No. 17-3128

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEDERAL LABOR RELATIONS AUTHORITY
Petitioner,

v.

MICHIGAN ARMY NATIONAL GUARD,

Respondent,

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR PETITIONER FEDERAL LABOR RELATIONS AUTHORITY

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is about an unlawful directive that the Michigan Army National Guard ("Agency") issued prohibiting all private communications between bargaining-unit employees and their exclusive representative, the Laborers' International Union of North America, Local 2132, AFL-CIO ("Union"), related to matters surrounding the termination of two Agency employees from their civilian positions. Congress has made these employees, called "dual status technicians," federal employees, and thus

converted the Agency to a federal entity in its capacity as the technicians' employer. As such, it is settled that the technicians enjoy the right to union representation granted under federal-sector labor law. The Authority found that, when the Agency restricted bargaining-unit employees' ability to communicate privately and freely with their union representative, it committed an unfair labor practice in violation of § 7116(a)(1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101–7135 (the "Statute"). Because the Authority correctly found that the Agency committed an unfair labor practice, this Court should grant the Authority's application for enforcement.

The Authority had subject matter jurisdiction over this case pursuant to § 7105(a)(2)(G) of the Statute. 5 U.S.C. § 7105(a)(2)(G). The Authority's decision is published at 69 FLRA (No. 56) 393 (2016) and is included in the Agency's Corrected Appendix ("Apx.") at 144–49. The Authority filed its application for enforcement pursuant to 5 U.S.C. § 7123(b). The application is timely, as the Statute imposes no time limit on the Authority for such filings. 5 U.S.C. § 7123(b).

STATEMENT ON ORAL ARGUMENT

The Authority believes that oral argument is unnecessary because this case involves a straightforward application of well-settled law to facts. To the extent the Court believes that oral argument would be helpful or grants the Agency's request for oral argument, the Authority requests the opportunity to participate.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Authority's finding that the Agency unlawfully interfered with bargaining-unit employees' rights by prohibiting them from speaking with their exclusive representative unless an Agency attorney was present to monitor the conversation.

2. Whether the Authority properly exercised its jurisdiction to resolve an unfair-labor-practice dispute under § 7116(a)(1) of the Statute regarding the right of bargaining-unit employees to privately consult with their exclusive representative, both off-duty and on-duty in their civilian capacities.

STATEMENT OF THE CASE

A. Relevant Statutory Background

1. The Statute delegates to the Authority the responsibility for regulating labor-management relations across the Federal government.

The Statute provides a general framework for regulating federal sector labor-management relations. It grants federal employees the right to organize, provides for collective bargaining, and defines unfair labor practices. *See* 5 U.S.C. §§ 7114(a)(1), 7116. Among other protections provided for in § 7116 of the Statute, "it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" Chapter 71 of Title 5. 5 U.S.C. § 7116(a)(1). Those rights include "the right to form, join, or assist any labor organization . . . and each employee shall be protected in the exercise of such right."

5 U.S.C. § 7102. And, once employees have selected union representation, § 7114 provides that an exclusive bargaining representative of federal employees "is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit." 5 U.S.C. § 7114(a)(1).

The Authority is responsible for implementing the Statute throughout the federal government through the exercise of broad adjudicatory, policy-making, and rulemaking powers. Under the Statute, the responsibilities of the Authority are performed by a three-Member independent and bipartisan body. 5 U.S.C. § 7104(a)-(b). The Authority's role is analogous to that of the National Labor Relations Board in the private sector. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 92–93 (1983). The Statute also provides for an independent General Counsel who is responsible for investigating unfair-labor-practice charges and, when the investigation so warrants, filing and prosecuting unfair-labor-practice complaints. 5 U.S.C. § 7104(f).

2. Under the Technicians Act, dual-status technicians are simultaneously military and civilian employees who, in their civilian capacities, enjoy the protections of the Statute.

This case involves Agency employees who are dual-status technicians. Under the National Guard Technicians Act of 1968, 32 U.S.C. § 709 ("Technicians Act"), dual-status technicians are simultaneously military members *and* civilian technicians of their State National Guard units – hence their "dual status." 32 U.S.C. § 709(b); *U.S. Dep't of Defense, Nat'l Guard Bureau*, 55 FLRA 657, 657 (1999). In their civilian capacity

as State National Guard technicians, Congress funds those positions and accordingly has designated dual-status technicians as federal employees. 5 U.S.C. § 2105(a)(1)(F); 32 U.S.C. § 709(e). As the Fifth Circuit has explained:

> [Dual-status technicians] are employed by and perform the daily operations of the state guard units, but are funded by the federal government. Despite their state character, these employees were explicitly granted federal employee status in 1968 when Congress enacted the Technicians Act. "In 1968, Congress was reacting to a situation in which national guard technicians were considered state employees and consequently were not assured of uniform treatment with respect to fringe benefits or retirement plans." *New Jersey Air National Guard v. FLRA,* 677 F.2d 276, 283–84 (3d Cir. 1982) . . . To provide uniformity and afford national guard technicians the emoluments of federal service, "all Guard technicians, who had previously been employees of the states, were declared to be federal employees, and were thereby afforded the benefits and rights generally provided for federal employees in the civil service." *Id.* at 279. Thus, through an act of Congress, national guard technicians are by design "dual-status" employees.

Lipscomb v. FLRA, 333 F.3d 611, 614 (5th Cir. 2003). In other words, dual-status technicians are "a 'hybrid class' of employee – federal civilians who work in a military environment and under the immediate control of state officers." *U.S. Dep't of Defense, Nat'l Guard Bureau*, 55 FLRA at 657.

The Technicians Act not only establishes the dual civilian-military character of technician employment, but also reflects Congress's intent that technicians enjoy the same collective-bargaining rights as other federal employees. In this regard, § 709(f) and (g) exempt dual-status technicians from specific provisions of Title 5 of the United States Code, but do not exempt them from the Statute. And it is well settled under Authority and unanimous judicial precedent that, in their civilian capacity, dual-

status technicians enjoy the protection of the Statute. *P.R. Air Nat'l Guard, 156th Airlift Wing (AMC) Caroline, P.R.*, 56 FLRA 174, 179 (2000), *aff'd sub nom.*, *Am. Fed'n Gov't Emps., Local 3936 v. FLRA*, 239 F.3d 66 (1st Cir. 2001); *accord Lipscomb*, 333 F.3d at 616 (collecting cases).

Legislation enacted after the Technicians Act confirms that Congress intended dual-status technicians to enjoy the Statute's protection like other federal employees. In 1978, Congress enacted what was to become 10 U.S.C. § 976 (Pub. L. 95-610), which prohibits collective bargaining in the military. The language and legislative history of that statute demonstrate that Congress recognized the special employment circumstances of dual-status technicians and was committed to collective-bargaining rights for dual-status technicians. *See* H.R. Rep. No. 95-894(I), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7575, 7580 (". . .the section [of the Senate bill] which required those [dual-status] technicians who are members of a military labor organization to terminate their membership within 90 days of enactment w[as] omitted from the Committee bill."); H.R. Rep. No. 95-894(II), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7575, 7586.

