 615 F.3d 455, 467-68 (6th Cir. 2010) (applying precedent that National Guard technician position was irreducibly military in nature to Air Reserve Technicians (ART), holding the court was not persuaded that the ART position is materially different from the position of National Guard technician such that ARTs could pursue remedies under Title VII or the Rehabilitation Act that were not available to National Guard technicians, and also noting the appellant technician's claims would be barred because they challenge the conduct of supervisory military officers of superior rank, and thereby threaten intrusion into officer-subordinate relationships); *Fisher v. Peters*, 249 F.3d 433, 443 (6th Cir. 2001); *Leistiko v. Stone*, 134 F.3d 817, 820-21 (6th Cir. 1998); *Bradley v. Stump*, 971 F. Supp. 1149, 1156-57 (W.D. Mich. 1997); *Leistiko I*, 922 F. Supp. at 73).

[19] *P.R. Nat'l Guard, 156 Airlift Wing (AMC), Carolina, P.R.*, 56 FLRA 174, 178 (2000) (*P.R. Nat'l Guard*) (citing *Wright v. Park*, 5 F.3d 586, 590-91 (1st Cir. 1993)).

[20] Exceptions at 3 (quoting *Leistiko I*, 922 F. Supp. at 73).

[21] *P.R. Nat'l Guard*, 56 FLRA at 178-79 (citing *NFFE, Local 1623 v. FLRA*, 852 F.2d 1349 (D.C. Cir. 1988); *Kostan v. Ariz. Nat'l Guard*, 50 MSPR 182, 186 (1991)).

[22] Judge's Decision at 3 (quoting *P.R. Nat'l Guard*, 56 FLRA at 179).

[23] 32 U.S.C. § 709(b)(1); *see also* 10 U.S.C. § 10216(a)(1)(C) (defining military technicians as "[f]ederal civilian employee[s]" who are "assigned to . . . civilian position[s]").

[24] *P.R. Nat'l Guard*, 56 FLRA at 178; *see also U.S. Dep't of the A.F., Seymour Johnson A.F. Base*, 57 FLRA 884, 886 (2002).

[25] *P.R. Nat'l Guard*, 56 FLRA at 178 (citing *NFFE, Local 1669*, 55 FLRA 63, 66-67 (1999); *NFFE, Local 1623*, 28 FLRA 633, 643 (1987)).

[26] Exceptions at 3-4.

[27] *Id.* at 3.

[28] Judge's Decision at 3 (quoting the Respondent's directive).

off-duty activities undertaken by technicians fall within the civilian component of technicians' dual military-civilian status.[29]

Accordingly, we deny this exception.

B. The Judge did not err by finding that § 7116(d) of the Statute does not bar the ULP charge.

Section 7116(d) of the Statute provides that "[i]ssues which can properly be raised under an appeals procedure may not be raised as [ULPs] prohibited under this section."[30] As such, the Authority will decline to assert jurisdiction over a ULP when "the factual predicate and the legal theory underlying [a ULP] complaint and a[n] . . . appeal are the same."[31] However, a ULP complaint is not barred under § 7116(d) "simply because it 'relates to' a matter that is the subject of an appeals procedure."[32]

The Respondent argues that the Judge erred in finding that § 7116(d) did not bar this charge.[33] The Judge found that the factual and legal matters at issue in the internal administrative hearing – of two technicians appealing their terminations for misconduct – were entirely distinct from the facts and the legal theory underlying the ULP, which arises from the Respondent's prohibition against any communications between the Union representative and any bargaining unit employees outside the presence of an Agency attorney.[34] The Respondent attempts to characterize this as a discovery dispute, and argues that it "provided all the documents and witnesses necessary to the hearing."[35] The Respondent further states that the Union was "free to raise the issue of access to discovery before the administrative hearing examiner and elected not to do so."[36]

However, the Judge found that the Respondent violated the Statute not because the Respondent denied access to discovery, but that the Respondent obstructed bargaining-unit employees' right under § 7102 of the Statute to communicate freely with their Union representative. Further, this violation occurred the moment that the directive was issued.[37] The question of whether the Respondent interfered with the exercise of its employees' rights under the Statute, especially if such interference extended to off-duty hours outside of the internal administrative hearing, is legally distinct from whether the Respondent complied with its discovery obligations at the hearing.

Accordingly, the Respondent has not shown that the Judge erred in this regard, and we deny this exception.