Dual-status technicians have organized and bargained collectively almost since becoming federal civilian employees forty-five years ago. *See* H.R. Rep. No. 95-894, pt. 2, at 5 (1978) (noting that there were 68,000 unionized civilian technicians in 1978 under E.O. 11491, the predecessor to the Statute); *see also id.* at 15 (recognizing that in 1970, there were fourteen labor organizations covering all dual-status technicians). In

Michigan, Army technicians organized over thirty years ago. *Mich. Army Nat'l Guard*, 11 FLRA 365, 370 (1983) (discussing collective bargaining in 1980). The Union currently represents about 700 employees, 95% of whom are dual-status technicians. Federal Labor Relations Authority General Counsel ("GC") Cross-Mot. for Sum. J., Apx. 42 & n.8.

B. Procedural History

Section 7102 of the Statute protects communications between federal employees and their exclusive bargaining representative about workplace issues, and a breach of the right to meet and talk with a union representative about working conditions is an unfair labor practice in violation of § 7116(a)(1) of the Statute. 5 U.S.C. §§ 7102, 7116(a). After the Agency sent a letter to the Union containing a directive prohibiting private communications between bargaining-unit employees and the Union, the Union filed an unfair-labor-practice charge with the Authority's Chicago Regional Director. (Authority Decision ("Dec."), Apx. 145; Administrative Law Judge Decision ("ALJ Dec."), Apx. 109.) The Regional Director investigated the charge and issued a complaint alleging that the Agency violated § 7116(a)(1) of the Statute when it issued the directive. (Dec., Apx. 145; ALJ Dec., Apx. 109.) The Judge determined that the Agency committed an unfair labor practice, in violation of § 7116(a)(1), by restricting bargaining-unit employees' ability to communicate privately and freely with their exclusive representative. (Dec., Apx. 145; ALJ Dec., Apx. 111.)

The Agency filed exceptions (Apx. 114–23) to the Judge's decision with the Authority, which found that the Judge did not err in concluding that the Agency committed an unfair labor practice, (Dec., Apx. 144). When the Agency refused to comply with the Authority's order, the Authority sought enforcement of the order in the U.S. Court of Appeals for the Fourth Circuit, where the Department of the Army and the Department of Defense's National Guard Bureau are located. (App. for Enforcement, Apx. 150.) Without deciding whether it was an "appropriate" venue under the Statute, the Fourth Circuit transferred the Authority's enforcement application to this Circuit, where the alleged unfair labor practice occurred. Order at 1–3, *FLRA v. Mich. Army Nat'l Guard*, No. 16-1913 (4th Cir. Feb. 7, 2017) (denying Agency's motion to dismiss the case on jurisdictional grounds) (Addendum).

C. Factual Background

1. The Agency bans all communications between bargaining-unit employees and the Union outside the presence of Agency counsel regarding two dual-status technician termination proceedings.

In January 2014, the Agency concluded a six-month internal investigation at its Grayling, Michigan facility and released a report outlining allegations of theft, moonlighting, destruction of government property, and nepotism. (GC Cross-Mot. for Sum. J., Exs. 2, 7, Apx. 81, 93–94.) As a result of the report, the Agency disciplined several employees, and, according to the Union's business

manager/secretary-treasurer, other employees feared that more disciplinary actions could follow. (*Id.*)

In March 2014, the Agency removed two dual-status technicians from their federal civilian positions for misconduct. (Dec. at 393, Apx. 144; ALJ Dec. at 400, Apx. 110; GC Cross-Mot. for Sum. J., Ex. 2, Apx. 81; Resp. Br. in Support of its Mot. for Dismissal and/or Sum. J. ("Resp. Mot. for Sum. J."), Exs. 3, 4, Apx. 32–38.) The employees remained in good standing as military reservists for the National Guard. (GC Cross-Mot. for Sum. J., Ex. 2, Apx. 77, 80.) The Union agreed to represent the two technicians in an internal administrative hearing, which would ultimately result in a recommendation to the Adjutant General, who has the authority to decide whether to terminate employees for cause or to reinstate them. GC Cross-Mot. for Sum. J., Ex. 2, Apx. 77; 32 U.S.C. § 709(f); *Ass'n of Civilian Technicians*, 14 FLRA 38, 44 (1984).

On March 12, 2014, Agency Deputy General Counsel Captain David Bedells sent Union Business Manager/Secretary-Treasurer Ben Banchs a letter regarding the Union's representation of the terminated employees that gave rise to this case (the "March 12 letter"). That letter read:

> 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.

(Dec., Apx. 144; ALJ Dec., Apx. 110; GC Cross-Mot. for Sum. J., Ex. 3, Apx. 85.) The Union replied that the Agency had no right to restrict communication between bargaining-unit employees and the Union concerning employment matters, asserted that the March 12 letter violated the Statute, and requested that the Agency rescind the letter's directive. (Dec., Apx. 144–45; ALJ Dec., Apx. 110; GC Cross-Mot. for Sum. J., Ex. 4, Apx. 86.) The Agency did not respond or rescind the directive contained in the March 12 letter.[1] (Dec., Apx. 145; ALJ Dec., Apx. 110.)

The Union then filed an unfair-labor-practice charge with the Federal Labor Relations Authority's Chicago Regional Office. After investigating the charge, the Regional Director issued an unfair-labor-practice complaint, which was submitted to an Authority administrative law judge (the "Judge").

2. The Judge finds that the Agency committed an unfair labor practice when it prohibited private communications between bargaining-unit employees and the Union.

Before the Judge, the parties agreed that there were no undisputed material facts and filed cross-motions for summary judgment. (Dec., Apx. 145; ALJ Dec.,

[1] The Agency failed to challenge this factual finding on a motion for reconsideration, *see infra* p. 26, and, therefore, is barred from doing so now under § 7123(c) of the Statute. 5 U.S.C. § 7123(c); *cf. Glaziers' Local No. 558 v. NLRB*, 408 F.2d 197, 203 (D.C. Cir. 1969) (failure to raise claim of incorrect factual finding in motion for reconsideration precluded union from raising the claim for the first time on appeal); *see also Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986) (explaining that § 7123(c) is "virtually identical" to the analogous waiver provision under the National Labor Relations Act).

Apx. 109; Resp. Mot. for Sum. J., Apx. 31; GC Cross-Mot. for Sum. J., Apx. 39.) The Judge concluded that the Agency committed an unfair labor practice, in violation of § 7116(a)(1) of the Statute, by restricting bargaining-unit employees' right to communicate privately and freely with their exclusive representative under § 7102 of the Statute. (Dec., Apx. 145; ALJ Dec., Apx. 111.)