C. The Judge did not err by finding that the Respondent's directive violated § 7116(a)(1) of the Statute.

Under § 7116(a)(1) of the Statute, an agency commits a ULP when it interferes with, restrains, or coerces employees in the exercise of their rights protected under the Statute.[38] The test for determining whether a statement or conduct violates § 7116(a)(1) is an objective one.[39] Although the circumstances of the pertinent incident are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer.[40] Rather, the question is whether, viewed objectively, the agency's action would tend to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Statute,[41] or whether the employee could reasonably have drawn a coercive inference from the agency's action.[42]

Here, the Judge found that the Respondent violated bargaining-unit employees' rights as set forth in § 7102 of the Statute, which guarantees employees the right to engage in union activity, including the right to communicate with a union representative.[43] The Respondent argues that the Judge erred in making this finding because the directive "was not drafted in an effort to stifle communications between bargaining[-]unit

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[29] *See P.R. Nat'l Guard*, 56 FLRA at 180.
[30] 5 U.S.C. § 7116(d).
[31] *Wildberger v. FLRA*, 132 F.3d 784, 787 (D.C. Cir. 1998) (citing *U.S. Small Bus. Admin.*, 51 FLRA 413, 421 (1995)).
[32] *U.S. Dep't of the Army, Human Resources Command, St. Louis, Mo.*, 64 FLRA 140, 144 (2009) (quoting *Bureau of the Census*, 41 FLRA 436, 448 (1991)).
[33] Exceptions at 4-6.
[34] Judge's Decision at 4.
[35] Exceptions at 5.
[36] *Id.*

[37] *See Dep't of the A.F., Scott A.F. Base, Ill.*, 34 FLRA 956, 962-65 (1990) (*Scott A.F. Base*) (violation of § 7116(a)(1) occurred the moment the agency made coercive and interfering statements); *Veterans Admin., Wash., D.C. & Veterans Admin. Med. Ctr., Reg'l Office, Sioux Falls, S.D.*, 23 FLRA 122, 124 (1986) (same); *Dep't of the Treasury, U.S. Customs Serv., Region IV, Miami, Fla.*, 19 FLRA 956, 969 (1985) (same).
[38] 5 U.S.C. § 7116(a)(1); *see U.S. EPA, Region 2, N.Y., N.Y.*, 63 FLRA 476, 478 (2009) (*EPA*) (citing *Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 53 FLRA 1500, 1508-11 (1998)).
[39] *AFGE, Nat'l Border Patrol Council, Local 2595*, 67 FLRA 361, 366 (2014) (*Local 2595*) (citing *EPA*, 63 FLRA at 478).
[40] *Id.* at 366-67 (*citing SSA, Office of Disability Adjudication & Review, Nat'l Hr'g Ctr.*, 66 FLRA 193, 197 (2011)).
[41] *Id.* at 367 (citing *EPA*, 63 FLRA at 478).
[42] *Scott A.F. Base*, 34 FLRA at 962 (citing *Marine Corps Logistics Base, Barstow, Cal.*, 33 FLRA 626, 637 (1988)).
[43] Judge's Decision at 5; *see* 5 U.S.C. § 7102; *Norfolk Naval Shipyard, Portsmouth, Va.*, 5 FLRA 788, 804 (1981).

employees and their union."[44] However, as stated above, the intent of the employer is irrelevant in determining whether an agency interfered with employees' rights under the Statute. The only inquiry is whether, viewed objectively, the agency's actions tended to interfere with or restrain employees in the exercise of their statutory rights.

The Respondent further argues that the directive was merely an example of simple advocacy.[45] But simple advocacy does not supersede the rights of employees as set forth in the Statute, nor does it permit an agency to violate those rights. The Respondent's directive mandated that "*[a]ny* communications with employees or representatives of the [Respondent] outside the presence of a [Respondent] attorney are improper."[46] This sweeping command extended far beyond the scope of the internal administrative hearings concerning the technicians' misconduct and prohibited private communications with *all* bargaining-unit employees, to include potential witnesses and even other bargaining-unit employees who may have been concerned about their own continued employment. Thus, under the circumstances of this case, and viewed objectively, the directive tended to interfere with employees' right under § 7102 to participate in union activities.[47] We therefore find that the Judge did not err in concluding that such an explicit ban on communication between the Union representative and all bargaining-unit employees violated § 7116(a)(1) of the Statute.

Accordingly, we deny this exception.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[48] and § 7118 of the Statute,[49]

The Respondent shall:

1. Cease and desist from:

(a) Prohibiting private communication between bargaining-unit employees and their Union representatives.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining-unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities where bargaining-unit employees represented by the Union are located, copies of the attached notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the Adjutant General, and shall be posted and maintained for sixty consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(b) In addition to physical posting of paper notices, notices shall be distributed electronically, on the same day, as posting of the physical notices, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with bargaining-unit employees.

(c) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago Region, FLRA, in writing, within thirty days from the date of this Order, as to the steps taken to comply.

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[44] Exceptions at 7.
[45] *Id.* at 7-8.
[46] Judge's Decision at 3 (quoting the Respondent's directive) (emphasis added).
[47] *See Scott A.F. Base*, 34 FLRA at 964-65.
[48] 5 C.F.R. § 2423.41(c).
[49] 5 U.S.C. § 7118.

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

The Federal Labor Relations Authority (FLRA) has found that the Michigan Army National Guard violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

The Statute gives employees of the Michigan Army National Guard the following rights:

> To form, join, or assist any labor organization;
> To act for a labor organization in the capacity of a representative;
> To present the views of the labor organization, as a representative of a labor organization, to heads of agencies and other officials of the executive branch of the Government, Congress or other appropriate authorities;
> To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under the Statute; and
> To refrain from any of the activities set forth above, freely and without fear of penalty or reprisal.

The Michigan Army National Guard will not violate any of these rights. More specifically:

WE AFFIRM that bargaining-unit employees have the right to privately communicate with their union representatives about their conditions of employment, including disciplinary matters.

WE WILL NOT require that communications between union representatives of the Laborers' International Union of North America, Local 2132, AFL-CIO and bargaining-unit employees be conducted in the presence of an agency attorney.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of their rights assured by the Statute.

____
Michigan Army National Guard

Dated: ________ By: ____________________________
(Signature) (Title)

This notice must remain posted for sixty consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Region, FLRA, whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL, 60604, and whose telephone number is: (312) 886-3465.

Office of Administrative Law Judges

MICHIGAN ARMY NATIONAL GUARD
RESPONDENT

AND

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 2132, AFL-CIO
CHARGING PARTY

Case No. CH-CA-14-0475

Alicia E. Weber
For the General Counsel

LTC John J. Wojcik
For the Respondent

Tiffany Malin, Esq.
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

On November 10, 2014, the Regional Director of the Chicago Region of the Federal Labor Relations Authority (FLRA/Authority), issued a Complaint and Notice of Hearing, alleging that the Michigan Army National Guard (Respondent), violated § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute). The Complaint alleged that the Respondent interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by § 7102 of the Statute.

On November 25, 2014, the Respondent filed an answer admitting some of the facts alleged while denying that it committed an unfair labor practice (ULP) in violation of 5 U.S.C. § 7116(a)(1). On January 9, 2015, the Respondent filed a Motion for Dismissal and/or Summary Judgment contending that the FLRA lacks jurisdiction to adjudicate this case. In support thereof, the Respondent filed a brief with Enclosures 1 through 10. (Resp't Exs. 1-10). On January 15, 2015, the General Counsel (GC) filed a Cross-Motion for Summary Judgment and a motion to indefinitely postpone the hearing. The motion to indefinitely postpone the hearing was granted on January 22, 2015, and the hearing was canceled.

On February 2, 2015, the GC filed a Cross-Motion for Summary Judgment in which it asserted that there were no issues of material fact in dispute and that it was entitled to judgment as a matter of law because the action alleged to be a violation of the Statute was admitted. In support of its motion, the GC provided a brief with Exhibits 1 through 7 which included an affidavit of Ben Banchs, Business Manager/Secretary for the Union. (GC Exs. 1-7). On February 13, 2015, the Respondent filed a response in which it agreed that there were no material facts in dispute, but contended that it was entitled to a summary judgment. In support, the Respondent filed additional exhibits (Resp't Ad. Exs. 1, 2) and a sworn statement from David J. Bedells, Deputy General Counsel for the Michigan Army National Guard.

STANDARDS FOR SUMMARY JUDGMENT

In considering motions for summary judgment submitted pursuant to § 2423.27 of the Authority's regulations, the standards to be applied are those used by United States District Courts under Rule 56 of the Federal Rules of Civil Procedure, *Nat'l Labor Relations Bd., Wash., D.C.*, 65 FLRA 312, 315 (2010). As the record demonstrates and the parties agree that there is no genuine issue of material fact in dispute, it is appropriate to resolve this case by summary judgment, and I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. The Michigan Army National Guard, Lansing, Michigan is an agency under § 7103(a)(3) of the Statute.