The Judge found that the case involved "unit employees communicating freely and privately with their exclusive bargaining representative without any interference, restrain, or coercion" and that "the matter relate[d] to the civilian aspect of technician employment." (ALJ Dec., Apx. 111.) He rejected the Agency's claim that he lacked jurisdiction to hear the dispute, explaining that "neither the fact that the [March 12 letter] was related to termination actions, nor that it applied to technicians with a dual military function, serves to bar the Authority's jurisdiction" over an unfair-labor-practice complaint alleging that the Agency violated the Statute with respect to its employees' civilian employment and communication with their bargaining representative. (ALJ Dec., JA 111; *see also* Dec., Apx. 145; Resp. Mot. for Sum. J., Apx. 11–23.)

The Judge also denied the Agency's claim that the Union waived its right to file an unfair-labor-practice charge under § 7116(d) of the Statute when it appealed the two employees' terminations in an internal administrative hearing. (ALJ Dec., Apx. 111; *see also* 5 U.S.C. § 7116(d).) He found that the unfair-labor-practice complaint was not barred by § 7116 because "the matter and the legal theories advanced in the

internal administrative hearing in comparison to the matter and legal theory underlying the [unfair-labor-practice complaint] are entirely distinct." (ALJ Dec., Apx. 111.)

Finally, the Judge held that the issue was not moot, as the Agency argued, because the Union had declared that it would ignore the March 12 letter's directive. (ALJ Dec., Apx. 111; *see also* Resp. Mot. for Sum. J. 23–25, Apx. 28–30.) The Judge explained that the statutory violation occurred when the March 12 letter was issued because "the objective interpretation" of the directive was to preclude bargaining-unit employees from exercising rights under the Statute – the effectiveness of the directive was immaterial. (*Id.*)

3. The Authority upholds the Judge's finding that the Agency committed an unfair labor practice.

The Authority denied the Agency's exceptions to the Judge's decision. With respect to the exceptions properly before it, the Authority first determined that the Judge's exercise of jurisdiction over the unfair-labor-practice complaint was appropriate because the dispute was not a "military matter." (Dec., Apx. 146.) It found that the unfair-labor-practice charge did not stem from the subject of the administrative hearing, but only concerned the Agency's directive prohibiting the Union representative from communicating with bargaining-unit employees outside the presence of Agency counsel. (*Id.*) The Authority explained that the March 12 letter's communications ban extended "beyond any military aspect of the

administrative hearing and into the civilian realm of bargaining-unit employees' employment," extending even to off-duty communications. (*Id.* at 147.)

Second, the Authority found that § 7116(d) of the Statute did not bar the unfair-labor-practice charge. (Dec., Apx. 147.) Under § 7116, the Authority will decline to assert jurisdiction over an unfair labor practice when the factual predicate and the legal theory underlying an unfair-labor-practice complaint and an appeal are the same. (*Id.* (citing *Wildberger v. FLRA*, 132 F.3d 784, 787 (D.C. Cir. 1998) and *U.S. Small Bus. Admin.*, 51 FLRA 413, 421 (1995).) Under Authority precedent, however, an unfair-labor-practice complaint is not barred under § 7116(d) "simply because it 'relates to' a matter that is the subject of an appeals procedure." (*Id.* (quoting *U.S. Dep't of the Army, Human Res. Command, St. Louis, Mo.*, 64 FLRA 140, 144 (2009)). Accordingly, the Authority determined that the complaint was not barred because the question of "whether the Agency interfered with 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 [Agency] complied with its discovery obligations at the [dual-status technicians' termination] hearing." (*Id.*)

Third, the Authority affirmed the Judge's finding that the March 12 letter violated § 7116(a)(1) of the Statute. (Dec., Apx. 147–48; *see* 5 U.S.C. § 7116(a)(1).) Under § 7116(a)(1), an agency commits an unfair labor practice when it interferes with, restrains, or coerces employees in the exercise of their rights protected under the

Statute. (*Id.*) The Authority found that the letter's directive objectively tended to interfere with employees' § 7102 right to participate in union activities. (Dec., Apx. 148; *see* 5 U.S.C. § 7102.) It reasoned that the letter's "sweeping command extended far beyond the scope of the internal administrative hearings" 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." (Dec., Apx. 148)

To remedy the violations, the Authority ordered the Agency to cease and desist from "prohibiting private communication between bargaining-unit employees and their Union representatives" and from "interfering with, restraining, or coercing bargaining-unit employees in the exercise of their rights assured by the Statute." (Dec., Apx. 148.) The Authority also ordered the Agency to post a notice informing bargaining-unit employees of their rights under the Statute and of the Agency's commitment to respecting those rights. (*Id.* at 148–49.) Because the Agency refused to comply, the Authority now seeks enforcement of its order.

SUMMARY OF THE ARGUMENT

Under Authority precedent, an agency commits an unfair labor practice, in violation of § 7116(a)(1) of the Statute, if, viewed objectively, its actions would tend to "interfere with, restrain, or coerce any employee in the exercise of any right" under the Statute – including the rights to meet and talk with a union representative about working conditions and to receive adequate advice in the face of a disciplinary

hearing. *See* 5 U.S.C. § 7116(a)(1); *see also id.* § 7102 (granting employees right to "form, join, or assist any labor organization"). Here, substantial evidence supports the Authority's finding that the Agency's ban on private communications between bargaining-unit employees and the Union objectively tended to interfere with their rights under the Statute. The Agency's ban prohibited confidential discussions between the two federal employees challenging their terminations and the Union about their defense, as well as between potential witnesses and the Union. (March 12 letter, Apx. 85.) It even banned private communications between non-witness employees and the Union about how their colleagues' terminations would affect their working conditions – perhaps the quintessential example of protected behavior under the Statute. *See U.S. Dep't of the Treasury, Customs Serv.*, 38 FLRA 1300, 1308–09 (1991). The March 12 letter's ban was not limited to military time or even duty time, but extended to off-duty communications between employees and their Union representatives, as well. Accordingly, the Authority correctly applied its precedent to find that the Agency committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1).

In the face of its obvious unfair labor practice, the Agency attempts to manufacture a jurisdictional question, claiming that this Court cannot enforce the Authority's order. *See* Br. 18–29. But its jurisdictional arguments are based on the incorrect premise that the Authority's decision is a collateral attack on the dual-status technicians' termination hearing. In fact, the Authority's decision is factually and

legally distinct from the terminations: its finding that the Agency interfered with bargaining-unit employees' right to communicate freely with the Union had no bearing on whether the technicians were properly terminated.

None of the Courts of Appeals have found that the Authority lacks jurisdiction over the civilian aspects of dual-technicians employment at issue here. The precedent in which the Agency grounds its jurisdictional claim is problematic. The in-circuit cases the Agency cites, *see* Br. 22, do not involve employee rights under the Statute and have likely been superseded by the 2016 amendment to the Technicians Act. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, 130 Stat. 2000, § 512 (2016). Further, the Agency's out-of circuit precedent is inapposite because it concerns direct challenges to terminations or military decisions, not an agency's prohibition on employee-union communications during civilian-duty time and off-duty time, which occurred in this case. *See* Br. 22–29.