2. The Laborers' International Union of North America (LIUNA), Local 2132, AFL-CIO is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

3. The Union filed the charge in Case No. CH-CA-14-0475 with the Chicago Regional Director on June 6, 2014.

4. A copy of the charge was served on the Respondent.

5. At all material times, David J. Bedells occupied the position of Captain with the Respondent and has been a supervisor and/or management official of Respondent within the meaning of 5 U.S.C. § 7103(a)(10) and (11), as well as an agent acting on behalf of the Respondent.

6. On March 12, 2014, the Respondent, by Captain Bedells sent Ben Banchs, Business Manager/Secretary Treasurer for the LIUNA, National Guard District Council, a letter in which he stated:

> Please be advised that this office will represent the interests of the Michigan Department of Military and Veterans Affairs at the administrative hearing requested by your client. Accordingly, any and all communications with employees or representatives of the agency regarding this matter should be directed to this office. Any communications with employees or representatives of the agency outside the presence of an agency attorney are improper until such time as the administrative hearing examiner determines that further pre-hearing interviews are necessary.

7. On March 17, 2014, the Union, by Mr. Banchs responded, indicating that the letter announced a directive that would severely impede private communications between bargaining unit employees and the Union.

8. On March 20, 2014, Captain Bedells replied that "any and all communications with employees or representatives of the agency regarding this matter should be directed to this office." (GC Ex. 6). Captain Bedells further clarified that the agency's concern is communication with current employees of the agency that concern matters related to the subject of the administrative hearing.

9. On March 20, 2014, Mr. Banchs responded that the agency had no right to restrict communication between bargaining unit employees and the Union concerning employment matters. He further stated that the directive violated the Statute and encouraged Captain Bedells to rescind the directive. Mr. Banchs also expressed that if he needed to speak to bargaining unit employees, he would do so and nothing would prevent him from doing so.

10. The agency did not respond or rescind the directive issued by Captain Bedells.

DISCUSSION

In its motion the GC asserts that the Respondent violated § 7116(a)(1) of the Statute by issuing a ban that unlawfully interfered with employees protected union activity in their civilian capacity. The Respondent argues that summary judgment should be made in its favor because the Authority lacks jurisdiction to adjudicate the case since the dispute is military in nature. It is settled that "[a]lthough technician employment takes place in a military environment, the technician[s are] federal civilian employee[s] who [have] rights under the [Federal Service Labor-Management Relations] Statute." *Puerto Rico Air Nat'l Guard, 156th Airlift Wing (AMC) Carolina, P.R.*, 56 FLRA 174, 179 (2000) *aff'd*, *AFGE v. FLRA*, 239 F.3d 66 (1st Cir. 2001). The National Guard is not a full-time active force; it employs civilian 'technicians' to perform administrative, clerical, and technical tasks. *Mississippi Army Nat'l Guard, Jackson, Miss.*, 57 FLRA 337, 339 (2001) (citing *U.S. Dep't of Def., Nat'l Guard Bureau, Rhode Island Nat'l Guard, R.I. v. FLRA*, 982 F.2d 577, 578 (D.C. Cir. 1993).

Further, "the Technicians Act provides the guard technicians' dual status as federal civilian employees and as members of the States' national guards/militia." These technicians are federal employees. *See* 5 U.S.C. § 2105. When a National Guard administers the technicians program, it is acting in its federal capacity. *See also* Technicians Act, 32 U.S.C. § 709(d) ("the Secretary of the Army or the Air Force, as the case may be, shall designate the adjutants general . . . to . . . employ and administer the technicians authorized by this section.") 57 FLRA at 339. Nothing in the Respondent's argument demonstrates that the Respondent "is in any way exempted from or excluded from the Technicians Act while administering the technicians program." (*Id.* at 337). This case involves unit employees communicating freely and privately with their exclusive bargaining representative without any interference,

restrain, or coercion and the matter relates to the civilian aspect of technician employment. The Michigan National Guard is an executive agency and not exempted from the Statute. As the technicians are entitled to the protections provided by the Statute, the Authority has jurisdiction to adjudicate alleged violations related thereto, and the Respondent's argument that the military aspect of the position precludes Authority jurisdiction is without merit. The issue in this case is not the termination of two technicians, it is a communication made by Respondent's agent which precluded communication between a Union representative and bargaining unit employees, and neither the fact that the communication was related to termination actions, nor that it applied to technicians with a duel military function, serves to bar the Authority's jurisdiction over a ULP complaint that alleges the Respondent violated the Statute.