Finally, the Agency's claim, Br. 29–31, that the Court lacks jurisdiction because the Union was required to first raise its concerns with the Agency's internal hearing examiner, rather than by filing an unfair-labor-practice charge, rests on a convoluted interpretation of the Statute and ignores the Authority's Congressionally delegated duty to resolve unfair labor practices. With judicial approval, the Authority has consistently held that when the legal theory underlying an unfair-labor-practice complaint is distinct from an issue raised under an appeals procedure, § 7116(d) of the Statute does not bar the complaint. *Wildberger v. FLRA*, 132 F.3d 784, 787 (D.C. Cir.

1998). Further, the § 7116(d) jurisdictional bar does not apply when the unfair-labor-practice charge focuses on a union's organizational interests, rather than individual employees' rights. *U.S. Small Business Admin.*, 51 FLRA 413, 422–25 (1995), *aff'd in relevant part by Wildberger*, 132 F.3d at 788. This Court owes deference to these longstanding interpretations of the Authority's enabling statute, *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), and the Authority properly applied that precedent to determine that its jurisdiction over the unfair-labor-practice complaint was appropriate here. As the Authority found, the Agency's unlawful interference with bargaining-unit employees' communications with the Union was separate and apart from whether the Agency was complying with the administrative hearing's discovery requirements under the Agency's Technical Personnel Regulation. Accordingly, § 7116(d) did not bar the unfair-labor-practice complaint and the Court should enforce the Authority's valid order.

STANDARDS OF REVIEW

This Court's review of Authority decisions is "narrow." *U.S. Naval Ordnance Station, Louisville, Ky. v. FLRA*, 818 F.2d 545, 547 (6th Cir. 1987). The Authority's function is "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Act," and it "is entitled to considerable deference when it exercises its special function of applying the general provisions of the Act to the complexities of federal labor relations." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (internal

quotation marks omitted); *see also Dep't of Air Force v. FLRA*, 775 F.2d 727, 732 (6th Cir. 1985). In accordance with section 10(e) of the Administrative Procedure Act, when the Authority "'considers the relevant factors and articulates a rational connection between the facts found and the choice made, the decision is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and will be upheld if supported by substantial evidence.'" *Nat'l Treasury Emps. Union v. FLRA*, 802 F.2d 843, 845 (6th Cir. 1986) (quoting *Film Transit, Inc. v. I.C.C.*, 699 F.2d 298, 300 (6th Cir. 1983)); *see also* 5 U.S.C. § 706(2)(A), 5 U.S.C. § 7123(c) (incorporating Administrative Procedure Act standards of review). The substantial evidence standard applies both to the Authority's findings of fact and its application of law to particular facts, such as finding an unfair labor practice. *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (applying substantial evidence standard); *Turnbull Cone Baking Co. of Tenn. v. NLRB*, 778 F.2d 292, 295 (6th Cir. 1985) (same); *see also Am. Fed'n of Gov't Emps., Local 1302 v. FLRA*, 180 F. App'x 168, 170 (D.C. Cir. 2006) (upholding Authority's unfair-labor-practice holding based on substantial evidence). The Court reviews the Authority's interpretations of other statutes de novo. *Ft. Knox Dependent Sch. v. FLRA*, 875 F.2d 1179, 1180 (6th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990).

Additionally, under § 7123(c) of the Statute, this Court may not consider any "objection that has not been urged before the Authority, or its designee," unless "the failure or neglect to urge the objection is excused because of extraordinary

circumstances." 5 U.S.C. § 7123(c); *see also Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986).

ARGUMENT

The Agency committed a textbook statutory unfair labor practice when it issued the March 12 letter directing the Union not to speak with unit employees outside of the presence of Agency counsel. The Technicians' Act makes those unit employees *federal* employees, who enjoy rights to union representation under the Statute. The Agency's directive thus violated bargaining-unit employees' right to freely communicate with their exclusive representative. *See* 5 U.S.C. § 7116(a)(1). That unfair-labor-practice was not a collateral attack on the terminations of two dual-status technicians or their termination proceedings: it had no bearing on whether or not the technicians committed the actions of which they were accused, nor on the Agency's decision to end their civilian employment. Because the Agency's jurisdictional and 5 U.S.C. § 7116(d) arguments rest on the premise of a collateral attack, for all of the reasons set out below, they must fail.

A. The Statute Protects Communications Between Federal Civilian Employees, Including Dual-Status Technicians, and Their Exclusive Bargaining Representative About Workplace Issues.

Section 7102 of the Statute guarantees civilian employees of the Federal Government the right to "form, join, or assist any labor organization." 5 U.S.C. § 7102. The Authority has consistently held that this right protects communications between employees and their exclusive bargaining representative about workplace

issues. *E.g., U.S. Dep't of the Treasury, Customs Serv.*, 38 FLRA 1300, 1308–09 (1991); *Norfolk Naval Shipyard, Portsmouth, Va.*, 5 FLRA 788, 804 (1981) (finding similar violations under the executive order that preceded the Statute); *cf. Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) (holding that "the right of employees to self-organize and bargain collectively . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite"); *Dorsey Trailers, Inc. v. NLRB*, 233 F.3d 831, 838 (4th Cir. 2000) (holding that an employer violated § 8(a)(1) of the National Labor Relations Act when it "told workers not to talk to the union during working hours without a supervisor's approval"). And under longstanding Authority precedent, the right and duty of a union to represent employees in disciplinary proceedings under the Statute, and the correlative right of employees to be represented by their union, "demand that the employee be free to make full and frank disclosure to his or her representative in order that the employee have adequate advice and a proper defense." *U.S. Dep't of the Treasury, Customs Serv.*, 38 FLRA at 1308; *accord U.S. Dep't of Justice v. FLRA*, 39 F.3d 361, 369 (D.C. Cir. 1994). Any interference with that right to full and frank disclosure violates the Statute unless the employee waives confidentiality or the agency establishes an overriding need for the information. *Customs Serv.*, 38 FLRA at 1308; *Long Beach Naval Shipyard*, 44 FLRA 1021, 1039 (1992).[2]

[2] As the Agency failed to allege waiver or overriding need before the Authority (and

As noted above, it is well settled that, in their civilian capacities, dual-status technicians enjoy the protection of the Statute, including the right to meet and talk with a union representative free of agency interference, restraint or coercion. *Miss. Army Nat'l Guard, Jackson, Miss.*, 57 FLRA 337, 340 (2001) ("technicians possess the same rights and privileges as other federal employees, except where specifically and expressly limited by law"); *accord Lipscomb*, 333 F.3d at 616 (collecting cases). An agency commits an unfair labor practice, in violation of § 7116(a)(1) of the Statute, if, viewed objectively, its actions would tend to "interfere with, restrain, or coerce any employee in the exercise of any right" under the Statute – including the right to meet and talk with a union representative about working conditions. *See* 5 U.S.C. § 7116(a)(1); *Am. Fed'n of Gov't Emps., Nat'l Border Patrol Council, Local 2595*, 67 FLRA 361, 366 (2014) ("*Local 2595*"). While the Authority takes the surrounding circumstances into consideration, the subjective perceptions of employees or the intent of the employer are irrelevant. *Local 2595*, 67 FLRA at 366. Rather, proof of actual interference is not required for the Authority to find an unfair labor practice: the test is whether the agency's action "'tended'" to have a chilling effect on employees' exercise of their protected rights. *Dep't of the Army*, 3 FLRA 363, 376

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makes no such claim now), it is jurisdictionally barred from doing so under 5 U.S.C. § 7123(c).

(1980) (quoting *NLRB v. Huntsville Manufacturing Co.*, 514 F.2d 723, 724 (5th Cir. 1975)).

In exercising its authority over dual-status technicians working for State National Guard units, the Authority judiciously circumscribes the exercise of its authority only to matters relating to the civilian aspects of their employment. *See, e.g., U.S. Dep't of the Air Force, Seymour Johnson Air Force Base,* 57 FLRA 884, 886 (2002).

B. The Agency Committed an Unfair Labor Practice, in Violation of § 7116(a)(1) of the Statute, When it Barred All Private Communications Between Union Representatives and Bargaining-Unit Employees.

1. The Agency concedes that the directive in the March 12 letter was an attempt to chill communications between bargaining-unit employees and their exclusive representative about the termination of two dual-status technicians from their civilian posts. Indeed, the Agency admits that "[t]he challenged letter prohibited . . . *ex parte* communication regarding the termination proceedings . . . between employees and their union representatives," Br. 32, a classic violation of the Statute's express guarantee to federal employees of the right to choose union representation. By its plain – expansive – wording, the letter precluded the Union from communicating confidentially with the terminated employees about their defense: a blatant violation of an employee's right to make "full and frank" disclosure to his representative to ensure a proper defense. *U.S. Dep't of the Treasury, Customs Serv.*, 38 FLRA at 1308; *see* March 12 letter, Apx. 85. The March 12 letter also prohibited the

Union from speaking with potential witnesses to build a case for the employees' defense, in accordance with the Union's statutory right and duty of representation. *See id.*

The letter's broad wording further banned discussions between bargaining-unit employees and Union representatives about the impact of the terminations on employee working conditions or on the bargaining unit, generally[3] – discussions that could have no plausible bearing on the outcome of the termination proceedings and that are undeniably protected by the Statute. *See U.S. Dep't of the Treasury, Cust. Serv.*, 38 FLRA at 1308–09 (recognizing that § 7102 protects an employee's right to meet and talk with a union representative about working conditions); March 12 letter, Apx. 85. It prohibited private conversations between employees and their representative both about ways to support the terminated employees *and* voicing support for the terminations. *See* March 12 letter, Apx. 85. As the Authority found, the letter's ban on communications was not limited to military time or even duty time, but extended to off-duty communications between employees and the Union as well. *See* Dec., Apx. 148; March 12 letter, Apx. 85; *cf. Mercury-Marine, Div. of Brunswick Corp.*, 282 NLRB 794, 795 (1987) (citing longstanding National Labor Relations Board precedent

[3] According to the Union's business manager/secretary-treasurer, because the terminations stemmed from a report documenting "widespread theft, moonlighting, destruction of property and nepotism" on the base, employees reasonably feared that more disciplinary actions could be imminent. (G.C. Cross-Mot. for Sum. J., Ex. 7, Apx. 97.)

"that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful"). This sweeping language provides ample substantial evidence to support the Authority's finding that the directive in the March 12 letter, viewed objectively, tended to interfere with or restrain bargaining-unit employees from their statutory right to communicate with their Union representatives. (Dec., Apx. 148 (citing *Local 2595*, 67 FLRA at 367).)

The Agency's arguments that it did not commit an unfair labor practice have no support in the case law. The Agency protests that "neither the Authority nor the Union identified any example of an employee whose union activity was affected." Br. 32. But that showing is not necessary for an unfair-labor-practice finding: the statutory violation occurred when the Agency issued the letter. *See, e.g., Dep't of the Army*, 3 FLRA 364, 376 (1980); *cf. Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) ("The Board is merely required to determine whether employees would reasonably construe the [disputed] language to prohibit Section 7 activity and not whether employees have thus construed the rule." (internal quotation marks and citation omitted)); *accord Flex Frac Logistics L.L.C. v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014); *NLRB v. Northeastern Land Services Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011); *see also Mercury-Marine, Div. of Brunswick Corp.*, 282 NLRB 794, 795 (1987) (". . . [T]he mere

existence of an overly broad rule tends to restrain and interfere with employees' rights under the [National Labor Relations] Act even if the rule is not enforced.").[4]

The Agency similarly belies its misunderstanding of the statutory unfair-labor-practice standard when it pleads that the March 12 letter interfered with employee-union communications "only temporarily." Br. 32. The Statute, however, contains no de minimis exception: the length of time during which the Agency committed an unfair labor practice does not negate its violation.

2. The Agency's claims that the Authority misinterpreted the breadth of the March 12 letter's ban on employee-Union communications, *see* Br. 25–26, 32–33, conflict with the letter's plain wording. For example, the Agency argues that "the March 12 letter did not bar the [U]nion representative from speaking with the terminated technicians whom he represented, nor did it prohibit union officials from communicating with their members about other subjects." Br. 25–26. But the Authority's finding that the March 12 letter's broad language *did* bar those communications was supported by ample record evidence: namely, the letter itself. (Dec., Apx. 148.) Specifically, the March 12 letter stated that its communications ban

[4] The Authority has long recognized that "[w]hen there are comparable provisions under the Statute and the [National Labor Relations Act], decisions of the [National Labor Relations Board] and the courts interpreting the [National Labor Relations Act] have a high degree of relevance to similar circumstances under the Statute." *U.S. Geological Survey, Caribbean Dist. Office, San Juan, P.R.*, 53 FLRA 1006, 1015 (1997). Accordingly, the Authority regularly looks to analogous precedent under the National Labor Relations Act when evaluating an unfair-labor-practice complaint. *See, e.g.*, *Am. Fed'n of Gov't Emps., Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1279–80 (1998).

applied to "[a]ny communications with employees or representatives of the [A]gency outside the presence of an [A]gency attorney." (March 12 letter, Apx. 85.)