The Respondent also contends that the Union waived its right to file an ULP when the Union appealed the termination of the two bargaining unit employees in an internal administrative hearing. The Respondent cites to § 7116(d) under the Statute which limits unit employees from raising an issue as a ULP when the issue can properly be raised under an appeals procedure. The Respondent argues that the ULP concerns access to witnesses during the elected internal appellate process. As a consequence, the Respondent asserts that the complaint is barred by application of § 7116(d).

The Authority will decline to assert jurisdiction over a ULP when "the factual predicate and the legal theory underlying an unfair labor practice complaint and a[n] . . . appeal are the same." *Wildberger v. FLRA*, 132 F.3d 784, 789 (D.C. Cir. 1998). In this case, the matter and the legal theories advanced in the internal administrative hearing in comparison to the matter and legal theory underlying the ULP are entirely distinct. The internal administrative hearing concerns two unit employees' appeal of their termination, while the ULP arose from a prohibition upon all bargaining unit employees' right to speak privately with a Union representative. The Authority has found even if the circumstances underlying the two proceedings are "related" or "clearly bound up" it is not enough to bar an ULP claim and there is nothing more present in this case. *U.S. Dep't of the Army, Human Res. Command, St. Louis, Mo.*, 64 FLRA 140, 143 (2009).

The Respondent's final argument is that the summary judgment should be granted in its favor because the Union admitted that it would ignore the restriction imposed by the Respondent's agent, which rendered the issue moot. However, the violation alleged is not an actual denial of access to witnesses. The act that gave rise to the ULP complaint arose from the restriction announced by Captain Bedells prohibiting the Union's representative from communicating privately with bargaining unit employees. That ban was not rescinded and its relative ineffectiveness does not render the act of issuing it moot. The standard to determine whether a statement or conduct violates § 7116(a)(1) is an objective one. *U.S. Envtl. Prot. Agency, Region 2, N.Y., N.Y.*, 63 FLRA 476, 478 (2009). "[T]he question is whether, under the circumstances, the statement or conduct [would] tend[] to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement." *See U.S. Dep't of Transp., FAA*, 64 FLRA 365, 370 (2009) (finding violation where employer's conduct linked employee's protected activity with treatment adverse to employee's interest). The intended coercion and intimidation presented by such an outright restriction is not negated by virtue of the recipient's failure to comply. The directive issued by Captain Bedells was objectively coercive under the Statute even if it was ineffective. Whether the directive was disregarded or not is irrelevant. The violation occurred when the directive was issued because the subjective intent and the objective interpretation was one of precluding bargaining unit employees from the exercise of rights provided by the Statute. In restricting the bargaining unit employees ability to communicate privately and freely with their exclusive representative, the Respondent violated § 7116(a)(1) of the Statute. Therefore the Respondent's motion for summary judgment is denied.

CONCLUSIONS OF LAW

For the reasons set forth in this decision, I recommend that the Authority grant the General Counsel's Cross-Motion for Summary Judgment and adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Michigan Army National Guard, shall:

1. Cease and desist from:

(a) Prohibiting private communication between bargaining unit employees and their union representatives.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Adjutant General, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted at Respondent's facilities statewide. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) In addition to physical posting of paper notices, Notices shall be distributed electronically, on the same day, as posting of the physical notices, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with bargaining unit employees.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to the steps taken to comply.

Issued, Washington, D.C., October 23, 2015

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CHARLES R. CENTER
Chief Administrative Law Judge

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

The Federal Labor Relations Authority has found that the Michigan Army National Guard, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

The Statute gives employees of the Michigan Army National Guard the following rights:

To form, join, or assist any labor organization;
To act for a labor organization in the capacity of a representative;
To present the views of the labor organization, as a representative of a labor organization, to heads of agencies and other officials of the executive branch of the Government, Congress or other appropriate authorities;
To engage in collective bargaining with respect to conditions of employment
through representatives chosen by employees under the Statute; and
To refrain from any of the activities set forth above, freely and without fear of penalty or reprisal.

The Michigan Army National Guard will not violate any of these rights. More specifically:

____

WE AFFIRM that bargaining unit employees' have the right to privately communicate with their union representatives about their conditions of employment, including disciplinary matters.

WE WILL NOT require that communications between union representatives of the Laborers' International Union of North America, Local 2132, AFL-CIO and bargaining unit employees be conducted in the presence of an agency attorney.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

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(Michigan Army National Guard)

Dated: _________ By: ___________________________

(Signature) (Title)

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.