Further, to the extent the Agency argues that the March 12 letter's communications ban was not an unfair labor practice because the Agency later clarified in a March 20 letter "that [its] concern [wa]s communication with current employees of the Agency that concern matters related to the subject of the administrative hearing," its claim is unavailing. Br. 26. As an initial matter, the Authority did not consider the March 20 letter, and the Agency did not challenge the Authority's decision on that ground in a motion for reconsideration. Any arguments about the March 20 letter, therefore, are not properly before this Court under § 7123(c) of the Statute. *Cf. Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933–34 (D.C. Cir. 2013) (failure to raise claim of incorrect factual finding in motion for reconsideration precluded union from raising the claim for the first time on appeal); *Glaziers' Local No. 558 v. NLRB*, 408 F.2d 197, 203 (D.C. Cir. 1969) (same).

In any event, the language the Agency cites would not cure its March 12 violation of the Statute. *See Cooper Tire & Rubber Co. v. NLRB*, 156 F. App'x 760, 767–68 (6th Cir. 2005) (to cure a threat of retaliation, "the employer must, at a minimum, give employees a clear assurance that it will behave lawfully and will not follow through with the conduct threatened earlier" (internal quotation marks omitted)); *cf. U.S. Dep't of Agric., Plant Prot. & Quarantine, Animal & Plant Health Inspection Serv.*, 17 FLRA 281, 296 n.4 (1985) ("the mere willingness . . . to receive the

Union's recommendations after the announcement of a fait accompli did not cure its improper refusal to negotiate in good faith" (internal quotation marks omitted)). The language of the March 20 letter essentially repeats the threats of March 12. "[C]urrent employees" (March 20 letter, Apx. 91) is substantially similar to, if not synonymous with, "all employees," (March 12 letter, Apx. 84), and plainly does not mean "only potential witnesses," as the Agency now claims, *see* Br. 25. And, even if it did mean "only potential witnesses," that would still likely violate the Statute by interfering with the Union's ability to represent the two terminated dual-status technicians. Further, as discussed above, "matters related to the subject of the administrative hearing," although purportedly clarifying, could reasonably be interpreted to include a wide range of communications protected by the Statute. The March 20 letter did nothing to cure the original violation.

Finally, the Agency mischaracterizes the Authority's role in arguing that "if there were doubt about the scope of the March 12 letter's prohibition, that doubt should have been resolved in a way that would avoid a potential conflict between the [Statute] and the Technicians Act." Br. 34. Yet, there is no conflict. The Authority's role is not to re-write an agency's directive to ensure its compliance with both the Statute and the Technicians Act, but only to evaluate whether that directive, as written, violates the Statute. Here, the Authority correctly found that the plain wording of the directive in the Agency's March 12 letter impermissibly restricted communications between the Union and bargaining-unit employees. (Dec., Apx.

148.) Should the Court disagree that the letter's language was clear, however, any ambiguity in the letter should be construed against the Agency. *See TelTech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (construing against employer ambiguities of employer rule requiring permission for employees to engage in protected activity); *cf. Savedoff v. Access Group, Inc.*, 524 F.3d 754, 764 (6th Cir. 2008) ("If the language in the contract is ambiguous, the court should generally construe it against the drafter.").

C. The Agency's Jurisdictional Arguments Fail Because They are Based on the Mistaken Premise that the Authority's Decision is a Collateral Attack on the Termination Hearing.

The Agency's remaining arguments, Br. 18–30, require the Court to find that the Authority's order collaterally attacks the termination hearing. But, as set out below, the order simply vindicates the speech rights of all bargaining-unit employees to freely communicate with their representative under the Statute. Because the Agency's jurisdictional arguments are based on the incorrect premise that the Authority's decision interfered with the termination proceedings, the Court should reject them.

1. The Authority's decision is not a collateral attack on the termination hearing.

The Agency's claim that the Authority's unfair-labor-practice finding is somehow a collateral attack on the technicians' terminations, Br. 25, is unfounded. "A 'collateral attack' is '[a]n attack on a judgment in a proceeding other than a direct appeal.'" *Wall v. Kholi*, 562 U.S. 545, 552 (2011) (quoting BLACK'S LAW DICTIONARY

298 (9th ed. 2009)) (emphasis omitted); *see also JGR, Inc. v. Thomasville Furniture Industries, Inc.*, 505 F. App'x 430, 433 (6th Cir. 2012) ("The Ohio Supreme Court has defined a collateral attack as an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved." (internal quotation marks omitted)). But the resolution of the unfair labor practice here had no influence on the dual-status technicians' termination. Indeed, the Union official who filed the unfair-labor-practice charge stated under oath that the charge "in no way challenge[d] the terminations of bargaining unit employees . . . from their bargaining unit civilian positions." (GC Cross-Mot. for Sum. J., Ex. 2, Apx. 77; *id.* at 80 (". . . I'm not challenging [the technicians'] terminations in this charge. It's totally irrelevant what they were accused of doing and what rules the Agency says they did or didn't violate.").) Instead, the unfair-labor-practice charge sought to vindicate the communication and organization rights held by the entire bargaining unit. Accordingly, the Authority's decision is not a collateral attack on the termination proceedings.

To the extent the Agency argues that the Authority's decision was a collateral attack on the Agency's termination *procedures*, *see* Br. 25, the Authority's decision in no way prevented the Agency from determining the procedures for its civilian-status termination proceedings. It only held that, as written, the Agency's broad ban on employee-Union communications in the March 12 letter reached far beyond those

termination proceedings and, therefore, constituted an unfair labor practice. (Dec., Apx. 148.)

2. There is no doubt that the Authority has jurisdiction to review unfair labor practices involving dual-status technicians.

None of the Courts of Appeals that have considered the issue have found that the Authority lacks jurisdiction over the civilian aspects of dual-status technicians' employment. *See, e.g., Lipscomb v. FLRA*, 333 F.3d 611, 615 (5th Cir. 2003) (holding that civilian technicians are covered by the Statute and within Authority's jurisdiction); *Nat'l Fed'n of Fed. Emps., Local 1623 v. FLRA*, 852 F.2d 1349, 1350–51 (D.C. Cir. 1988) (same); *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 281 (3d Cir. 1982) (same).[5] Of course, that jurisdiction is not unlimited: the Authority acknowledges that § 709 reserves for the Adjutant General the final word on dual-status technician terminations with respect to activity occurring while the technician is in a military pay status or fitness for duty in the Agency's reserve components. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, 130 Stat. 2000,

[5] *See also Ind. Air Nat'l Guard, Hulman Field v. FLRA*, 712 F.2d 1187, 1189-92 (7th Cir. 1983) (resolving appeal from Authority's order without questioning Authority's jurisdiction); *Nebraska v. FLRA*, 705 F.2d 945, 953 (8th Cir. 1983) (finding a conflict between Technicians Act and the Statute, but cautioning that the decision should not be read more broadly); *Cal. Nat'l Guard v. FLRA*, 697 F.2d 874, 879 (9th Cir. 1983) (holding that certain "provisions of the Technicians Act constitute a narrow exception to the broad legislative scheme set forth in the [Statute]"); *Div. of Military & Naval Affairs v. FLRA*, 683 F.2d 45, 47-49 (2d Cir. 1982) (resolving appeal from Authority's order without questioning Authority's jurisdiction).

§ 512(a)(1)(C) (2016); 32 U.S.C. § 709(f)(5) (granting dual-status technicians certain termination appeal rights under the provisions of §§ 7511, 7512, and 7513 of Title 5, and § 717 of the Civil Rights Act of 1991); *P.R. Air Nat'l Guard, 156th Airlift Wing, (AMC), Carolina, P.R.*, 56 FLRA 174, 181–82 (2000) ("*P.R. Nat'l Guard*"); 32 U.S.C. § 709(f)(3), (4).

This case, however, falls squarely outside any Technicians Act exceptions. Applying its precedent, the Authority correctly determined that the unfair-labor-practice complaint did not stem from the subject of the administrative hearing: the termination of two dual-status employees. (Dec., Apx. 146.)[6] Tellingly, the remedy the complaint sought – and the Authority ordered – was not the reinstatement of the terminated employees, but only for the Agency to cease and desist from prohibiting private communications between bargaining-unit employees and the Union and to post a notice affirming that the Agency would not further violate employees' rights under the Statute. (*Id.*; GC Cross-Mot. for Sum. J., Apx. 71–72.) Put another way, whether or not the Agency's restriction on employee-Union communications was an unfair labor practice under the Statute had no bearing on whether the terminated employees committed the infractions of which they were accused. As the Authority

[6] Although the termination proceedings preceded the 2016 amendments to the Technicians Act, there is no indication that they concerned activity occurring while the technicians were in military pay status or their fitness for duty in the reserve components, which 32 U.S.C. § 709(f)(4) now requires to place the termination decision entirely in the unappealable discretion of the Adjutant General.

stated, the Agency's "complete and unqualified ban on communications extend[ed] beyond any military aspect of the administrative hearing and into the civilian realm" of the dual-status technicians' employment. (Dec., Apx. 146; *see also id.* at 147 (citing *P.R. Nat'l Guard*, 56 FLRA at 180).) Accordingly, under Authority and court precedent, the Authority properly asserted jurisdiction over the unfair-labor-practice complaint.

The Agency's cases do not negate the Authority's valid exercise of jurisdiction.[7] There is no in-circuit precedent on point. The Sixth Circuit cases the Agency cites – *Fisher v. Peters* and *Leistiko v. Stone* – do not involve the Statute or the Agency's obligations as an employer subject to the Statute. *See* Br. 22 (citing *Fisher v. Peters*, 249 F.3d 433, 443 (6th Cir. 2001) and *Leistiko v. Stone*, 134 F.3d 817, 821 (6th Cir. 1998)). Rather, they are direct challenges by individual dual-status technicians to termination decisions under Title VII and the Rehabilitation Act, respectively.[8] Those cases, however, are not only factually and legally inapposite, but they also have likely been superseded by the December 19, 2016, amendment to the Technicians Act, National

[7] The Agency has narrowed its arguments considerably from the ones it made before the Judge, no longer relying on *Feres v. United States*, 340 U.S. 135 (1950), and the Tenth and Eleventh Amendments, but only asserting that § 709 bars the Authority from resolving the unfair labor practice in this case. *Compare* Resp. Mot. for Sum. J., Apx. 14–22 *with* Br. 20–21, 24–29.

[8] In *Fisher v. Peters*, a dual-status technician appealed her non-selection and alleged other discrimination under Title VII of the Civil Rights Act of 1964. 249 F.3d at 437. Similarly, in *Leistiko v. Stone*, a dual-status technician challenged his termination under the Rehabilitation Act and other authorities. 134 F.3d at 818.

Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, 130 Stat. 2000, § 512 (2016). Under that amendment, dual-status technicians' Title VII and Rehabilitation Act claims that arise from their civilian duties *are* appealable beyond the Adjutant General. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, 130 Stat. 2000, § 512(a)(1)(C) (2016); 32 U.S.C. § 709(f)(5); *see supra* pp. 30-31. And Congress took care to note that this amendment was not meant to create new rights on behalf of dual-status technicians, but only to "clarify" the existing "employment rights and protections of military technicians." S. Rep. No. 114-255, at 139 (2016); *accord* H.R. Conf. Rep 114-840, at 1016–17 (2016). Though the Agency claims the amendment is insignificant, Br. at 7 n.2, in fact, the amendment likely supersedes the in-circuit precedent on which the Agency rests its case, *see* Br. 22.

The Agency's out-of-circuit precedent is likewise distinguishable. *American Federation of Government Employees, Local 3936 v. FLRA*, 239 F.3d 66 (1st Cir. 2001), for example, involved a union's attempt to appeal a dual-status technician's termination, which the Court and the Authority agreed fell outside the Authority's purview. It did not concern a ban on union communications with bargaining-unit employees, as here. *See* Br. 20. Other cases the Agency cites involve union proposals for collective-bargaining agreements that the courts have deemed nonnegotiable because the proposals cover military matters. But those cases are inapposite because, as the Authority found here, the March 12 letter did not cover military matters: it was not a collateral attack on the termination hearing. *See, e.g., Nat'l Fed'n of Fed. Emps., Local*

1623 v. FLRA, 852 F.2d 1349, 1352-53 (D.C. Cir. 1988) ("*NFFE, Local 1623*"); *Ind. Air Nat'l Guard v. FLRA*, 712 F.2d 1187, 1191-92 (7th Cir. 1983); *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 280 (3d Cir. 1982).

In *NFFE, Local 1623*, for example, the U.S. Court of Appeals for the D.C. Circuit affirmed the Authority's decision that a union proposal requiring civilian supervisors to attempt to "convince military officers to assign personnel in some manner other than the one they originally thought best" was not bargainable under § 7103 of the Statute. 852 F.3d at 1352. The Court reasoned that while the Technicians Act "d[id] not specifically countermand the [union]'s proposal," the proposal was nevertheless nonnegotiable because "military matters are excluded from bargaining" and the proposal would "subject military personnel decisions to civilian influence." *Id.* at 1352-53. But unlike in *NFFE Local 1623* and similar cases, the military aspect of dual-status technicians' employment is nowhere at issue here. As the Authority found, the Agency's ban on employee-Union communications extended "beyond any military aspect of the administrative hearing and into the civilian realm of bargaining-unit employees' employment," including to their off-duty time. (Dec., Apx. 146; *see also P.R. Nat'l Guard*, 56 FLRA at 180 (holding that technicians' off-duty activities fall within the civilian component of their dual status).) Accordingly, the *NFFE, Local 1623* holding – and the similar out-of-circuit precedent the Agency cites – is of no moment in this case. *See also Ind. Air Nat'l Guard v. FLRA*, 712 F.2d 1187,

1191-92 (7th Cir. 1983); *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 280 (3d Cir. 1982).

3. The Authority properly exercised jurisdiction under § 7116(d) of the Statute because the Union was not required to raise its unfair-labor-practice complaint before the Agency's internal hearing examiner.

Section 7116(d) of the Statute provides that "[i]ssues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section." 5 U.S.C. § 7116(d). Under that provision, the Authority will decline to assert jurisdiction over an unfair-labor-practice complaint when "the factual predicate and the legal theory underlying [the] unfair labor practice complaint and a[n] . . . appeal are the same." *Wildberger v. FLRA*, 132 F.3d 784, 787 (D.C. Cir. 1998). Section 7116(d) typically applies when an employee challenges the agency's decision to terminate him in another forum, and later brings an unfair-labor-practice charge challenging the same termination decision. *See, e.g.*, *Wildberger*, 132 F.3d at 792-93 (Authority lacked jurisdiction over complaint where employee challenged termination decision before Merit Systems Protection Board, and later before Authority as unfair labor practice); *Dep't of Commerce v. FLRA*, 976 F.2d 882, 888 (4th Cir. 1992) (same).

The Authority correctly held that the Union was not required to raise its objections to the directive in the March 12 letter to the Agency's hearing examiner before filing an unfair-labor-practice charge under § 7116(d). As the Authority

explained, whether the Agency violated the Statute by interfering with bargaining-unit employees' communications with the Union was separate and apart from whether the Agency was complying with the administrative hearing's discovery requirements under the Agency's Technical Personnel Regulation. (Dec., Apx. 147.) In other words, those questions were premised on entirely different legal theories. *Wildberger*, 132 F.3d at 787. Under the Authority's longstanding precedent, to which this Court owes deference, § 7116(d) does not bar the Authority from reviewing an unfair-labor-practice complaint "simply because [the complaint] 'relates to' a matter that is the subject of an appeals procedure." *U.S. Dep't of the Army, Human Res. Command, St. Louis, Mo.*, 64 FLRA 160, 144 (2009) (quoting *Bureau of the Census*, 41 FLRA 536, 448 (1991)); *see Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *Ctr. Const. Co. v. NLRB*, 482 F.3d 425, 433-34 (6th Cir. 2007) (deferring to agency's statutory interpretation under *Chevron*).

Furthermore, the unfair-labor-practice charge sought to protect the right of all bargaining-unit employees to freely communicate with their elected representative, whereas a concern about witness access would involve only the rights of the terminated employees to a fair termination hearing. As the Authority found, these are distinct factual and legal issues. (Dec., Apx. 144.) There is no § 7116(d) jurisdictional bar when the unfair-labor-practice charge focuses on a union's institutional interests,

as opposed to the rights of individual employees. *U.S. Small Business Admin.*, 51 FLRA 413, 422 (1995) ("[W]e will assert jurisdiction when the [unfair labor practice] focuses on the union's institutional interest in protecting the rights of other employees."), *aff'd in part, rev'd in part by Wildberger*, 132 F.3d at 788. Accordingly, § 7116(d) could not operate to preclude an unfair-labor-practice charge with the Authority. *See id.*; *U.S. Small Business Admin.*, 51 FLRA at 422–25.

Finally, the Agency's perplexing assertion that the hearing examiner could have "clarified" any "ambiguity" in the letter "in a way that ensured maximum consistency with the interests supporting the Technicians Act and the . . . Statute," Br. 30, ignores the fact that Congress delegated the responsibility of interpreting the Statute to the Authority: the hearing examiner would have no statutory authority to resolve an unfair-labor-practice complaint. *See* 5 U.S.C. § 7105(a)(2)(G) (enumerating powers of the Authority, including to "conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title"). Rather, as the Supreme Court has recognized, the Authority has exclusive and final authority to process unfair labor practice complaints. *Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 533 (1989) (citing H.R. Rep. No. 95-1403, p. 52 (1978)). As contemplated by Congress, "[a]ll complaints of unfair labor practices [a]re to be filed with the FLRA." *Id.* (citing S. Rep. No. 95-969, p. 107 (1978)).

CONCLUSION

The Authority respectfully requests that the Court grant the Authority's application for enforcement.

Respectfully submitted,

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June 12, 2017

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,289 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font in Garamond.

June 12, 2017

/s/ Fred B. Jacob
FRED B. JACOB

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Fred B. Jacob
FRED B. JACOB

ADDENDUM

Order Transferring to Sixth Circuit,
FLRA v. Mich. Army Nat'l Guard,
No. 16-1913 (4th Cir. Feb. 7, 2017)

FILED: February 7, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1913
(FLRA-1: CH-CA-14-0475)

FEDERAL LABOR RELATIONS AUTHORITY,

Petitioner,

v.

MICHIGAN ARMY NATIONAL GUARD,

Respondent.

O R D E R

The Federal Labor Relations Authority ("FLRA") seeks enforcement of its order regarding a Michigan Army National Guard ("Guard") labor dispute. The Guard has moved to dismiss, arguing that, not only is venue absent in this circuit for the enforcement of the FLRA's order, but furthermore, that no United States appellate court has jurisdiction over the dispute.

"The [FLRA] may petition any appropriate United States court of appeals for the enforcement of any [FLRA] order . . . ." 5 U.S.C. § 7123(b) (2012) (emphasis added). The appropriate court of appeals "includes the circuit where the respondent resides or transacts business." Fed. Labor Relations Auth. v. Soc. Sec.

Admin., 846 F.2d 1475, 1478 (D.C. Cir. 1988). The Guard resides in Michigan—where the alleged unfair labor practice occurred—and has no physical presence in this circuit. See Davlan Eng'g, Inc. v. NLRB, 718 F.2d 102, 103-04 (4th Cir. 1983) (order) (considering what constitutes transacting business in context of National Labor Relations Act). The FLRA argues that the Guard transacts business in this circuit through its relationships with the Department of the Army and the National Guard Bureau, both of which are located within this circuit, in regulating and overseeing the dual-status technician program. The Guard disagrees and argues that the relationships pointed to by the FLRA are too attenuated to support venue in this circuit. We need not resolve that question here.

The Guard's jurisdictional challenge to our review of the FLRA order rests on its assertion that labor disputes involving dual-status technicians fall outside the FLRA's authority. See 32 U.S.C. § 709(f)(4) (2012). The relevant jurisdictional statute, however, plainly provides that the FLRA "may petition any appropriate United States court of appeals for the enforcement of any order of the [FLRA]." 5 U.S.C. § 7123(b). Thus, the jurisdiction of federal appellate courts is clearly distinct from the question of the jurisdiction of the FLRA in the first instance. Under the circumstances, we are satisfied that transfer of this enforcement action to the Sixth Circuit Court of Appeals is in the

interest of justice. See Fed. Labor Relations Auth., 846 F.2d at 1478 (noting, but declining to exercise, its "inherent discretionary power" to transfer venue in the "interest of justice and sound judicial administration").

Accordingly, we deny the motion to dismiss. We forthwith transfer this matter to the United States Court of Appeals for the Sixth Circuit.

Entered at the direction of the panel: Judge Traxler, Judge Floyd, and Senior Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk