

No. 21-\_\_\_\_

**In the Supreme Court of the United States**

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THE OHIO ADJUTANT GENERAL'S DEP'T, ET AL.,  
*Petitioners,*

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.,  
*Respondents.*

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*ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

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**APPENDIX**

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**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Case No. 20-3908

THE OHIO ADJUTANT GENERAL'S  
DEPARTMENT; Major General JOHN C. HARRIS,  
JR., in his official capacity as the Adjutant General  
of the Ohio National Guard; UNITED STATES  
DEPARTMENT OF DEFENSE/OHIO NATIONAL  
GUARD,

*Petitioners,*

v.

FEDERAL LABOR RELATIONS AUTHORITY,

*Respondents,*

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 3970, AFL-CIO,

*Intervenor.*

On Petition for Review from the Federal Labor  
Relations Authority;

Nos. CH-CA-17-0248; CH-CA-17-0249; CH-CA-17-  
0251; CH-CA-17-0252; CH-CA-17-0336.

Argued: October 27, 2021

Decided and Filed: December 21, 2021

Before: DAUGHTREY, COLE, and CLAY,  
Circuit Judges.

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**COUNSEL**

**ARGUED:** Michael J. Hendershot, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Petitioners. Rebecca J. Osborne, FEDERAL LABOR RELATIONS AUTHORITY, Washington, D.C., for Respondent. Matthew W. Milledge, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, Washington, D.C., for Intervenor. **ON BRIEF:** Michael J. Hendershot, Benjamin M. Flowers, Dale T. Vitale, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Petitioners. Rebecca J. Osborne, Noah Peters, FEDERAL LABOR RELATIONS AUTHORITY, Washington, D.C., for Respondent. Matthew W. Milledge, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, Washington, D.C., for Intervenor.

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**OPINION**

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COLE, Circuit Judge. The Ohio National Guard and its Adjutant General (collectively, the “Guard”) petition this court to review a Federal Labor Relations Authority (“FLRA”) decision and order arising out of a collective-bargaining dispute between the Guard and the union that represents its technicians, the American Federation of Government Employees, Local 3970, AFL-CIO (the “Union”). The Guard seeks reversal of the decision and order, arguing that the FLRA does not have jurisdiction under the Federal Service Labor-Management Relations Statute (the “Statute”), 5 U.S.C. §§ 7101–7135, to adjudicate

federal labor-relations questions between the Guard and the technicians' Union. The Guard additionally argues that it is unconstitutional for the FLRA to enforce the Statute by issuing orders to state national guards and their adjutants general, and that the Guard cannot legally comply with the FLRA's order. We deny the Guard's petition.

## I. BACKGROUND

This case arises from the Guard's decision to end its 45 year-long collective-bargaining relationship with the Union that represents its technicians. National Guard technicians are civilian federal employees who work in a wide variety of clerical, administrative, and technical roles in support of the Guard's daily operations. *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 279 (3d Cir. 1982). Technicians are described as dual-status employees because their employment is "a hybrid, both of federal and state, and of civilian and military strains." *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1398 (D.C. Cir. 1988). Although technicians hold a military grade and wear a military uniform while performing the military aspects of their jobs, they are also "afforded the benefits and rights generally provided for federal employees in the civil service." *N.J. Air Nat'l Guard*, 677 F.2d at 279.

The most recent collective bargaining agreement ("CBA") between the Guard and the Union was signed in 2011 and was set to expire in 2014. As the expiration date neared, the Guard and the Union started negotiations for a new CBA. But no new agreement was reached by the expiration date. In January 2014, seemingly to continue bargaining and

reestablish the CBA, the Guard issued a memorandum. In this memorandum, the Guard recommitted to being bound by the mandatory bargaining topics set forth in the 2011 CBA.

But the Guard did not keep its promise. Instead, in September 2016, the Guard issued a memorandum titled “Collective Bargaining Agreement (CBA).” This memorandum was sent to over 2,000 people, including many bargaining-unit technicians. The memorandum announced:

1. **No Collective Bargaining Agreement (CBA).** The Ohio National Guard has informed Local 3970, American Federation of Government Employees, that the Ohio National Guard is not bound by any provision of the CBA between the parties that expired in 2014.
2. **Federal Service Labor Management Relations Statute . . . .** The Ohio National Guard has also communicated to Local 3970 that it questions the applicability to National Guard Technicians of the statutes in the [Federal Service Labor-Management Relations Statute] that have historically underlain the collective bargaining relationship between local 3970 and the Ohio National Guard. The details of this jurisdictional dispute are unimportant here; but until this dispute is resolved in a satisfactory way, new CBA or by some other means, the Ohio National Guard does not consider itself obligated to abide by the

[Federal Service Labor-Management  
Relations Statute].

(ALJ Decision, Pet'r App., Dkt. 19, p. 21a (alterations added.))

After issuing this memorandum and thus ending the collective-bargaining relationship between itself and the technicians' Union, the Guard next started terminating Union dues deductions. First, the Guard told the Union it did not have Standard Form 1187s ("Form 1187s")—which is a request for payroll deductions for dues—on file for most of the dues-paying members of the Union. Federal-sector bargaining-unit members (like those in the Union) are required to submit Form 1187s to their employing agencies. Once a Form 1187 is submitted, union dues are deducted from member paychecks, as provided by 5 U.S.C. § 7115(a). If employees want to cancel dues allotments, they must submit a different form: Standard Form 1188—cancellation of payroll deductions ("Form 1188").

The Guard acknowledged it was required to maintain Form 1187s in its files, and that the bargaining unit employees were not so obligated. Still, the Guard could not explain what happened to the Form 1187s, and it sent letters to most dues-paying members, including the President of the local Union, asking them to either provide a copy of the original form or resubmit the form within 60 days. If members did not submit a new or original Form 1187 within the 60-day period, the Guard completed a Form 1188 for those employees and signed the forms on their behalf without asking for consent. As a result, union dues deductions for around 89 bargaining unit employees

were terminated between September 2016 and June 2017. In April 2017, the Guard sent a letter to at least 48 bargaining-unit employees, 41 of whom had a Form 1187 on file. In this letter, the Guard recommended that the union-dues allotments for these employees be terminated because there was no longer a CBA.

In March 2017, in response to the Guard's conduct, the Union filed four Unfair Labor Practice charges ("ULPs") with the FLRA. At this stage in the ULP process, the FLRA's regional General Counsel investigates the charges and decides whether to issue a complaint on behalf of the Union. Here, the General Counsel issued a complaint alleging that the Guard refused to negotiate in good faith when it told employees it was no longer bound by the Statute or the CBA. The General Counsel also alleged that the Guard refused to negotiate in good faith when it unilaterally implemented new policies regarding union-dues deductions and, as a result, the Guard interfered with, restrained, and coerced employees in the exercise of their rights under the Statute.

The Union filed an additional ULP charge with the FLRA in April 2017. After investigating, the FLRA's Regional Director filed a second complaint on behalf of the Union and consolidated this new case with the first one. Like the General Counsel's first complaint, this one also alleged that the Guard interfered with, restrained, and coerced employees in the exercise of their rights under the Statute, this time by recommending the termination of employees' union-dues deductions.

In May 2017, the Guard filed answers to the first and second complaints. In both answers, the Guard



admitted certain facts, but denied that it violated the Statute. For example, the Guard conceded that it terminated the dues of most of the paying bargaining-unit employees. But the Guard denied that it constitutes an “agency” and that technician bargaining-unit employees are “employees” for the purposes of the Statute. Both the General Counsel and the Guard moved for summary judgment before an Administrative Law Judge (“ALJ”). The assigned ALJ denied both motions and set the case for a hearing.<sup>1</sup>

After conducting the hearing, the ALJ issued a recommended decision on June 18, 2018. The ALJ found that: (1) the Guard is an “agency” within the meaning of § 7103(a)(3); (2) the FLRA had jurisdiction over the Guard; (3) technicians had collective-bargaining rights under the Statute; and (4) the Guard’s actions in repudiating the CBA clearly violated the Statute.

The ALJ ordered the Guard to cease and desist from: (1) “[f]ailing and/or refusing to recognize and comply with the mandatory terms of the expired [CBA];” (2) “[f]ailing and/or refusing to maintain existing personnel policies, and practices and matters affecting working conditions;” (3) “[u]nlawfully removing employees from union dues withholdings, or threatening to do so;” and (4) “[i]nforming employees, supervisors, and managers that the [Guard] does not consider itself bound by the [Statute] and that the CBA... is a nullity.” The ALJ also recommended that the Guard reinstate the dues allotments and

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<sup>1</sup> ULP hearings are adversarial hearings before an ALJ.

reimburse to the Union the dues that were improperly cancelled.

If either party disagrees with the ALJ's recommended decision, that party can file an appeal with the FLRA's headquarters in Washington, D.C. These appeals are called "exceptions." 5 C.F.R. § 2423.40. Exceptions are heard by a panel of FLRA members. And in July 2018, the Guard filed exceptions to the ALJ's recommended decision. The Guard argued that the FLRA cannot regulate state national guards because Congress had not called the militia into service. The Guard further argued that the FLRA does not have jurisdiction over technician employees. In addition to challenging the FLRA's jurisdiction, the Guard contended that its actions were not ULPs, and that the remedies recommended by the ALJ were inappropriate.

In August 2018, the FLRA's General Counsel opposed the Guard's exceptions. Citing our decision in *Federal Labor Relations Authority v. Michigan Army National Guard*, 878 F.3d 171 (6th Cir. 2017), the General Counsel argued that the Guard fell under the FLRA's jurisdiction in its capacity as the employer of technicians, who are protected by the Statute.

On June 30, 2020, the three-member FLRA panel, with one member dissenting, issued a Decision and Order adopting the ALJ's recommended decision in full, finding the ALJ did not commit prejudicial error in his factual findings or legal analysis. The FLRA found that the Guard's exception "served only to repeat its arguments below." The Guard timely petitioned this court to review the FLRA's order, arguing that we should reverse the FLRA's decision.

## II. ANALYSIS

### A. The FLRA's Waiver Argument

The core issue before us is whether the FLRA has jurisdiction under the Statute to adjudicate federal labor-relations questions between the Guard and the technicians' Union.<sup>2</sup> But before turning to the merits, we first address the FLRA's waiver argument. Title 5, Section 7123(c) of the United States Code provides that "[n]o objection that has not been urged before the [FLRA], or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." On appeal, the FLRA asserts that five of the Guard's arguments cannot be reviewed by this court because they were not properly exhausted in the Guard's exceptions briefing below. The five arguments that the FLRA takes issue with are:

- 1) The Guard's arguments based on the text of the Statute.
- 2) The Guard's arguments based on the canon of constitutional avoidance.
- 3) The Guard's arguments based on the federalism canon.
- 4) The Guard's argument that the FLRA's order to reinstate the wrongfully terminated dues allotments is unenforceable.

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<sup>2</sup> Created by the Civil Service Reform Act of 1978, the FLRA is an independent federal agency that governs labor-relations between the federal government and its employees.

- 5) The Guard's arguments based on the "uniformed services" exception.

We are not persuaded by the FLRA's narrow reading of the exhaustion requirement in 5 U.S.C. § 7123(c). On appeal, "parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Although it is true that the Guard did not raise these five arguments verbatim at the exceptions stage, each argument nonetheless supports the consistently argued claims that the Guard brought below. It would be unreasonable, and in some ways would defeat the purposes of appellate litigation, to require the petitioners to raise the exact same arguments that they raised earlier. Thus, these five arguments are not waived, and we move on to the merits.

## **B. The FLRA's Jurisdiction Over the Guard**

The Guard contends that the FLRA lacks jurisdiction over the Guard because the Guard is not an executive agency under the Statute. Questions of statutory interpretation are questions of law, which we review de novo. *Ammex, Inc. v. United States*, 367 F.3d 530, 533 (6th Cir. 2004) (citing *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 509 (6th Cir. 2001)).

As background, the Statute is a federal law that establishes collective-bargaining rights for most employees of the federal government. It was established under Title VII of the Civil Service Reform Act of 1978, which limited the scope of the FLRA's jurisdiction to "executive agencies." 5 U.S.C. § 7103(a)(3). Thus, we start our analysis by addressing

whether the Guard is a federal executive agency under the Statute. Our precedent dictates that it is.

In *Michigan Army National Guard*, the Michigan National Guard challenged the power of the FLRA to assert jurisdiction over it and cited to many of the same cases on which the Guard now relies. We rejected their challenge and held that the Statute “clearly” provides labor rights and protections to dual-status technicians, and that the FLRA has jurisdiction over state national guards and their adjutants general with respect to technician bargaining. *Id.* at 178 (citing *N.J. Air Nat’l Guard*, 677 F.2d at 286; *Lipscomb v. FLRA*, 333 F.3d 611, 620 (5th Cir. 2003)). We reasoned that “[w]hile each state unit of the National Guard is ‘a state agency, under state authority and control,’ the ‘activity, makeup, and function of the Guard is provided for, to a large extent, by federal law.’” *Id.* at 177 (citing *New Jersey Air Nat’l Guard*, 677 F.2d at 278).

Put differently, in their capacity as employers of dual-status technicians who receive “the benefits and rights generally provided for federal employees in the civil service,” *id.* (quoting *New Jersey Air Nat’l Guard*, 677 F.2d at 279), state national guards are executive agencies. Because our precedent dictates that the FLRA has jurisdiction over the Michigan National Guard with respect to labor-relations disputes, it would be unreasonable to suggest that the FLRA does not have jurisdiction over the Ohio National Guard with respect to nearly identical issues.

Every other circuit that has considered this issue has similarly found that state national guards constitute executive agencies in their capacity as

employers and supervisors of technicians. For example, in *Lipscomb*, 333 F.3d at 616, the Fifth Circuit held that dual-status technicians are employees of an “executive agency” for the purposes of the Statute. In fact, the Guard itself concedes that many circuits have held that “technicians have bargaining rights under the Reform Act, and that state adjutants general or state national guards are therefore subject to the orders of the FLRA.” See *Assoc. of Civilian Technicians v. FLRA*, 230 F.3d 377, 378 (D.C. Cir. 2000); *U.S. Dep’t of Def. v. FLRA*, 982 F.2d 577, 578 (D.C. Cir. 1993); *N.Y. Council, Ass’n of Civilian Technicians v. FLRA*, 757 F.2d 502, 505 (2d Cir. 1985); *Ind. Air Nat’l Guard v. FLRA*, 712 F.2d 1187, 1190 n.3 (7th Cir. 1983); *Neb. v. FLRA*, 705 F.2d 945, 948 (8th Cir. 1983); *Cal. Nat’l Guard v. FLRA*, 697 F.2d 874, 879 (9th Cir. 1983); *N.J. Air Nat’l Guard*, 677 F.2d at 286. If we accepted the Guard’s argument to the contrary, we would create a circuit split. And given the “unanimity of thought” across the circuits on this issue, we are not inclined to do so. *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 279 (6th Cir. 2010).

For the foregoing reasons, the Guard is a federal executive agency in its capacity as the employer of technicians. Thus, the FLRA has jurisdiction over the Guard with respect to labor- relations issues under the Statute.

### **C. The FLRA’s Jurisdiction Over Dual-Status Technicians**

To issue orders over the Guard with respect to the collective-bargaining disputes at issue here, the FLRA also needs jurisdiction over dual-status technicians.

The Guard argues that technicians are members of the uniformed services, and that the Civil Service Reform Act explicitly excludes members of the uniformed services from the FLRA's reach. 5 U.S.C. § 7103(a)(2)(B)(ii). According to the Guard, technicians are members of the uniformed services because they must "wear the uniform appropriate for the member's grade and component of the armed forces." 32 U.S.C. § 709(b)(4). But once again, our decision in *Michigan Army National Guard* forecloses this conclusion.

In *Michigan Army National Guard*, we held that dual-status national guard technicians are covered by the Statute and are thus afforded certain labor rights. 878 F.3d at 179–80. This includes the right to form, join, and/or assist a labor organization, and the right for labor organizations to engage in collective bargaining with their employing guard over certain labor relations matters related to the civilian aspects of technician employment. *Id.* at 181. And because the FLRA is tasked with enforcing these rights, it follows that technicians fall under the FLRA's jurisdiction. Were we to accept the Guard's argument that technicians are not covered under the FLRA's jurisdiction, we would in effect be overturning the ruling of a three-judge panel, an action we are not permitted to take under these circumstances. *See, e.g., United States v. Lanier*, 201 F.3d 842, 846 (6th Cir. 2000).

Statutory analysis provides further support for the conclusion that dual-status technicians fall within the FLRA's jurisdiction. The Civil Service Reform Act separates government service into three buckets: the civil service, the armed forces, and the uniformed

services. 5 U.S.C. § 2101(1). Additionally, the text of 10 U.S.C. § 10216(a) discusses dual-status military technicians and states that “for purposes of this section and *any other provisions of the law*,” dual-status technicians are “federal civilian employees,” not uniformed services employees. (Emphasis added.) Because technicians are federal civilian employees, they have collective bargaining rights under the Statute.

The legislative history of 10 U.S.C. § 976, which prohibits military unions, also supports this reading. The House Committee specifically rejected the idea that civilian technicians were members of the military. H.R. Rep. No. 95-894(II) at 7 (1978). This legislative history reflects Congress’s efforts to ensure that dual-status technicians, in their civilian capacity, have collective bargaining rights that members of the uniformed services do not have.

Thus, for the reasons stated, both the Guard and its technicians fall within the scope of the FLRA’s jurisdiction.

#### **D. The Guard’s Constitutional Arguments**

We turn next to the Guard’s constitutional challenge. We review constitutional questions *de novo*. *Ammex*, 367 F.3d at 533 (citing *Johnson*, 241 F.3d at 509.)

The Guard argues that, under the Militia Clause of the Constitution, art. I, § 8, cls. 15–16, Congress’s power to govern state national guards (militias) extends only to the part of the militia that is employed in service of the United States. The Guard understands this to mean that “Congress’s power to



govern the militia applies only to the portion of the militia called into active duty at any one time.” (Pet’r Br. 32.) If the state guard has not been called into active duty, argues the Guard, then the Tenth Amendment “reserves to the states” the power to regulate. (*Id.* at 33.) This argument fails. It is not unconstitutional for the FLRA to enforce the Statute by issuing orders to state national guards and their adjutants general. Not a single court of appeals has found that the FLRA lacks jurisdiction over dual-status technicians, or their employing agencies, when the labor dispute at hand is related to the civilian aspects of a technician’s job.

In *Lipscomb*, for example, the Fifth Circuit addressed similar arguments from the Mississippi National Guard. 333 F.3d at 620. Specifically, the Fifth Circuit rejected the argument that the Tenth and Eleventh Amendments barred the FLRA from exercising jurisdiction over the Mississippi Guard. *Id.* at 618 n.7. The Fifth Circuit found that, in its capacity as employer of dual-status technicians, the Mississippi Adjutant General and Mississippi National Guard were not acting as state agencies, but instead as federal executive agencies. *Id.* at 618–19. For that reason, the Fifth Circuit held there were no constitutional problems with Congress giving the FLRA jurisdiction over the state guard. The Tenth and Eleventh Amendment issues addressed in *Lipscomb* mirror the Guard’s arguments in this case, and we find the Fifth Circuit’s reasoning persuasive here. It is not unconstitutional for the FLRA to enforce the Statute by issuing orders to state national guards in their role as employers of technicians.

### **E. The Legality of Restoring the Cancelled Dues Allotments**

The final issue before us is whether the Guard can legally comply with the FLRA's order, which requires it to reinstate the canceled dues allotment. Whether the Guard can comply is a question of law we review de novo. *Ammex*, 367 F.3d at 533 (citing *Johnson*, 241 F.3d at 509.)

The Guard argues that compliance with the FLRA's reinstatement order would require it to violate federal law. This argument is unpersuasive. It is neither unlawful nor impractical for the Guard to comply with the FLRA's order requiring it to restore the erroneously cancelled dues allotments. The Statute empowers the FLRA to protect the labor rights of technicians, and in this case, it found that the Guard committed a violation. Specifically, despite the statutory requirement that employees must submit Form 1188s to change or cancel their allotments, the Guard itself submitted Form 1188s on behalf of numerous technicians without their consent. If the Guard could so easily avoid compliance with an order under these circumstances, the Statute would have no teeth.

### **III. CONCLUSION**

In conclusion, we DENY the Guard's Petition for Review. The FLRA has jurisdiction to adjudicate the collective-bargaining dispute between the Guard and the Union and to issue an order requiring the Guard to comply. Further, the Guard can lawfully comply with the FLRA's order.

**APPENDIX B**

71 FLRA No. 165

FEDERAL LABOR RELATIONS AUTHORITY  
WASHINGTON, D.C.

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UNITED STATES DEPARTMENT OF DEFENSE  
OHIO NATIONAL GUARD  
(Respondent)

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES LOCAL 3970, AFL-CIO  
(Charging Party)

and

MAJOR GENERAL MARKE. BARTMAN, IN HIS  
OFFICIAL CAPACITY AS THE ADJUTANT  
GENERAL OF THE OHIO NATIONAL GUARD  
(Intervenor-Respondent)

and

THE OHIO ADJUTANT GENERAL'S  
DEPARTMENT  
(Intervenor-Respondent)

CH-CA-17-0248  
CH-CA-17-0249  
CH-CA-17-0251  
CH-CA-17-0252  
CH-CA-17-0336.

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DECISION AND ORDER

June 30, 2020

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

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**I. Statement of the Case**

This unfair labor practice case comes before us on exceptions to the attached decision by Federal Labor Relations Authority (FLRA) Administrative Law Judge Richard A. Pearson (the Judge) filed by the Ohio National Guard (ONG), the Adjutant General of the Ohio National Guard, and the Ohio Adjutant General's Department (OAGD) (collectively, Respondent).<sup>1</sup> The General Counsel filed an opposition to the exceptions.

The Judge found that the Authority had jurisdiction over the Respondent and that the Respondent violated § 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute).<sup>2</sup> when it: (1) issued written communications to the Union and bargaining-unit employees (technicians) stating that it was not bound by the Statute or the parties' expired collective-

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<sup>1</sup>The Respondent in the complaint was the U.S. Department of Defense, ONG. The Adjutant General and the OAGD joined the case as intervenor-respondents before the Judge.

<sup>2</sup> 5 U.S.C. § 7116(a)(1), (5), (8).

bargaining agreement (the agreement); (2) refused to comply with the mandatory terms of the agreement, including the negotiated grievance procedure and official time provisions; (3) terminated technicians' authorized union dues allotments; and (4) unilaterally implemented new dues allotment and merit promotion policies.

The Respondent has filed exceptions that challenge the Judge's factual findings and legal analysis. Pursuant to § 2423.41(b) of the Authority's Regulations,<sup>3</sup> upon consideration of the decision and the entire record, and because the Respondent's exceptions served only to repeat its arguments below, we find that the Judge committed no prejudicial errors in his factual findings or legal conclusions. Therefore, we adopt the Judge's findings, conclusions, and recommended order and deny the Respondent's exceptions.

## **II. Order**

Pursuant to § 2423.41(c) of the Authority's Regulations<sup>4</sup> and § 7118 of the Statute,<sup>5</sup> the U.S. Department of Defense, ONG and the Respondent shall:

1. Cease and desist from:

(a) Failing and/or refusing to recognize and comply with the mandatory terms of the parties' expired agreement, including those terms regarding

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<sup>3</sup> 5 C.F.R. § 2423.41(b).

<sup>4</sup> *Id.* § 2423.41(c).

<sup>5</sup> 5 U.S.C. § 7118.

grievances and arbitrations, official time, and hiring and promotion.

(b) Failing and/or refusing to maintain existing personnel policies and practices and matters affecting working conditions to the maximum extent possible.

(c) Unlawfully removing employees from union dues withholdings, or threatening to do so.

(d) Informing employees, supervisors, and managers that the Respondent does not consider itself bound by the Statute, and that the parties' agreement, including the grievance procedure, is a nullity.

(e) In any like or related manner interfering with, restraining, or coercing 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 unit employees 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 of the ONG, and shall be posted and maintained for sixty consecutive days thereafter, in conspicuous 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) Disseminate a copy of the notice signed by the Adjutant General through the Respondent's email system to all technicians, managers, and supervisors in the Ohio Army and Air National Guard.

(c) Reinstate to dues withholding status all technicians removed from dues withholding since September 28, 2016, who did not fill out dues revocation forms in the anniversary month of their allotment.

(d) Reimburse the Union for the dues it would have received had the Respondent not removed employees unlawfully from dues withholding.

(e) Rescind any changes to the mandatory terms of the agreement and to any existing personnel policies and practices and matters affecting working conditions since September 28, 2016, including restoring the agreement's grievance and arbitration procedure, rescinding the February 2017 changes to the merit-promotion policy, restoring reasonable amounts of official time, and making employees whole for any other losses resulting from the Respondent's unlawful changes.

(f) Upon request, bargain with the Union to the extent required by the Statute.

(g) Pursuant to § 2423.41(e) of the Authority's Regulations,<sup>6</sup> notify the Regional Director, Chicago Region, FLRA, in writing, within thirty days from the date of this order regarding what compliance actions have been taken.

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<sup>6</sup> 5 C.F.R. § 2423.41(e).

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

The Federal Labor Relations Authority (FLRA) has found that the U.S. Department of Defense, Ohio National Guard and the Adjutant General of the Ohio National Guard (collectively, ONG) 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 dual-status technicians of the ONG 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 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 or reprisal.

The ONG will not violate any of these rights.

More specifically:

**WE RECOGNIZE** and will comply with the mandatory terms of the expired collective-bargaining



agreement (agreement) between the American Federation of Government Employees, Local 3970 (Union) and the ONG, including the provisions concerning grievance and arbitration procedures, official time, and hiring and promotion.

**WE RECOGNIZE** that our employees have the right to file grievances under the agreement, bring unfair labor practice charges, and seek and receive Union representation.

**WE RECOGNIZE** our obligation to honor the dues withholding allotments of bargaining-unit employees, even after the agreement has expired.

**WE WILL** maintain the personnel policies and practices and matters affecting working conditions that were in effect on September 28, 2016.

**WE WILL** restore the mandatory terms of the expired agreement and the preexisting personnel policies, practices, and matters affecting working conditions to the maximum extent possible.

**WE WILL** rescind the February 2017 changes to our merit-promotion policy.

**WE WILL** grant Union officials reasonable official time to carry out their representational responsibilities.

**WE WILL** reinstate to dues withholding status those employees who were unlawfully removed from that status and reimburse the Union for the dues it would have received, but for our unlawful actions.

**WE WILL** give the Union notice and an opportunity to bargain prior to making changes to

existing personnel policies, practices, and matters affecting working conditions.

**WE WILL NOT** fail and/or refuse to maintain the mandatory terms of the agreement and the existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible.

**WE WILL NOT** refuse to grant Union officials reasonable official time.

**WE WILL NOT** unlawfully remove employees from dues withholdings without their authorization.

**WE WILL NOT** tell employees, verbally or in writing, that the agreement is a nullity, or that the ONG is not required to comply with the Statute.

**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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(Adjutant General, ONG)

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, Ill. 60604, and whose telephone number is: (312) 886-3465.

**Member Abbott, concurring:**

Chairman Kiko offers a compelling argument in her dissent. I share her concerns regarding existing judicial and Authority precedent which applies the Statute to the Adjutant General as though it were a federal agency.

Her constitutional concerns and her observations that “the Adjutant General’s obligations under federal regulations do not alter his status as a state officer”<sup>1</sup> and the Supreme Court’s treatment of “federal legislation that commandeers a State’s legislative or administrative apparatus for federal purposes”<sup>2</sup> are well founded.

However, I am also mindful that the U.S. Court of Appeals for the Fifth Circuit has spoken quite decisively on this matter and at least four other Circuits have reached similar conclusions,<sup>3</sup> although

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<sup>1</sup> Dissent at 8.

<sup>2</sup> *Id.* at 9.

<sup>3</sup> See *Mich. Army Nat’l Guard*, 69 FLRA 393,395 (2016), *enfd as modified by FLRA v. Mich. Army Nat’l Guard*, 878 F.3d 171,178 (6th Cir. 2017) (finding Statute’s protections apply to technicians despite the military authority of state adjutants general); *In re Sealed Case*, 551 F.3d 1047, 1049 (D.C. Cir. 2009) (rejecting constitutional argument that national guard must be called into the service of the United States to have federal status); *Lipscomb v. FLRA*, 333 F.3d 611, 618 & n.7 (5th Cir. 2003) (citing *Gilliam v. Miller*, 973 F.2d 760, 762 (9th Cir. 1992)) (rejecting arguments based on the Tenth and Eleventh Amendments and the adjutant general’s state character and finding that, because the agency acts in a federal capacity, the Statute does not “amount[] to conscription of a state official into the performance of a federal duty”); *NeSmith v. Fulton*, 615 F.2d 196, 198-99 (5th Cir. 1980) (holding that adjutant general is a federal agency, despite its

not directly addressing the concerns raised by the Chairman in her dissent. For this reason, because of the current judicial precedent on this matter, I believe that we are bound to assume jurisdiction and address the issues raised by the complaint and the judge's decision.

I believe the issues and concerns regarding the extent to which our Statute applies to the Adjutant General is a matter that ought to be revisited. But, those are matters for the courts, and Congress, to resolve.

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status as a state office); *Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3d Cir. 1974) (finding “no doubt” that the adjutant general is an “agency or an agent of the United States” under the National Guard Technicians Act and subject to federal jurisdiction); *see also AFGE, Local 3936, AFL-CIO v. FLRA*, 239 F.3d 66 (1st Cir. 2001); *Ind Air Nat'l Guard, Hulman Field, Terre Haute, Ind v. FLRA*, 712 F.2d 1187, 1191 (7th Cir. 1983); *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 278, 281 (3d Cir. 1982); *Miss. Army Nat'l Guard, Jackson, Miss.*, 57 FLRA 337,340 (2001); *NFFE, Local 1623*, 28 FLRA 633,643 (1987); *Adjutant Gen., State of Ohio, Ohio Air Nat'l Guard, Worthington, Ohio*, 21 FLRA 1062, 1079 (1986); *AFGE, AFL-CIO, Local 2953*, 7 FLRA 87, 90 (1981).

**Chairman Kiko, dissenting:**

The Authority's longstanding treatment of state Adjutants General as federal "Executive agenc[ies]" is wrong,<sup>1</sup> and we should correct that mistake in this case. The Adjutant General of the Ohio National Guard and the Adjutant General's Department are the Respondents for the unfair labor practices (ULPs) alleged in this dispute, and the Respondents allege that the Authority lacks jurisdiction over them.<sup>2</sup> The Federal Service Labor-Management Relations Statute (the Statute) empowers the Authority to redress ULPs committed by an "agency."<sup>3</sup> Thus, if neither of the Respondents is an "agency" under the Statute,<sup>4</sup> then the Authority lacks jurisdiction over the ULP complaints here.

The governor of Ohio appoints the Ohio Adjutant General, and the state of Ohio pays his salary.<sup>5</sup> Further, he "perform[s] the duties prescribed by the laws" of the state of Ohio.<sup>6</sup> Although his employment of technicians must follow regulations that the National Guard Bureau prescribes, federal officials "retain no authority over the day-to-day employment

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<sup>1</sup> 5 U.S.C. § 7103(a)(3).

<sup>2</sup> Exceptions Br. at 20-30.

<sup>3</sup> 5 U.S.C. § 7118(a)(7). Although not relevant here, the Authority also has the power to redress ULPs committed by a "labor organization." *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Judge's Decision at 5; Exceptions Br. at 20-21; *Singleton v. MSPB*, 244 F.3d 1331, 1333-34 (Fed. Cir. 2001).

<sup>6</sup> 32 U.S.C. § 314(a); Exceptions Br. at 21 (summarizing 32 U.S.C. § 314(a)).

of the technicians,”<sup>7</sup> which is solely the province of the Ohio Adjutant General, a state officer.<sup>8</sup> The Adjutant General must comply with federal regulations, but that compliance does not render him, or his department, a federal “agency” under the Statute.<sup>9</sup> Indeed, if the obligation to comply with federal regulations rendered a state officer a federal agency for purposes of the Statute, many state officers, including governors, would be considered federal agencies. Thus, the Adjutant General’s obligations under federal regulations do not alter his status as a state officer.

The Ohio Adjutant General’s authority to “employ and administer the “technicians” is delegated from federal officials<sup>10</sup>-specifically, the Secretary of the Army and the Secretary of the Air Force. But that delegation does not change the Adjutant General’s status as an Ohio state officer, appointed by Ohio’s governor, and paid from Ohio’s public fisc. For this reason, the Authority’s sister agency-the Merit Systems Protection Board (MSPB)-has recognized that it may not issue orders to enforce its decisions against Adjutants General.<sup>11</sup> And the U.S. Court of

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<sup>7</sup> *U.S. DOD, Nat’l Guard Bureau*, 55 FLRA 657,661 (1999) (*DOD*); see Exceptions Br. at 31-32 (noting that *DOD* recognized that the National Guard Technicians Act (Technicians Act) may limit the rights that technicians are able to exercise under the Statute).

<sup>8</sup> *DOD*, 55 FLRA at 660-61.

<sup>9</sup> 5 U.S.C. § 7103(a)(3).

<sup>10</sup> 32 U.S.C. § 709(d); Exceptions Br. at 30 (discussing rulemaking responsibilities under 32 U.S.C. § 709(d)).

<sup>11</sup> *E.g., Melendez v. P.R. Nat’l Guard*, 70 M.S.P.R. 252, 253-54 (1996) (*Melendez*). The Authority has previously distinguished

Appeals for the Federal Circuit has affirmed the MSPB's view.<sup>12</sup> The Authority should similarly recognize the limits of its ULP enforcement powers against Adjutants General.

I recognize that the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) reached a different conclusion in *Lipscomb v. FLRA*.<sup>13</sup> Despite my respect for the court, I find that the deficiency in its decision is plain on its face. In particular, the Fifth Circuit recognized that “if one is searching for translucent, definitional ... words under the [Statute] stating” that the Adjutant General “constitute[s] an ‘Executive agency,’ the search will be disappointing.”<sup>14</sup> And the rest of the U.S. Code is likewise bereft of “definitional ... words” stating that an Adjutant General is a federal agency.<sup>15</sup> Thus, the court should have finished its analysis where it started. In the face of clear provisions of the U.S. Code designating Adjutants General as state officers performing duties under state law,<sup>16</sup> only a similarly unambiguous command from Congress could manifest a contrary intent to

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*Melendez*, stating that it conflicts with Authority precedent. *P.R. Air Nat'l Guard, 156th Airlift Wing (AMC) Carolina, AR.*, 56 FLRA 174, 178 (2000). But because I would change Authority precedent in this area, that effort at distinguishing *Melendez* is unpersuasive.

<sup>12</sup> Exceptions Br. at 21-22 (citing *Singleton v. MSPB*, 244 F.3d 1331, 1333 (Fed. Cir. 2001)).

<sup>13</sup> 333 F.3d 611 (5th Cir. 2003).

<sup>14</sup> *Id.* at 618.

<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g.*, 32 U.S.C. § 709(d) (providing that state adjutants general will “employ and administer the technicians authorized by this section”).



treat Adjutants General as federal agencies. We have no such statutory command here.<sup>17</sup>

Reinforcing the conclusion that we may not treat state officers as federal agencies, the Supreme Court has held that the U.S. Constitution forbids “the forced participation of the States’ executive in the actual administration of a federal program.”<sup>18</sup> The Authority’s enforcement powers regarding ULPs, especially those that concern an obligation to negotiate over technicians’ conditions of employment, permeate every labor-relations interaction between the Adjutants General and the technicians that they employ. Consequently, if the Statute were interpreted to cover the Ohio Adjutant General and his department in this case, it would impermissibly force a state officer to administer a federal program under the supervision of a federal administrative tribunal.<sup>19</sup> The Supreme Court has consistently struck down “federal legislation that commandeers a State’s legislative or administrative apparatus for federal purposes.”<sup>20</sup>

Nor do the constitutional problems raised by the Authority’s interpretation end there. In this case, a state entity (the Ohio Adjutant General) has been forced to litigate a complaint brought by a private entity (AFGE, Local 3970) before a federal administrative tribunal (the FLRA). The Supreme Court has found, under analogous circumstances, that

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<sup>17</sup> See *DOD*, 55 FLRA at 661.

<sup>18</sup> *Printz v. United States*, 521 U.S. 898,918 (1997).

<sup>19</sup> *Id.*

<sup>20</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519,577 (2012).

state sovereign immunity bars a federal administrative body “from adjudicating complaints filed by a private party against a nonconsenting State.”<sup>21</sup> “Simply put, if the Framers thought it an impermissible affront to a State’s dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency.”<sup>22</sup> But that is just what has happened here-and there is no indication that the State of Ohio ever consented to this infringement on its sovereign immunity.<sup>23</sup>

Under the canon of constitutional avoidance, the Authority must read its Statute in such a way as to avoid serious constitutional issues.<sup>24</sup> There is no language in the Statute, or even legislative history, suggesting that Congress intended for state entities

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<sup>21</sup> *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

<sup>22</sup> *Id.*

<sup>23</sup> The Office of the General Counsel and AFGC argue that the State of Ohio consented to this arrangement by agreeing to accept federal funding for their National Guard units. But nothing in either the Technicians Act or the Statute indicates that the State of Ohio “voluntarily and knowingly accept[ed] the terms of th[is] ‘contract.’” *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 577.

<sup>24</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568,575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

like the Ohio Adjutant General to be covered under the Statute. Thus, interpreting the Statute to force unwilling state entities to engage in federally mandated collective bargaining under the aegis of a federal agency, thereby raising serious constitutional questions, is wholly unwarranted.

Finally, I would note that, even if the ULP complaints in this case had named other respondents - such as the National Guard Bureau, or the Departments of the Army or Air Force - the Authority would have faced many of the same legal obstacles to the exercise of its jurisdiction. That is because, in order for any remedial order to be meaningful, those entities would have had to enlist the cooperation of the Ohio Adjutant General.<sup>25</sup> However, the legal obstacles that I have discussed are especially plain in this case because the Adjutant General and his department are the named Respondents.

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<sup>25</sup> See *DOD*, 55 FLRA at 660-61 (recognizing that federal officials lack the power for employment and administration of the technicians program, without the involvement of the Adjutants General).

**APPENDIX C**

**FEDERAL LABOR RELATIONS AUTHORITY  
Office of Administrative Law Judges  
WASHINGTON, D.C. 20424**

**Case Nos. CH-CA-17-0248  
CH-CA-17-0249  
CH-CA-17-0251  
CH-CA-17-0252  
CH-CA-17-0336**

**U.S. DEPARTMENT OF DEFENSE  
OHIO NATIONAL GUARD**

**RESPONDENT**

**AND**

**AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 3970, AFL-CIO**

**CHARGING PARTY**

**AND**

**MAJOR GENERAL MARK E. BARTMAN, IN HIS  
OFFICIAL CAPACITY AS THE ADJUTANT  
GENERAL OF THE OHIO NATIONAL GUARD**

**INTERVENOR-RESPONDENT**

**AND**

**THE OHIO ADJUTANT GENERAL'S  
DEPARTMENT**

**INTERVENOR-RESPONDENT**

**Alicia E. Weber**

**Greg Weddle**

**For the General Counsel**

Lt. Col. Christopher Stallkamp  
Cpt. Adam H. Leonatti  
For the Respondent and the Intervenors

William R. Kudrle  
For the Charging Party

Before: RICHARD A. PEARSON  
Administrative Law Judge

### **DECISION**

The facts of this case are complex, but the crux of the case is simple: after 45 years of collective bargaining with the union representing its dual status technicians, under the Federal Service Labor-Management Relations Statute (the Statute) and the Executive Orders that preceded it, management at the Ohio National Guard decided that it was not covered by the Statute after all, and that the Federal Labor Relations Authority had no jurisdiction over its employees or its Adjutant General. Management and the Union had negotiated a series of collective bargaining agreements (CBAs) over this period, but when negotiations to replace the agreement expiring in 2014 became stalled, management made two fateful decisions: first, that the expired agreement was now null and void; and second, that the Ohio Adjutant General never had any obligation to comply with the federal law that he and his predecessors had been following for decades. Having made these decisions, everything else in this case flowed naturally from that point.

In short, this is a case of “union busting” in its purest form. If the Agency’s legal claims are valid, then it will drastically disrupt the course of labor relations for National Guard dual status technicians – not just in Ohio, but in nearly every state in the country where unions bargain collectively under the Statute. None of the tens of thousands, perhaps hundreds of thousands, of technicians will have any federally protected bargaining rights, and state adjutants general will have unfettered control over the technicians’ conditions of employment. Fortunately, the Agency is wrong in its legal analysis, and the purpose of this decision is to correct the Agency’s errors before they metastasize.

This case presents several issues, but the first and foremost question is whether the Authority has jurisdiction over the Respondent. Because the Respondent acts as a federal agency in its role as an employer of federal employees, and because the Authority’s jurisdiction over state National Guards has been upheld by numerous federal courts as well as the Authority, the answer to this question is yes.

The next question is whether a series of written communications by Agency officials – telling employees that they were not protected by the Statute and that the Agency would no longer be bound by the CBA – violated § 7116(a)(1) of the Statute. Because the Agency coercively interfered with employees’ rights, including employees’ right to use the contractual grievance procedure and their right to assist the Union without fear of reprisal, the answer to this question is yes.

The third question is whether the Agency violated § 7116(a)(1) and (5) of the Statute by refusing to be bound by specific terms of the expired CBA. Because the Agency demonstrated in a series of communications that it did not consider itself to be bound by any provision in the CBA, and because it refused to follow the negotiated grievance procedure or to grant official time, the answer again is yes.

The fourth question is whether the Agency violated § 7116(a)(1) and (8) of the Statute when it terminated union dues deductions for 89 employees. Because § 7115 of the Statute permits an agency to terminate dues deductions for only two reasons, and the Agency's action was for neither of these reasons, the answer to this question is yes.

The fifth and sixth questions are whether the Agency violated § 7116(a)(1) and (5) of the Statute by unilaterally implementing new policies regarding union dues deductions and merit promotions. Because the Agency implemented these changes without providing adequate notice to the Union or an opportunity to bargain under the Statute, the answer to these questions is also yes.

### **STATEMENT OF THE CASE**

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On March 8, 2017, the American Federation of Government Employees, Local 3970, AFL-CIO (the

Union or Local 3970) filed four ULP charges (Case Nos. CH-CA-17-0248, CH-CA-17-0249, CH-CA-17-0251 & CH-CA-17-0252) against the Ohio National Guard, Adjutant General's Department. GC Ex. 1(a). After investigating the charges, the Regional Director of the FLRA's Chicago Region issued a Consolidated Complaint and Notice of Hearing on April 13, 2017, on behalf of the General Counsel (GC), alleging that the U.S. Department of Defense, Ohio National Guard (the Respondent or Agency) refused to negotiate in good faith, in violation of § 7116(a)(1) and (5) of the Statute, by (among other things) telling employees that it was no longer bound by the mandatory terms of the expired collective bargaining agreement and that it was not obligated to comply with the Statute, and by unilaterally implementing new policies regarding union dues deductions, grievances, official time, and merit promotions. GC Ex. 1(b). The Complaint further alleged that the Respondent failed to comply with its obligations under § 7115(a) to honor dues withholding authorizations and make appropriate allotments to the Union, in violation of § 7116(a)(1) and (8) of the Statute. Finally, the Complaint alleged that by engaging in this conduct, the Respondent interfered with, restrained, and coerced employees in the exercise of their § 7102 rights, in violation of § 7116(a)(1) of the Statute. *Id.*

On April 20, 2017, the Union filed an additional ULP charge (Case No. CH-CA-17- 0336) against the Respondent. GC Ex. 1(a). After investigating, the Regional Director issued a second Complaint and Notice of Hearing on May 4, 2017, and he consolidated the new case with the four earlier cases. GC Ex. 1(c). The new complaint alleged that by sending letters to



employees stating that it would recommend the termination of employees' union dues deductions because the collective bargaining agreement had expired, the Respondent had failed and refused to comply with its obligations under § 7115(a) of the Statute, in violation of § 7116(a)(1) and (8), and that it had interfered with, restrained, and coerced employees in the exercise of their § 7102 rights, in violation of § 7116(a)(1) of the Statute. *Id.*

The Respondent filed an Answer to the first Complaint on May 8 and an Answer to the second Complaint on May 30, 2017. In both pleadings, the Respondent admitted certain factual allegations but denied violating the Statute. GC Exs. 1(d) & 1(h). In this regard, it admitted that it had first recognized the Union in 1971 under Executive Order 11491, and that the Authority had certified the Union as the exclusive representative of a consolidated bargaining unit of its employees on February 12, 1990; but it denied that it is an “agency” or that the bargaining unit employees are “employees” within the meaning of the Statute. GC Exs. 1(b) & 1(d) at 4. It further admitted.: “Starting on or about November 14, 2016, the Respondent sent notices to the majority of the bargaining unit employees who had authorized Union dues allotments. The Respondent gave the employees sixty (60) days to complete a new SF 1187 or send in a copy of their old form.” *Id.* at 17. It also admitted: “Starting in or around January 2017, the Respondent ... completed a new SF 1188 for the employees who did not return a fully executed SF 1187 ... [and] terminated the dues of the majority of the bargaining

unit employees then paying dues to the Union and stopped remitting dues to the Union.” *Id.* at 18.<sup>1</sup>

On July 25, 2017, counsel for the Respondent filed a motion to intervene for Major General Mark E. Bartman, in his official capacity as Adjutant General of the Ohio National Guard, and for the Ohio Adjutant General’s Department. GC Ex. 1(aa). I granted the motion on July 26, 2017. GC Ex. 1(bb). Additionally, both the General Counsel and Respondent filed motions for summary judgment along with evidence in support thereof, and opposed each other’s motion. GC Ex. 1(i), 1(m), 1(q) & 1(r). I denied both motions for summary judgment on July 26, 2017, because there were numerous genuine issues of fact in dispute. GC Ex. 1(bb).

A hearing was held in this matter on August 1 and 2, 2017, in Columbus, Ohio. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The

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<sup>1</sup> Between May 15 and July 6, 2017, Respondent filed ten ULP charges against the Union, and on July 7, 2017, Respondent filed a motion asking me to consolidate its charges with the instant proceeding, despite the fact that the Regional Director had not completed its investigation or acted on the Respondent’s charges. Respondent argued that consolidating all the charges would give me “a broader context in which to evaluate the contentions made by all parties to this case.” GC Ex. 1(s) at 2; *see also* attachments thereto. I denied this motion on July 18, 2017, noting that only the FLRA’s General Counsel, through its regional directors, has the authority to issue a complaint, and that I can act only on cases that have been submitted to me upon issuance of a complaint. GC Ex. 1(u).

GC, Charging Party, and Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

### **FINDINGS OF FACT**

As I will explain in more detail later, the Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute. As noted above, the Respondent recognized the Union in 1971, and the Union was certified by the Authority in 1990 as the exclusive representative of general schedule and wage board technicians employed in the Air National Guard and the Army National Guard in the State of Ohio. GC Exs. 1(b) and 1(d) at 4; GC Ex. 7. These employees are primarily “dual status technicians” - federal civilian employees who, as a condition of their employment, must become and remain military members of the National Guard of the state in which they are employed. Tr. 29-30; *see also* 10 U.S.C. § 10216; 32 U.S.C. § 709. As civilians, technicians do a broad range of work, from administrative to blue collar work; they may perform vehicle or aircraft maintenance, logistics, or finance. GC Ex. 1(i), Ex. 21 at 2 (GC Motion for Summary Judgment (GC MSJ)). They perform in their military (i.e., non-civilian) role during weekend drills, during their two weeks of training per year with the National Guard, and when deployed. *Id* When in military status, a technician takes leave from his or her civilian job. *Id* at 2-3.

Bargaining unit employees can have their union dues deducted from their pay by submitting Standard Form 1187 (SF 1187) to the Agency.<sup>2</sup> GC Ex. 12 at 2; Tr. 38. The union dues deducted from an employee's pay are reflected on the employee's pay stub. Tr. 38. Bargaining unit employees can cancel these deductions by submitting another form, Standard Form 1188 (SF 1188), to the Agency. GC Ex. 12 at 1.

The Ohio National Guard is administered by the Ohio Adjutant General's Department, which is commanded by the Adjutant General, Ohio National Guard. The Adjutant General is appointed by the Governor of the State of Ohio and is employed by the State of Ohio. Tr. 270, 341. While adjutants general are state employees, they administer the technician programs in their states in accordance with regulations prescribed by the Secretary of the Army and the Secretary of the Air Force. GC Ex. 1(i), Ex. 21 at 2 (GC MSJ); Tr. 301; *see also* GC Ex. 1(m), Dernberger Affi. at 2 (Resp. Cross Motion for Summary Judgment (Resp MSJ)) and Aukland Affi. at 3-4.<sup>3</sup>

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<sup>2</sup> Union dues deductions (or withholdings) is the informal term I use in connection with the process of assignments, deductions, and allotments described in § 7115(a) of the Statute, which states, in pertinent part:

If an agency has received from an employee ... a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment....

<sup>3</sup> Mr. Aukland gave two affidavits, which were attached to different prehearing motions. The first affidavit, dated March 27,

The National Guard Bureau is a federal agency within the U.S. Department of Defense (DoD), comprising the Air National Guard and the Army National Guard. 10 U.S.C. § 10501; *see also* Tr. 170-71, 180. The National Guard Bureau provides federal money and property to the Ohio National Guard and owns property used by the Ohio National Guard. Tr. 180, 271. In addition, the National Guard Bureau issues Technician Personnel Regulations (TPRs), which govern the employment of technicians. Tr. 275-77. The payroll functions within the National Guard are performed by the Defense Finance and Accounting Service, which is frequently referred to as DFAS. Tr. 257-58.

#### The Collective Bargaining Agreement

On December 17, 2010, the Ohio Adjutant General and the Union executed a collective bargaining agreement which was submitted to DoD for agency head review, as required by § 7114(c) of the Statute. GC Ex. 9. On January 11, 2011, DoD informed the Adjutant General and the Union that the agreement was disapproved because several provisions did not conform to law, rule, or regulation. *See* First Attachment to GC Ex. 9. The parties revised the agreement and resubmitted it for agency head review, and on February 24, 2011, DoD advised the Adjutant General and the Union that the revised CBA had been approved. *Id* With that, the CBA went into effect, and

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2017, is an exhibit attached to the GC's opposition to the Respondent's MSJ, GC Ex. 1(r). The second affidavit, dated June 15, 2017, is an exhibit attached to Respondent's MSJ, GC Ex. 1(m).

it was to remain; in effect for three years. GC Ex. 9 at 19. It was signed by Major General Deborah Ashenhurst, the Adjutant General at that time, and by Jeffrey Tanner, then the Union President. *Id.* at 20.

Article 7 of the CBA, Hiring and Promotion, defined the “initial area of consideration” and created a Joint Partnership Executive Council (JPEC), consisting of bargaining unit employees and management, to address selection procedures for bargaining unit positions. *Id.* at 5, 6. Soon after the CBA went into effect, the parties negotiated several JPEC policy letters, expanding on the language of Article 7. *See* Attachments to GC Ex. 9. Article 11 of the CBA, Official Time, provided that official time would be granted “in the amount necessary to accomplish union obligations and responsibilities,” with the Union President on 100% official time. *Id.* at 8; *see also* Tr. 334.

Article 15(b), Discipline, provided: “Before a supervisor initiates any disciplinary action or a letter of counseling, the affected employee and a union representative will be given the opportunity to informally discuss the problem and the basis for the action with the supervisor.” GC Ex. 9 at 11. Article 16 established a five-step grievance procedure, culminating in arbitration, except that arbitration was prohibited for those issues reserved by 32 U.S.C. § 709(f) for final decision by the Adjutant General. *Id.* at 15. Article 18 established a joint union-management procedure for coordinating the deduction of union dues and specified that such deductions could be “terminated for loss of membership due to promotion or transfer to a non-union position,

retirement, death, or separation from technician employment.” *Id.* at 18.

Beginning in 2012, the Agency and the Union attempted, but failed, to negotiate a successor agreement prior to the expiration date of the CBA. *See* GC Ex. 10 at 1. On January 24, 2014, Colonel Homer Rogers, the Agency’s Human Resources Officer, advised the Union that when the CBA expired on February 24, the Agency intended “not to be bound by certain permissive subjects of bargaining currently included in our CBA.” *Id.* at 2. Rogers identified several articles that would no longer apply, including provisions relating to union-management partnership, details and temporary promotions, and several JPEC policy letters, but he indicated that other permissive subjects would continue in effect. He continued: “The Agency intends to continue to honor those agreements that are mandatory subjects of bargaining to include the grievance process, seniority, and dues withholding.” *Id.* Finally, the letter stated that while union representatives would continue to be granted a reasonable amount of official time, he wished to renegotiate the provision granting the Union President 100% official time. *Id.*

#### The Agency’s New Understanding of its Duty to Bargain

In June 2015, Duncan Auckland became a Labor Relations Specialist for the Adjutant General’s Department. Tr. 268. Auckland’s “prime directive” was to negotiate a new collective bargaining agreement with the Union. Tr. 294. He stated in his March 2017 affidavit that although he was working to negotiate a new agreement, he and others in management had

come to believe that the expired CBA was “null and void in its entirety.” GC Ex. 1(r), Aukland Affi. at 4. Management also had “objections” to the notion that the Adjutant General’s Department was bound by the Statute, or that the FLRA had any jurisdiction over the Adjutant General’s Department. *Id.* He reiterated these views at the hearing. Tr. 282,299,332. Aukland communicated his views on these matters to both Union President Tanner and to his successor, but he told them that the Agency would “waive [its] jurisdictional and statutory arguments for the duration” of a successor agreement, in an attempt to bring the Union to the bargaining table. GC Ex. 1(r), Aukland Affi. at 3; *see also* Tr. 299-300. But according to Aukland, the Union was unwilling to bargain, “because we were telling them that we had defenses to jurisdiction.” *Id.* at 3.

In March 2016, the Adjutant General and the Union entered into a memorandum of understanding settling a ULP charge concerning a performance grievance. GC Ex. 11. In the MOU (signed by Tanner for the Union), the Agency agreed to comply with the grievance procedures (including arbitration) set forth in Article 16 of the CBA until a successor agreement was reached, “because grievance/arbitration is a mandatory subject of bargaining under the Federal Service Labor-Management Relations Statute.” *Id.* The Agency also asserted that it “does not waive or concede any jurisdictional arguments and may raise other arguments concerning the merits of the grievance before an arbitrator.” *Id.*

In approximately August of 2016, Tanner retired from the National Guard and notified the Agency by



email that Mike Dohrmann would be the new Union President.<sup>4</sup> Tr. 324-25; *see also* GC Ex. 1(r), Auckland Affi. at 4-5. During this same general time period, Colonel William Giezie was taking over as the Agency's Director of Human Resources, and he was instructed by the Adjutant General to do everything he could to negotiate a new CBA with the Union. Tr. 149, 342-43. Initially, Dohrmann and Giezie communicated regularly, and in August Dohrmann sent an email to Giezie, outlining a variety of labor-management issues he wanted to resolve. Tr. 348, 357-58. Colonel Giezie responded to Dohrmann's concerns in an email of his own, and he further indicated his interest in resuming CBA negotiations, but he didn't get an immediate response. Tr. 348. In early September, Colonel Giezie ran into Dohrmann and reiterated that management wanted to resume negotiations; Dohrmann replied that his workload at that time was too busy, but that he would like to begin negotiations at the beginning of 2017. *See* Tr. 349-50, 392.

On September 13, 2016, an arbitrator issued an award finding that the Ohio National Guard violated the CBA with respect to two employees' temporary details. GC Ex. 1(i) (Ex. 10 of GC MSJ at 22-23). According to Auckland, the arbitrator rejected the Agency's argument that the CBA had expired and had

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<sup>4</sup> At the hearing, Auckland speculated that Tanner may have retired as early as December 2015 (Tr. 324-25), but that seems to be rebutted by Tanner's signature on the March 2016 settlement agreement (GC Ex. 11) and by Auckland's own, more precise account in his March 2017 affidavit. GC Ex 1(r), Auckland Affi. at 4-5.

no effect, because the Agency had not previously notified the Union that it had expired. GC Ex. 1(r), Aukland Aff. at 4. The Agency saw the arbitrator's finding, in Aukland's words, "as an invitation to inform the Union that the CBA is null and void in its entirety, which we did on September 20, 2016."<sup>5</sup> *Id* In this regard, Colonel Giezie, in consultation with Aukland, wrote a letter to the Union, addressed to Dohrmann and dated September 19, along with a cover letter signed by Aukland on September 20. Tr. 314; Resp. Exs. 3 & 4. In the letter, Colonel Giezie wrote:

The Agency no longer recognizes the existence of any portion of the former Collective Bargaining Agreement (CBA). As has been previously stated, the Agency is willing to waive its jurisdictional defenses only in and for the duration of an acceptable new CBA. Until a new CBA is in effect, the Agency will continue to assert those jurisdictional defenses to the Federal Services Labor Management Relations Act.

It remains the Agency's hope that we can proceed to discuss the scope and scheduling of; and participation in, collective bargaining sessions. If the Union will not come to the table and seriously

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<sup>5</sup> Having read the arbitrator's award in full, I see nothing there that even suggests that the Agency could repudiate the CBA once it so notified the Union. Ex. 10 of GC Ex. 1(i). But for purposes of this case, it doesn't matter whether the Agency interpreted the arbitrator's decision correctly or not; what is relevant is that the Agency's subsequent actions were at least partly based on this interpretation.

negotiate, the Agency reserves the right to pursue other remedies....

Resp. Ex. 4. Although the Agency had difficulty serving this letter on the Union, Giezie acknowledged at the hearing that it was reasonable to expect that his September 19 letter would be communicated to bargaining unit employees. Tr. 413.

Almost immediately after sending the September 19 letter, Colonel Giezie (again in consultation with Aukland) wrote a memo dated September 28, which was distributed to a wide range of people in the Ohio Army and Air National Guard. GC Ex. 2; *see* Tr. 281-82. The memo read:

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Collective Bargaining Agreement (CBA)

- 1. No Collective Bargaining Agreement (CBA).** The Ohio National Guard has informed Local 3970, American Federation of Government Employees, that the Ohio National Guard is not bound by any provision of the CBA between the parties that expired in 2014.
- 2. Federal Services Labor Management Relations Act (FSLMRA), 5 USC Chapter 71.** The Ohio National Guard has also communicated to Local 3970 that it questions the applicability to National Guard Technicians of the statutes in the FSLMRA that have historically underlain the collective bargaining relationship between Local 3970 and the Ohio National

Guard. The details of this jurisdictional dispute are unimportant here; but until this dispute is resolved in a satisfactory, new CBA or by some other means, the Ohio National Guard does not consider itself obligated to abide by the FSLMRA.

3. **Guidance.** Pending a new CBA or some definitive determination that the FSLMRA applies to the Ohio National Guard, the interim guidance to supervisors for management of their National Guard Technician workforce is as follows with the understanding that any requirements of the following publication which are dictated either by the expired CBA or by the FSLMRA may be waived at the option of the Human Resource Office (HRO), on behalf of The Adjutant General.
  - a. Hiring will continue IAW Technician Personnel Regulation (TPR) 430 and the Ohio National Guard's Merit System Promotion Plan.
  - b. Compatibility, a statutory requirement, will continue to be governed by TPR 303.
  - c. Realignment, Reorganization or Reductions in Force will be governed by TPR 351.
  - d. Awards will be governed by TPR 451 and ONG Policy.
  - e. Classification will be governed by TPRs 500 and 511.

- f. Absence and Leave will be governed by TPR 630.
  - g. Non-adverse actions will be governed by TPR 715.
  - h. Disciplinary and adverse actions will be governed by TPR 752 and ONG TPR 752.
  - i. Pending the creation of a State Alternative Dispute Resolution Plan ... grievances will be forwarded to the HRO for ad hoc resolution.
4. **Not all-inclusive.** The guidance documents mentioned in para 3 above, are not intended to be all-inclusive; but to be representative of matters formerly the subject of the CBA.
5. **Questions.** Questions should be directed to Duncan Auckland, Labor Relations Specialist, at 614-336-7475.

FOR THE ADJUTANT GENERAL:

WILLIAM K. GIEZIE, PE, Col., OHANG  
Director of Human Resources

DISTRIBUTION:

A, D

GC Ex. 2. According to Auckland, the September 28 memo was written to resolve “confusion among our employees and supervisors over the status of where we are in labor relations, and it was thought that some communication to the field was appropriate to try to clarify where we were.” Tr. 282. Colonel Giezie testified that he intended the memo to be “an internal

management document[]” going only to managers and supervisors. Tr. 368. But it ended up being sent to hundreds of bargaining unit employees, as well as supervisors. Tr. 368; *see* GC Exs. 18, 19 & 22. Witnesses at the hearing testified how this happened.

On September 28, 2016, Colonel Giezie asked Pamela Tabler, his human resources assistant, to send the memo by email to all supervisors of technicians in the Ohio National Guard. Tr. 132, 369-70. Tabler told Giezie that she didn’t have a distribution list for supervisors, but that she always sent things out to the “A” and “D” distribution lists, and Colonel Giezie replied, “okay.” Tr. 142. Colonel Giezie acknowledged that he permitted Tabler to send the memo to the “A” and “D” distribution lists even though he was not familiar with the make-up of the “A” distribution list. Tr. 370.

Tabler testified that she regularly uses the “A” and “D” distribution lists to distribute documents that go out broadly to everyone within the Ohio National Guard. Tr. 138. The “A” distribution list goes to most of the Ohio Army National Guard, including bargaining unit employees, while the “D” distribution list goes mostly to managers and supervisors in the Ohio Air National Guard. Tabler noted, though, that recipients on the “D” distribution list “push it [email] out to the base for us.” Tr. 135, 137-38. Tabler further testified, “[W]hen I send things out, I send out ‘a’ and ‘d,’ because that’s the Army and the Air, and that’s who we send all of our correspondence to.” Tr. 135. As a result, Tabler sent the September 28 memo (GC Ex. 2) as an attachment to a blank cover memo, to

recipients on the “A” and “D” distribution lists at 9:31 a.m. on September 28. GC Ex. 17; *see* Tr. 134.

Later that same day, at 3:14 p.m., Tabler sent an email letter written by Colonel Giezie with the subject heading “Operations without a Collective Bargaining Agreement (CBA).” GC Ex. 20. This email, which included the September 28 memo as an attachment, was also sent to the “A” and “D” distribution lists, i.e., the same people who received the September 28 memo. Tr. 139. In this second document, Colonel Giezie wrote:

The Collective Bargaining Agreement (CBA) between the Adjutant General of Ohio and the AFGE, Local 3970 expired in January 2014. At that time, the agency was working with the union to negotiate a new CBA which was progressing in a positive manner. Therefore, the agency elected to keep certain articles of the old CBA in effect until a new CBA could be negotiated and agreed upon. Since that time the negotiations for a new CBA have essentially stopped. The HRO is currently working with the union to get the process started to negotiate a new CBA for the agency and we are hopeful this will begin in the near future. However in the interim, the union has been notified that the agency no longer recognizes any portion of the previously existing CBA. Therefore, the attached guidance is provided to agency supervisors on how to operate without a CBA until a new CBA can be negotiated and finalized....

GC Ex. 20.

As it turned out, 284 of the 2,190 people on the “A” distribution list receiving the September 28 memo,

and 2 of the 84 people on the “D” distribution list receiving the September 28 memo, were bargaining unit employees.<sup>6</sup> At the hearing, Colonel Giezie accepted the likelihood that bargaining unit employees received the memo (Tr. 154-55), although he testified that he did not know it had been sent to bargaining unit employees until he was so advised, in April 2017, by counsel for the GC. Tr. 411. Aukland similarly testified that the September 28 memo was supposed to be sent only to supervisory personnel, although that did not turn out to be the case. Tr. 335.

#### The Impact of the September 28 Memo

Roberta Craigo, a dual status technician in the bargaining unit and a Union steward since 2006, received the September 28 memo by virtue of being on the “A” distribution list. Tr. 122-25. She testified that she understood the memo to mean that “there was basically no Union anymore and we didn’t have a collective bargaining agreement.” Tr. 127. Craigo also forwarded the memo to Union President Dohrmann and to Vice President Charles Higginbotham. Tr. 90-93, 128-29. Higginbotham said he understood management to be saying in the memo “that they were no longer going to be dealing with the Union. They

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<sup>6</sup> These numbers were hand-counted by comparing GC Exhibit 22 with GC Exhibits 18 and 19. GC Exhibit 22 lists all bargaining unit employees, both Army and Air Force, as of September 28, 2016. Tr. 155. 284 of those employees were listed on GC Exhibit 18 as having received the September 28 memo from the “A” list, and 2 of those employees were listed on GC Exhibit 19 as having received the memo from the “D” list. While this methodology is inherently susceptible to human error, I am confident that these numbers are quite close, if not exact.



didn't have an agreement and didn't have the need to deal with us." Tr. 92. Higginbotham added that *the* Agency has not notified the Union that the September 28 memo has been rescinded. Tr. 93. In the wake of its distribution, "a couple of bargaining unit employees who received the September 28 memo asked Higginbotham "what was going on, or if the Union was still in existence or had been dissolved..." Tr. 94.

Higginbotham testified that no grievances had been filed since the Sept. 28 memo, "[b]ecause everyone felt that there was no longer a Union, there was no - that we had just been shut down. There was nothing going on." Tr. 105. He added, "[W]hen they said that there's no longer a collective bargaining-we're no longer recognizing 3970, you know, I felt that it was higher than me at that point." Tr. 106. Nonetheless, a couple of employees in his unit made him aware of problems they had, and Higginbotham was able to resolve the issues informally with the immediate supervisors, so that formal grievances did not need to be filed. Tr. 105-07. With regard to disciplinary actions, Higginbotham testified that before the September 28 memo was issued, "it wasn't uncommon for a supervisor to call us if he had a problem with an employee, to involve us during the proceedings of disciplinary actions." Tr. 95. But after the September 28 memo, "it pretty much went quiet. I didn't get hardly any calls from anybody, other than maybe an employee. That was it." Tr. 96.

Dan Wayble, who was also a Union Vice President until he became President in early 2017, first saw the September 28 memo when he returned from active-duty deployment in late December 2016. Tr. 27-29. He

understood it to mean that management had “left the employees and our Union without a means to resolve a conflict outside of the Agency itself.” Tr. 34. This made him concerned that he no longer had protection under the Statute. Tr. 34-35. Wayble understood the memo’s reference to ad hoc resolution of grievances by the HRO to mean that the Agency “would not recognize our negotiated ... grievance process that we had already been using,” including the use of binding arbitration that could be used to appeal decisions of the Adjutant General. Tr. 33, 37-38. Wayble testified that in one instance, some employees came to him with a problem in filling some vacant positions; when Wayble asked why past practice was not being followed, the selecting official told him “that negotiating it with the Union, they weren’t doing that anymore, they were relying on HRO’s guidance from now on out.” Tr. 48-49. Nevertheless, Wayble was able to work out a satisfactory solution directly with the employees’ supervisors. Tr. 49.

Shortly after the September 28 memo was issued, Higginbotham asked for official time from his supervisor. Tr. 94. According to Higginbotham, his supervisor called the Human Resources Office on the speakerphone in front of him, and the person on the other side of the line said that “official time wasn’t being recognized at this time.” Tr. 95, 103. He testified that he did not file a grievance about this, because “I did not feel like a grievance would do us any good at all.” Tr. 103-04.

Colonel Giezie denied that the Agency stopped complying with the CBA after September 28. He testified, “[W]e have addressed everything using the

grievance process that was established in the expired [CBA]. I have recommended that to all the supervisors and that's the procedures we have followed, if anybody has been interested in filing one." Tr. 383. Asked how anyone reading the September 28 memo would understand it to mean that the CBA grievance procedure would be followed, Colonel Giezie answered, "They don't. When they come to me and ask how [are] we going to resolve this, the answer is we're going to follow the grievance procedure in the [CBA]." Tr. 384. Asked whether that included binding arbitration, he stated, "We would be happy to do that." *Id.* He acknowledged, however, that he has not communicated this to the Union or to bargaining unit employees, nor has the Agency rescinded the September 28 memo. Tr. 410-11. He further acknowledged that no grievances had been filed since September 28. Tr. 383.

In contrast to Colonel Giezie's stated willingness to continue following the CBA, Auckland testified unconditionally that by virtue of the September 28 memo, the CBA was no longer in effect, and its mandatory terms were no longer recognized. Tr. 282. He said, "[W]e were going to operate under the application of the Statute, and the Statute requires at 709(a) that there be some Army or Air Force Regulation that mandates this process."<sup>7</sup> Auckland elaborated on this in his March affidavit: "I do not

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<sup>7</sup> By "Statute," Auckland was referring to the National Guard Technicians Act of 1968, 32 U.S.C. §§ 709 et seq. (which I will hereafter refer to as the Technicians Act), not the Federal Service Labor-Management Relations Statute (which I refer to as the Statute). *See* Tr. 282-83.

view us as having a grievance procedure per se. We have a willingness to entertain grievances, but we're not going to process them under the five-step process under the expired CBA." GC Ex. 1(r), Auckland Aff. at 8. Auckland further indicated that managers have not stopped notifying the Union of proposed disciplinary actions. Tr. 286. But he acknowledged that in issuing the September 28 memo, the Agency changed conditions of employment with respect to grievances and arbitrations under the CBA. *Id*

With respect to official time, Auckland testified that by issuing the September 28 memo, the Agency would no longer comply with the CBA provision that entitled the Union's president to 100 percent official time, but it would grant official time to Union representatives "where it's appropriate." Tr. 285; *see also* Tr. 333-37. He said the CBA provision for 100% official time was "illegal," as it violated the DoD FMR. Tr. 334. Auckland acknowledged that the Statute permits agencies and unions to negotiate reasonable provisions for official time, but he countered, "[W]e had determined that was not reasonable. We were no longer in partnership with the Union.... There was no intent to have anyone be on 100 percent official time. We could not get the Union to bargain on official time, so we repudiated that." Tr. 334-35. But he further testified that he has been asked to grant official time since September 28, and he has granted it "where it was appropriate to grant it," under the DoD FMR. Tr. 285-86. Agreeing with Auckland, Colonel Giezie testified: "I have specifically identified [to supervisors] that we believe Mr. Wayble, Mr. Reynolds, Mr. Higginbotham and Mr. Rice to be officers of AFGE Local 3970 and that they

are, as such, entitled to use official time for representational functions” Tr. 379.

The Agency’s Attempts to Contact and Negotiate  
with the Union Leadership

Between March 2016 and the hearing in August 2017, Local 3970 has undergone three transitions in its presidency: from Tanner to Dohrmann to Gaven Reynolds to Wayble. Dohrmann reached out to Agency management in August 2016, around the time he took office, and expressed his interest in resolving a variety of pending issues. Tr. 348-50. The parties appeared to be looking toward resuming CBA negotiations at the start of 2017. Tr. 350. But problems seem to have arisen (for both employees and management) when Dohrmann relinquished his position with the Union, sometime in the autumn of 2016.

The circumstances of Dohrmann’s departure were never explained at the hearing, but both Higginbotham and Craigo alluded to difficulties in communicating with him after the Agency distributed the September 28 memo. Tr. 94, 103, 125, 128. Craigo forwarded a copy of the September 28 memo to Dohrmann, and while Dohrmann forwarded it in turn to an AFGE national representative and signed the email as “President” of the Union, he didn’t respond to Craigo. Tr. 125, 128; GC Ex. 16. Simultaneously, management was also having difficulty in reaching Dohrmann.

On September 20, 2016, Aukland mailed to Dohrmann Colonel Giezie’s September 19 letter, which notified the Union that the Agency “no longer recognizes the existence” of the CBA and that it disputed the Statute’s jurisdiction over the Agency.

Resp. Exs. 3 & 4. He sent the letter by certified mail and addressed it to the Union's P.O. box, but repeated attempts to deliver it, to two different addresses, were unsuccessful. Tr. 315-24. The certified letter was returned unclaimed, as was a second mailing to a different address. *Id.*; Resp. Exs. 5, 6. This process dragged on from September 20 to November 30, when Auckland finally had Dohrmann's commander hand-deliver the letter to him at his workplace. Tr. 320-23, 351, 357-58; Resp. Ex. 7. At that time, Dohrmann told his commander that he no longer had anything to do with the Union and refused to accept the letter. Tr. 321,351; GC Ex. 1(r), Auckland Affi. at 5. The same day, Dohrmann emailed Colonel Giezie that he was no longer Union President, and that the Agency should send Union correspondence to the AFGE regional office in Indianapolis. Tr. 358-59. There is no evidence that the Agency actually forwarded the September 19 letter to the AFGE.

According to Colonel Giezie, he next heard from the Union just after New Year, 2017, when he received a letter from the AFGE's national office identifying Gaven Reynolds as the new President of Local 3970. Tr. 359. Rather than responding to Mr. Reynolds, however, Auckland sent an email to AFGE National Representative Chon Jung, at the AFGE's Indianapolis office, on January 10, 2017, questioning the legitimacy of Reynolds's selection as President and asking for "further assurances of the bona fides of Mr. Reynolds as President." GC Ex. 3 at 1. Citing the Union's constitution, Auckland further asserted that the AFGE national union had no authority to act on behalf of Local 3970. *Id.* Notwithstanding this

assertion, Aukland went on to address the status of labor relations at the Agency:

It is the Agency's position that the CBA has ceased to be applicable to the Agency's employees under 5 USC 7115(b)(1). Further support for the Agency's position i[s] found at... [the DoD FMR.] ... Paragraph 110202 [s]tates that dues allotments automatically terminate when the "(CBA) between the Agency and the labor organization ceases to be applicable to the employee." Thus it is not only the right but the duty of the Agency to terminate the allotments, with no "additional requirement for the employee to submit a cancellation form." Para 110202.A.3.4.

*Id.* at 1-2. Responding to AFGE's apparent claim that the Agency was violating the rights of employees under the Statute, Aukland denied that the Statute applied to National Guard technicians or "that the FLRA has some lawful authority over The Adjutant General of Ohio." *Id.* at 2. He concluded:

Finally, it is the Agency's position that until there is a CBA, no employee should be paying dues to AFGE consistent with the DoDFMR. While the Agency plans to start with those employees not having SF 1187 on file, the Agency reserves the right to terminate all union dues allotments until there is a CBA. The Agency welcomes any assistance AFGE can provide in obtaining SF 1187s from Ohio National Guard Technicians desirous of having dues withheld from their pay[.]

*Id.*

At the end of February or the beginning of March 2017, Wayble became the Union's President.<sup>8</sup> Tr. 55. Wayble testified that he notified his local chain of command in person that he was the Union President, and that he informed state officials of this shortly thereafter, by email. Tr. 55-59. Colonel Giezie testified that he learned from the AFGE national office in March 2017 that Wayble was the Union President.<sup>9</sup> Tr. 363.

During the same period of transition in Union leadership in early 2017, the Agency also sought to implement two changes in personnel policies: a new merit promotion plan and a new performance appraisal system. Tr. 359-60. Development of the merit promotion plan actually began in July 2016 with internal meetings with managers, and Giezie testified that once management was satisfied with the plan, Auckland "reach[ed] out" to Reynolds in mid January 2017 to obtain the Union's reaction. Tr. 360, 387-88. However, Respondent offered into evidence no documentation of its effort to notify the Union about the plan, and its witnesses' description of that effort is ambiguous, contradictory, and generally not credible.<sup>10</sup> Auckland acknowledged that Reynolds was

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<sup>8</sup> Wayble said that the Union Executive Board selected him as president without an election. Tr. 55-56. Higginbotham testified that he and others were appointed to the Union's executive board because there was an "emergency situation" and that elections would be held "as soon as we get everything straightened out," probably within a year. Tr. 102.

<sup>9</sup> Agency counsel proffered that the Agency received this notice on March 3, 2017. Tr. 59-60.

<sup>10</sup> Auckland seems to have conflated his attempts to serve Giezie's September 19 letter on Dohrmann (Tr. 315-24) with his attempts



attending a work-related school, out of state, during the time he was trying to contact him. Tr. 330. With regard to pursuing bargaining in general, I asked Aukland whether he could have gone to the workplace to talk face-to-face with Dohrmann, Reynolds, or Wayble; he responded: “That’s about a 25-mile drive each way, yes.” Tr. 331.

Wayble was asked whether management offered to bargain over the new merit promotion plan. He replied, “I can’t answer- I don’t have that answer, sir.” Tr. 79. However, he did not become President until early March, about two months after the Agency had allegedly reached out to the Union regarding the plan.

The Respondent implemented the new merit promotion plan on February 6, 2017, replacing the plan adopted in 2014. GC Exs. 4, 21. Both the 2014 and the 2017 plans require that job announcements be published on the USA Jobs website, but the old plan provided that announcements generally would be posted for thirty days, while the new plan provides that announcements generally will be posted for fifteen days. *Compare* GC Ex. 4 at 14 *and* GC Ex. 21

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to serve notice of the merit promotion plan on Reynolds (Tr. 290-91, 325-27). In describing the latter, Aukland said that correspondence sent to Reynolds was “repeatedly returned,” and he cited a letter he had sent to Reynolds in July 2017 that was returned to him, unopened, two days before the hearing. Tr. 326-27. These events occurred long after the Agency had already begun dealing with Wayble as Union President, and several months after the merit promotion plan had been implemented. As a result, I do not credit Aukland’s testimony that he actually attempted to notify the Union of the merit promotion plan or that he offered to bargain over it.

at 13. With respect to the area of consideration, the new plan retains language from the old plan, stating: “The area of consideration for each technician position vacancy announcement will be determined by the selecting official, subject to the approval of the HRO, to ensure the receipt of sufficient numbers of qualified candidates.” *Compare* GC Ex. 4 at 16 *and* GC Ex. 21 at 15. Wayble testified that under the old plan, the area of consideration was “statewide to on-board technicians[,]” but this assertion is not corroborated by the documents in evidence. Wayble also testified that when the new plan was implemented, Union President Jeff Tanner filed numerous grievances concerning positions advertised under the plan (Tr. 79-80), but this is difficult to credit, since Tanner had retired long before 2017 and had long ceased to be Union President. While it is possible that Wayble may have meant to identify Reynolds as filing the grievances, the lack of any documentation in evidence makes it impossible to credit that possibility.

With regard to the selection process utilized in the old and new merit promotion plans, Colonel Giezie outlined significant differences in how applicants are evaluated and scored. While the old plan only looked at how an applicant performed in the interview, without considering his or her past experience or references, the new plan allows for the consideration of many additional factors and reduces the influence that any single member of the selection board can have on the determination of a candidate’s score. Tr. 385-87.

In contrast to the lack of documentation of its attempt to negotiate the revised merit promotion plan,

the Respondent offered specific evidence regarding a new performance appraisal system. On March 2, 2017, Colonel Giezie sent Gaven Reynolds a memo offering the Union an opportunity to bargain over the implementation of a new appraisal program, with the proposed plan attached. Resp. Ex. 9. Giezie noted that his offer to bargain “in no way[] waives the longstanding objections of The Adjutant General’s Department to the applicability of the [Statute].to Ohio National Guard Technicians.” *Id.* Similarly, the Agency did not “concede any contractual rights under the now-expired former Collective Bargaining [Agreement]. This offer to bargain is solely in the spirit of conciliation between the Department and Local 3970.” *Id.* Colonel Giezie testified that he did not get a response from the Union. Tr. 362. The Agency prepared to implement the new plan on April 1, 2017, but that has been suspended on orders from the National Guard Bureau. *Id.*

On May 5, 2017, new Union President Wayble contacted the Adjutant General and requested the resumption of CBA negotiations. Colonel Giezie responded to Wayble on May 9, accepting the Union’s bargaining request, while adding certain conditions. GC Ex. 28. In his memo, Giezie agreed to bargain only with members of Local 3970, explicitly refusing to meet with any officials of AFGE’s regional or national offices or to allow them on State-owned property. He also asked that Wayble provide him with a list of the Union’s officers and evidence that they are authorized to act on the Union’s behalf. *Id.* at 1-2. Finally, he enclosed copies of seven of the ULP charges filed by the Respondent against the Union, and he concluded: “If the FLRA’s complaint is dismissed, this

Department is willing to dismiss its ULP charges and open negotiations provided the other conditions outlined above are met.” *Id.* at 2.

### The Agency’s Termination of Union Dues Deductions

Colonel John Dernberger is the United States Property and Fiscal Officer for Ohio, a position within the National Guard Bureau. Tr. 167, 271-72. Colonel Dernberger is responsible for issuing federal funds and property to the Ohio National Guard and for overseeing assistants who manage payroll functions. Tr. 169. He is not within the chain of command of the Ohio Adjutant General. Tr. 170. As part of his ongoing responsibility to make the Agency’s financial records “audit ready,” his office discovered in 2014 or 2015 that “there were missing [SF] 1187s in the files.” Tr. 175, 183-84. That is, the Agency had been withholding union dues for a large number of bargaining unit employees, but the Agency had SF 1187s, authorizing those deductions, for only some of the employees. Nonetheless, the Agency continued to deduct dues from those employees for an additional two or three years, while management officials decided what to do to correct the problem. Tr. 175-76, 183-84. Asked to explain why the Agency permitted this, Colonel Demberger testified that management was “working on this for a long time to get this corrected,” and that “it’s been an ongoing process.” Tr. 183-84. It was not initially known how many 1187s were missing. Tr. 353.

In the fall of 2016, the Agency’s Human Resources Office—primarily Colonel Giezie and Aukland - worked with Colonel Demberger to develop a policy for dealing with the missing 1187s. Tr. 184-85, 189-90. Colonel

Demberger's office conducted an audit to determine exactly how many bargaining unit employees were having union dues deducted from their pay without an SF 1187 on file. Captain (now Major) Daryl Scott, a Technician Branch Manager in the HRO, assisted in these efforts. Among other things, Scott created a spreadsheet listing bargaining unit employees whose union dues were being deducted from their pay. Tr. 216, 239-40; GC Ex. 26. Using that spreadsheet, Demberger had local comptroller offices around the state search their payroll files for SF 1187s for those employees. Tr. 205, 371-72. They identified thirty to forty Army technicians and forty to fifty Air Force technicians for whom the Agency had no SF 1187 on file. Tr. 227.

The Agency's witnesses were at a loss to explain why so many SF 1187s had disappeared. Tr. 193,257. Scott stated that the loss of so many documents was unprecedented. Tr. 256. While Colonel Demberger could not say for sure what happened, he did have a theory. "Speculating," he testified, "there has been rules in the past of 6 years 3 months is your normal record retention policy. Speculating, could during normal reviews anything older than 6 years 3 months be removed? And those items might have been pulled." Tr. 198. Colonel Giezie similarly testified that while he was not sure how long SF 1187s were retained, it was standard for the Agency to retain documents for six years and three months. Tr. 402.

Agency officials believed that they could not continue to deduct dues from a bargaining unit employee whose SF 1187 was not on file. In this regard, Colonel Demberger testified that if an

employee is having union dues deducted, “there should be the supporting 1187 in that file to do that. If ... one of those actions that’s on a payroll document does not have the supporting document, then that’s basically a glitch and says, no, that’s a failure of the audit and it needs to be corrected.” Tr. 177-78. He cited Department of Defense Financial Management Regulation, Volume 8, Chapter 11 (DoD FMR), in support of his position. Tr. 179-80; *see* Resp. Ex. 1. Colonel Giezie agreed, stating that under the DoD FMR, the Agency is liable for any unauthorized deductions that are made from an employee’s salary. Tr. 377.

To address their concerns regarding the missing SF 1187s, Colonel Giezie, Aukland, and Colonel Dernberger decided that a new policy was needed for the deduction of union dues. Tr. 175-76. The policy provided that if an employee was having union dues deducted and did not have an 1187 on file, then the Agency would contact the employee and give him or her sixty days to submit a copy of the original SF 1187 (if he had one) or to submit a new one. If the employee failed to submit a new or original 1187 form, the Agency would terminate the employee’s dues deductions. Tr. 287; Resp. Ex. 8.

Colonel Giezie testified that he sent Dohrmann (whom he believed to be the Union President at that time) an email in “[e]arly October [2016], because we gave him over 30 days of sending it out before we acted ...” Tr. 392. Giezie said he wanted to alert the Union that the Agency was “having issues with auditability[]” and that they planned to implement this new policy to address those issues. Tr. 352.

Further, Giezie testified that he provided Dohrmann a copy of the proposed policy and offered to meet with him to bargain over the impact and implementation of the change. Tr. 351. He added that he reached out to Dohrmann because “union dues collection policy or procedures are what I understand to be a mandatory term of negotiation for the collective bargaining agreement.” Tr. 354. Colonel Giezie did not hear back from Dohrmann until November 30, when Dohrmann told him he no longer represented the Union. Tr. 354,358.

On November 14, 2016, Colonel Giezie sent another letter to Dohrmann, informing him that the Agency would be implementing its new policy. The letter stated:

The Agency has audited the allotments of dues from [Ohio Army National Guard] Technicians to Local 3970. For unknown reasons ... in many cases, there is no SF 1187 on record to show when the dues allotment was requested. Without a record of a request for an allotment, the Agency can't continue indefinitely to withhold union dues from an employee's pay. Accordingly, I would be appreciative if any documentation Local 3970 has on file for those whose allotment documentation is lacking could be copied and furnished to the Agency within 60 days. I have also asked each Technician for whom there is no SF 1187 on file to request a new allotment; but if you have information on file that you will provide, this would alleviate the need for new allotments to be executed. An audit of [Ohio Air National Guard]

Technicians paying dues to Local 3970 will follow soon.

I want to make it clear that the Agency is simply trying to clean up its payroll records and not to discourage union dues-paying. But we simply cannot continue to withhold dues from the pay of any employee whose SF 1187 is unavailable in Agency files.

Finally, you were asked to advise me of any Impact and Implementation concerns about a previous draft of the Union Dues Allotment Policy. Since you have not communicated any such concerns in a timely manner, you will find enclosed a new Agency policy for Union Dues Allotments. If you have any questions or concerns, please contact Mr. Aukland at your earliest convenience.

Resp. Ex. 8 at 7 (Fourth Attach.).

A memorandum from Colonel Giezie explaining the new policy, which was dated November 15, 2016, was attached to the November 14 letter to Dohrmann. As relevant here, the policy states: "If no SF 1187 or other record is available ... and no new SF 1187 is initiated, the dues allotment will be terminated for lack of documentation [no later than] 30 days after the lack of documentation is determined." *Id.* at 3. Also attached were blank, sample copies of an SF 1187 and an SF 1188; both forms provide a space for employees to list their Social Security number or employee identification number. *Id.* at 4-5. The forms advise that providing an employee's Social Security number is "voluntary," but "failure to provide it, when it is used as the employee identification number, may mean that payroll deductions cannot be processed." *Id.*



Attached as well was a sample of a memo, which an employee desiring union dues to be deducted was supposed to send to Local 3970, releasing his Social Security number in order to effectuate that action. *Id* at 6.

Also on November 14, 2016, the Agency sent out the first group of letters (SF 1187 letters) to bargaining unit employees who had authorized union dues to be deducted from their pay but whose SF 1187 was missing (or whose dues withholding anniversary date was absent from the DCPS system). GC Ex. 13; Tr. 39-40, 222-23, 247-48; *see also* GC Exs. 1(b) & 1(d). The majority of bargaining unit employees who had Union dues deducted from their pay lacked an SF 1187 on file, so a majority of dues-paying members of the bargaining unit received an SF 1187 letter (either on November 14 or in subsequent mailings). GC Exs. 1(b) & 1(d); Tr. 222.

The SF 1187 letters, which were prepared by Captain Scott and signed by Colonel Giezie, stated, in pertinent part:

- 2. Union dues withheld.** Recently, an audit has been completed of Ohio ... National Guard Technicians whose pay records reflect that union dues are being withheld from their pay. Technician pay records reflect that you are such an employee :
- 3. Lack of documentation.** Technician pay records do not reflect an authorization to withhold union dues from your pay as required by [the] DoD FMR ... Therefore, the agency lacks the authority to withhold union dues from your technician pay in the absence

of this documentation. This notification is not a suggestion that you should continue or discontinue paying union dues but, if you want to continue to have dues withheld from your pay, you must either provide a copy of the original SF 1187 or AFGE 1187, or you must execute an authorization for dues withholding on a new SF 1187, Request for Payroll Deductions for Labor Organization Dues.

4. **Time limit.** Your current dues withholding will cease unless a copy of the original SF 1187 or a newly-executed SF 1187 is received in the Human Resource Office within 60 days of the date of this memorandum.

GC Ex. 13.

Captain Scott testified that if a bargaining unit employee failed to provide either the original SF 1187 or a new SF 1187 within sixty days, then he signed an SF 1188, with his own signature, on behalf of the employee and sent the SF 1188 to a payroll office to be processed, terminating the deduction of union dues from the employee's pay. Tr. 178-79, 231-32; GC Ex. 23. GC Exhibit 24 shows that in September 2016, the Agency deducted union dues from 126 technicians, while in June 2017 it deducted dues from only thirty-seven technicians. Based on this information, corroborated by Captain Scott's rough estimate (Tr. 227), I find that the Agency terminated dues deductions for at least eighty-nine bargaining unit employees during that time period.

Scott received responses to the SF 1187 letters from about five employees. Tr. 228. "[I]t was telephone

calls asking what the letter meant and what they needed to do, and various other questions,” he testified. *Id.* One of those employees was Roberta Craigo, who emailed a new SF 1187 to Captain Scott on November 30. Resp. Ex. 2. (This was the same day that Dohrmann advised the Agency that he was no longer Union President, and that the Agency should send Union-related correspondence to the AFGE regional office.) Scott responded to Craigo the next day, advising her that the SF 1187 was incomplete because, among other things, it lacked a signature from a Union official authorized to certify the dues amount. *Id.* Scott told her that he would certify the form once Craigo supplied the necessary information. *Id.* Over a month later, on January 10, 2017, Scott followed up with Craigo, advising her that he had learned that Gaven-Reynolds was the new President of Local 3970, and that Craigo should get Reynolds to sign her SF 1187. *Id.* (January 10 was the same date that Aukland had sent a letter to the AFGE regional office, advising AFGE that the Agency needed proof that Reynolds was authorized to represent Local 3970. GC Ex. 3.) Scott did not hear back from Craigo, nor did he follow up on the matter with her, and on January 13 (exactly 60 days after the first SF 1187 letters were mailed) he signed his name in the “Signature of Employee” block of an SF 1188, terminating Craigo’s (as well as 32 other employees’) dues deductions. Tr. 229-30; GC Ex. 23 at 8. Asked why he did not give Craigo the benefit of the doubt until she furnished the missing information, Scott testified that Craigo’s SF 1187 was incomplete, and that “[s]he has some personal responsibility to make sure that she touches base with the Union and the Union knows that she’s

going to be contributing, and they have to do their part.” Tr. 252. Scott admitted, however, that the absence of a signature from the Union president did not bar him from accepting Craigo’s SF 1187. Tr. 265.

On December 19, 2016, Colonel Giezie sent an SF 1187 letter to Wayble, who was deployed overseas at that time. Tr. 39; GC Ex. 13. When Wayble returned from deployment to his civilian position in late December or early January, he learned that the Agency was going to terminate his dues deductions unless he provided a new or original copy of his SF 1187. Tr. 39, 68-69. Wayble testified that he raised concerns about the SF 1187 issue with his supervisors and his commander, telling them that he “felt like it was a target against me as a union member.” Tr. 71. He also testified that when employees contacted him to discuss the matter, the employees told him that they were “afraid” to submit new 1187s, because the Agency’s letter “specifically stated ... that an audit was conducted only on the technicians who paid dues, and they were afraid ... they were singled out as dues-paying members[.]” Tr. 44.

Wayble had no desire to have his union dues deductions terminated, but he refused to submit a new SF 1187. Noting that he had originally submitted an 1187 in 2003, he explained, “I already had filled one out. I had dues withheld prior to this date for years.” Tr. 38-40, 66. He further stated that he did not submit a new or original SF 1187 because he did not want to “legitimize a new process or a new form.” Tr. 73. In February 2017, the Agency terminated the dues deductions for Wayble and forty-four other technicians without their consent. *Compare* GC Ex. 23

to GC Exs. 24 & 26. The Agency also terminated the dues deductions for John Williamson, a bargaining unit member, in March 2017, even though the Agency had his SF 1187 on file. *Compare* GC Ex. 23 at 36 to GC Ex. 26 at 5.

In December 2016, the Agency sent an SF 1187 letter to Shawn Rice, a dual-status technician in the bargaining unit who served as a Union Vice President for five years before becoming its Secretary-Treasurer in March 2017. Tr. 110-11, 117; GC Ex. 24, GC Ex. 26. Although Rice submitted an SF 1187 in 2005 and had never sought to rescind it, he did not submit a new or original SF 1187 in response to the Agency's SF 1187 letter. Tr. 117-20. Asked why, Rice testified, "I talked it over with Mr. Wayble and he stated that this was a bullying tactic that was coming from HR to try to union bust. So he said that the grievance was already filed, so it wasn't in our hands essentially, it was pretty much up to the national organizer and [the FLRA]." Tr. 118. Rice further stated that he believed the Agency would not have honored a new SF 1187 if he had submitted one. Tr. 114-15.

On February 23, 2017 (approximately sixty days after receiving his SF 1187 letter), Captain Scott signed an SF 1188 terminating Rice's union dues deductions. GC Ex. 5. Rice was notified by email the next day that his dues deductions would be terminated effective March 5. GC Ex. 15. The next work day, Rice responded, objecting that he had not signed the SF 1188 that had been issued in his name, and insisting that "[d]ues should not be cancelled unless the employee has signed the ... 1188." *Id.* Auckland responded to Rice on March 1, stating:

1. **No SF 1187, no Allotment.** Financial records were rigorously examined and you ... did not have the authorizing document, SF 1187, on file. According to the memo you received, you were given 60 days in which to submit a SF 1187; yet you did not do so. Since your dues allotments were un-auditable, it was terminated per the memo you received.
2. **DoD Financial Management Regulation (DoDFMR) on dues cessation.** This regulation covers how dues allotments are to work. The DoDFMR amplifies the statute, stating that dues allotments must be terminated by the agency when the Collective Bargaining Agreement (CBA) “ceases to be applicable” to the employee. It is the Agency’s view that the now-expired CBA cannot be applicable to an employee who does not have SF 1187 on file. For this reason, your dues allotment was terminated. Also, according to the DoDFMR, the dues allotment must be terminated “with no additional requirement for the employee to submit a cancellation form.” Thus you did not have to sign the SF 118[8] as you say.
3. **New SF 1187.** It is your right to submit a SF 1187 at any time. However, I must advise you that the above-cited language, from the DoDFMR, calls into question whether members of a union, not having a contract, may have dues withheld from their pay. Thus, since I am not a policy maker, I can’t

say whether the Agency will honor a new SF 1187 without a new CBA.

4. **Grievance.** You should also understand that under former Union leadership, Local 3970, refused to come to the table to negotiate a new CBA unless the Agency waived legally-valid defenses just to get the Union to the negotiating table. The Agency rightly refused this demand and countered with an agreement to waive those defenses in a CBA for the duration of the CBA and no longer. The Union never budged, instead choosing to arbitrate a management directed reassignment. Although, the Arbitrator did not agree that the entire contract had expired ... he invited the Agency to tell the Union the entire contract had expired. The Agency has done so. The entire contract is a nullity, including the contractual grievance process, because it has expired. You may, if you wish, file a grievance; but the process used will be the process deemed appropriate by the HRO Director or his designee, since your grievance is apparently against him.

GC Ex. 6 at 1-2.

On April 4, 2017, Colonel Giezie sent a form letter (the April 4 letters) to at least forty-eight bargaining unit employees. GC Exs. 8 & 14. Forty-one of those employees (including Higginbotham) had SF 1187's on file and continued to have union dues deducted from

their pay.<sup>11</sup> *Compare* the names on GC Exhibits 8 & 14 *with* the information regarding those employees on GC Exhibits 24 & 26; Tr. 98. In these letters, Colonel Giezie wrote:

1. I am advising you that pursuant to [the DoD FMR], The Adjutant General will recommend the termination of your Union Dues Allotment by the Defense Finance and Accounting Service (DFAS) because there is no collective bargaining agreement with AFGE Local 3970. If DFAS accepts this recommendation then your dues deductions will terminate 60 days from the date of this memorandum.
2. The Adjutant General has no intention of preventing you from paying Union dues; but

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<sup>11</sup> Three bargaining unit employees (Jeffrey Blazer, Brian Hennig, and Shawn Rice) received April 4 letters (*see* GC Ex. 8) but did not have SF 1187s on file and had already had their Union dues deductions terminated (*see* GC Ex. 23); *see also* data regarding these employees on GC Exhibits 24 & 26. Four employees who received April 4 letters (Keven Eberts, Brandon Harris, Michael Harris, and Ricky Hutchinson) had SF 1187s on file, but the Agency stopped deducting their union dues in May of 2017. *See* GC Ex. 26, which shows that dues were deducted for these employees from September 2016 through April 2017, but not thereafter. According to GC Exhibit 25, one of these four employees (Michael Harris) had submitted an SF 1188 to terminate dues deductions, but not the other three. Four other bargaining unit employees (Scotty England, Richard Ford, Jr., George Megimose, and Cara Rothe) received April 4 letters (GC Ex. 8), but they were not on the list of bargaining unit employees (GC Ex. 22), nor were they on the list of employees whose dues were deducted between September 2016 and July 2017 (GC Ex. 24).



cannot lawfully ask that they be withheld from your pay without a collective bargaining agreement. If you wish to continue to pay dues to AFGE Local 3970, please either pay your dues to the Local by check; or set up an electronic fund transfer from your bank account.

GC Ex. 8.

Colonel Demberger and Colonel Giezie both acknowledged that if an employee's union dues were being deducted from his pay, it is likely the employee had previously submitted an SF 1187 to initiate those deductions, though Giezie added that he knew of instances where deductions had been made without authorization. Tr. 189,403. Demberger also stated that it was the Agency, rather than the employee, who is responsible for maintaining the SF 1187s in its files. Tr. 186. Asked whether the Agency would act similarly with respect to other types of missing documents, such as documents pertaining to health insurance, Colonel Demberger testified, "I'm going to say I don't know...." Tr. 214-15. Aukland also affirmed that the Agency is responsible for maintaining SF 1187s. Tr. 303; He acknowledged that while Paragraph 110202 of the DoD FMR states that an SF 1187 must be submitted to initiate dues deductions, it does not state that SF 1187s must be maintained. *Id.*; *see also* Resp. Ex. 1 at 11-5.

Wayble testified that he has tried, unsuccessfully, to have the Agency initiate new requests for union dues deduction on behalf of three employees. Tr. 76. He said the Agency's Finance Department refused to process their SF 1187s, after which the employees

came to Wayble, who approached the employees' commanders directly. The commanders said they would look into the matter, but SF 1187s were never processed. *Id.* Subsequently, employees received Colonel Giezie's April 4 letter, notifying them that he was recommending the cessation of dues deductions even for employees with SF 1187s on file. GC Exs. 8 & 14. Nevertheless, Colonel Giezie testified that if an employee submits an SF 1187, the Agency would process it. Tr. 378. Aukland testified that while the Adjutant General's Department is "prepared to make a recommendation that 1187s not be recognized when the collective bargaining agreement has expired[,] it has delayed such an action while this ULP case is pending. Tr. 297.

## **POSITIONS OF THE PARTIES**

### **General Counsel**

As a threshold matter, the General Counsel argues that the Authority has jurisdiction over the Respondent. National Guard dual status technicians are employees, it insists, and the Respondent is an agency, within the meaning of § 7103(a)(2) and (3) of the Statute. GC Br. at 19 & n.10. These principles were affirmed most recently by the Authority, and endorsed by the Sixth Circuit Court of Appeals, in *Mich. Army Nat'l Guard*, 69 FLRA 393, 395 (2016) (*Mich. ANG*), *pet. for review enforced as modified sub nom. FLRA v. Mich. Army Nat'l Guard*, 878 F.3d 171 (6th Cir. 2017) (*FLRA v. Mich. ANG*). Other federal courts have echoed this position in a variety of contexts. In *P.R Air Nat'l Guard, 156th Airlift Wing (AMC) Carolina, P.R.*, 56 FLRA 174, 179 (2000), *aff'd sub nom. AFGE, Local 3936, AFL-CIO v. FLRA*, 239

F.3d 66 (2001) (*Puerto Rico ANG*), the court held that that technicians have the same rights and privileges as other federal employees, except where specifically limited by law. In *Ass'n of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA*, 360 F.3d 195, 196 (D.C. Cir. 2004) (*ACT Wichita v. FLRA*), the court ruled that dual status technicians may engage in collective bargaining over the civilian aspects of their employment. And in *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 281 (3d Cir. 1982) (*N.J. ANG*), it clearly stated that technicians fall within the coverage of the Statute. The consistent theme of all these cases, according to the GC, is that while the Technicians Act exempts technicians from a few specific provisions of the Civil Service Reform Act, it does not exempt technicians from coverage of the Statute. GC Br. at 21 (citing 32 U.S.C. § 709(g)(1)). As a result, dual status technicians are unionized in nearly every state, in about 100 different National Guard bargaining units. GC Br. at 19-20 & n.9.

With regard to the Respondent's status as a federal executive agency, the GC points to the fact that § 7103(a)(3) of the Statute explicitly lists those entities that are excluded from its coverage, and the state National Guards are not listed there. *Id.* at 19. Accordingly, the Fifth Circuit Court of Appeals in *Lipscomb v. FLRA*, 333 F.3d 611,617 & n.6 (5th Cir. 2003) (*Lipscomb*), *cert. denied*, 541 U.S. 935 (2004), found it "incontrovertible" that the Adjutant General of Mississippi was an agency of the Executive Branch of the federal government. The court explained that while the adjutants general of the states are state officials, the state National Guards are a "hybrid entity that carefully combines both federal and state

characteristics.” 333 F.3d at 614. The duties of the adjutants general include a significant federal component, and in their capacity as the employer of federal employee technicians, this renders them, and the national guards they oversee, “agencies” within the meaning of the Statute. GC Br. at 23-24 (citing 333 F.3d at 620).

The GC acknowledges that in *Merit Sys. Prot. Bd. v. Singleton*, 244 F.3d 1331, 1337 (Fed. Cir. 2001) (*Singleton*), the Federal Circuit Court of Appeals held that an order of the Merit Systems Protection Board (MSPB) was not enforceable against the Ohio Adjutant General or the Ohio National Guard. However, the GC emphasizes that *Singleton* involved only the MSPB, and its reasoning did not implicate the Statute or the Authority. GC Br. at 22-23. Moreover, the GC argues that *Singleton* was superseded by the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 (2016), which modified the Technicians Act to clarify that technicians have appeal rights with the MSPB. GC Br. at 22- 23 (citing S. Rep. No. 114-255, at 139 (2016); H.R. Conf. Rep 114-840, at 1016-17 (2016)).

Moving to the substantive unfair labor practice allegations, the GC argues that by communicating repeatedly to employees and to the Union that the Agency no longer recognized the CBA or the coverage of the Statute, the Agency coerced employees in the exercise of their statutory rights and chilled protected activity, in violation of § 7116(a)(1) of the Statute. GC Br. at 25-26. The Authority has consistently held that an agency violates § 7116(a)(1) when it makes statements that would tend to interfere with, restrain,

or coerce employees in the exercise of their rights protected by the Statute, and that statements are unlawful if they would cause a reasonable employee to “think twice” before exercising a statutory right. *AFGE, Nat’l Border Patrol Council, Local 2595*, 67 FLRA 361, 366 (2014); *U.S. Air Force, Lowry Air Force Base, Denver, Colo.*, 16 FLRA 952,960 (1984) (*Lowry AFB*). Similarly, an agency violates § 7116(a)(1) when it communicates that there would be no point in filing a grievance. *Dep’t of the Air Force, Scott AFB, Ill.*, 34 FLRA 956, 966 (1990) (*Scott AFB*); *Dep’t of the Air Force, 35th Combat Support Grp. (Tac), George AFB, Cal.*, 4 FLRA 22, 22-23 (1980) (*George AFB*).

The GC asserts that the written and oral statements of Colonel Giezie and Aukland conveyed to employees that they were not protected by the Statute, and that there was “no point in exercising *any* of their protected rights,” such as consulting with a Union representative or asserting their Weingarten rights. GC Br. at 26. Further, since the Agency considered the CBA void, there was no point in complaining of contract violations or filing a grievance. At best, going to the Union would be “ineffectual,” and at worst it could subject them to “unreviewable reprisal.” Therefore, the Agency’s communications “objectively chilled” the exercise of employees rights, in violation of § 7116(a)(1). *Id*

Next, the GC alleges that the Agency violated § 7116(a)(1) and (5) by failing to abide by the mandatory terms of the CBA. GC Br. at 27, 31. The Authority has repeatedly held that when a collective bargaining agreement expires, mandatory subjects of bargaining continue in effect, absent agreement to the contrary or

unless modified in a manner consistent with the Statute. *Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1004 (2015) (*IUPEDJ*); *NTEU*, 64 FLRA 982, 985 n.4 (2010)). In this regard, the Agency's September 28, 2016 memo made "an unqualified statement that no provision of the contract will be followed," and management then proceeded to change employee working conditions regarding several mandatory subjects of bargaining. GC Br. at 27 (citing Tr. 305). Specifically, it: (1) replaced the grievance and arbitration provisions of the CBA with an "ad hoc" process administered by the HRO; (2) admitted, through Aukland, that it repudiated the official time provisions of the CBA, a fact supported by Higginbotham's testimony; (3) stopped providing the Union with advance notice of disciplinary actions; and (4) failed to properly notify and bargain with the Union before implementing the new merit promotion plan and the plan for terminating employees' union dues deductions. GC Br. at 28-30, 39.

According to the GC, the Authority has found the types of changes made by the Agency here to be mandatory subjects of bargaining: *George AFB*, 4 FLRA at 22-23 (grievance procedures); *Ass'n of Civilian Technicians, Del. Chapter*, 3 FLRA 57, 57-60 (1980) (procedures for filling vacant positions); *Dep't of Health & Human Servs., SSA*, 44 FLRA 870, 879-81 (1992) (*SSA*) (areas of consideration); *AFGE, AFL-CIO, Local 3732*, 39 FLRA 187, 211-13 (1991) (procedures for imposing discipline); *U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1119 (1994) (*Materiel Command*) (official time); *Army & Air Force Exch. Serv., Dall., Tex.*, 35 FLRA

835, 838 (1990) (dues deduction procedures). Therefore, the Agency committed unfair labor practices by making these changes without properly bargaining with the Union.

While the Agency claims that it notified the Union of its proposed changes to the merit promotion plan and to its new procedures for union dues deductions, the GC disputes that notice was given at all, and argues further that any notice given to the Union was inadequate. GC Br. at 30-31, 39. The GC notes that the Respondent did not offer into evidence any letter to the Union offering to bargain over the merit promotion plan, and the GC asserts that the accounts given by management witnesses on this issue were “ambiguous and inconsistent....” GC Br. at 30-31 (citing *U.S. Army Corps of Engineers, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 82-83 (1997) (*Corps of Engineers*)). Moreover, the GC insists that the Agency’s offers to negotiate throughout the period after September 28, 2016, were contingent on the Union accepting the Agency’s assertions that the CBA was null and void, that the Statute did not cover the Agency or its technicians, and that AFGE national and regional officials could not negotiate with the Local Union. GC Br. at 32-34 (citing *Bureau of Indian Affairs, Isleta Elementary Sch., Pueblo of Isleta, N.M.*, 54 FLRA 1428, 1438 (1998), and *Griffin Inns*, 229 NLRB 199 (1977)). Thus, what the Agency offered was not bargaining within the meaning of the Statute, but rather a process in which management set the rules and the Adjutant General was the final authority on all disputes. GC Br. at 32- 33.

With regard to the Agency's termination of union dues deduction, the GC contends that the Agency violated employees' personal rights under § 7115(a) of the Statute, in addition to violating its duty to bargain with the Union over the change. *Id.* at 34-39 (citing *Fed. Emps. Metal Trades Council, AFL-CIO, Mare Island Naval Shipyard*, 47 FLRA 1289, 1294 (1993) (*Mare Island*). Under § 7115, the employee alone controls the decision to deduct his union dues; the agency's "obligation to honor dues check-off authorizations is mandatory and nondiscretionary." GC Br. at 35 (citing *AFGE, AFL-CIO, Local 2612 v. FLRA*, 739 F.2d 87, 89-90 (2d Cir. 1984)). Absent the employee's consent, § 7115(b) permits agencies to terminate those deductions in only two situations: when the collective bargaining agreement ceases to be applicable to the employee, such as when an employee is promoted out of the bargaining unit or leaves the employ of the agency; or when the employee is suspended or expelled from the union. GC Br. at 36 (citing the legislative history of the Statute, H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 48 (1978)).

Contrary to the Respondent's claim, the GC insists that the CBA does not "cease to be applicable" to employees when it expires. The CBA's expiration is irrelevant to an agency's obligation to continue deducting union dues, because the Authority has repeatedly held that an agency is required to honor employees' authorized union dues deductions even in the absence of a CBA. *Federal Deposit Insurance Corp.*, 40 FLRA 775, 786 (1991); *Def Logistics Agency*, 5 FLRA 126, 129-30 (1981). The GC further contends that the Agency's audit of employee records and SF 1187s was undertaken as a pretext, "to weaken the



Union, not clean up the Respondent's pay records." GC Br. at 38.

To remedy the Respondent's unfair labor practices, the General Counsel requests both traditional and nontraditional remedies. In the former category, the GC urges that the Respondent be ordered to recognize the mandatory subjects in the parties' CBA, including the grievance-arbitration procedure, hiring and promotion, discipline, and official time. Further, the Agency should restore the status quo concerning conditions of employment that existed before September of 2016 and make any employees whole who suffered losses as a result of changes in mandatory subjects of bargaining. Accordingly, the Agency must reinstate dues withholding for all bargaining unit employees who were removed from withholding since September 28, 2016, and reimburse the Union for all dues it should have received from those employees. GC Br. at 40. The GC contends that such remedies are standard for this type of violation (*see U.S. Army Materiel & Readiness Command, Warren, Mich.*, 7 FLRA 194, 199 (1981)), and that they do not violate the doctrine of sovereign immunity (*see U.S. Dep't of Justice, Fed Bureau of Prisons, Fed Corr. Complex, Tucson, Ariz.*, 66 FLRA 517, 520-21 (2012)).

In addition to these traditional remedies, the GC contends that the severity of the Agency's ULPs require more extensive remedial actions. The GC submits that the Agency has "significantly chilled union activity, causing employees to question whether they have collective bargaining rights at all or a Union." GC Br. at 41. Utilizing the Authority's reasoning in *U.S. Penitentiary Leavenworth, Kan.*, 55

FLRA 704, 718-19 (1999) (*USP Leavenworth*), the GC asserts that the Respondent's "widely disseminated egregious anti-Union statements" require the Respondent to retract those statements by reading the Authority's Notice to Employees aloud at meetings of employees around the state.<sup>12</sup> And because managers and supervisors received the same unlawful statements from the Respondent's HRO, the GC contends that managers and supervisors should also receive the Notice and be required to attend those meetings. *U.S. Penitentiary, Florence, Colo.*, 53 FLRA 1393, 1394 (1998) (*USP Florence*).

### **Charging Party**

The Union agrees with the GC that the Respondent violated the Statute and that the FLRA has jurisdiction over the Respondent. Specifically, the Agency violated the Statute by refusing to be bound by the mandatory terms of the CBA and by unilaterally implementing the new merit promotion plan. CP Br. at 16. The Union notes that the Agency continues to refuse to be bound by the Statute, as seen in Colonel Giezie's refusal to bargain on Agency premises with AFGE national or regional officials representing the Union. *Id.* at 14.

The Union describes the Agency's contention that it could not reach the Union to initiate negotiations as "laughable," since Union officers "work for the Agency at the Agency's facilities." *Id.* at 16-17. Management "knows where the union officer[s]' workstations are,"

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<sup>12</sup> Alternatively, the GC would agree to having an FLRA agent read the notice. GC Br. at 41 n.22.

and Auckland could have met with Wayble or any other Union official at his workplace to discuss any of the issues in dispute; instead, the Agency chose to implement changes unilaterally. *Id.*

With respect to union dues deductions, the Union asserts that the Agency admitted that all of the employees who received SF 1187 letters had previously authorized dues deductions. The Union argues that the Agency's audit of dues deductions was a "thinly veiled and unlawful attempt to financially weaken the Union." *Id.* at 20. In this regard, the Union notes that Colonel Dernberger could not say who came up with the idea for the audit, and that the Agency "seemed not to have its story straight" as to why employees needed to submit SF 1187s: while Dernberger asserted that SF 1187s needed to be submitted for "audit readiness," Auckland asserted that SF 1187s needed to be submitted to comply with the DoD FMR, even though Auckland could not show where that requirement was listed in the regulation. *Id.* Another sign the audit was pretextual, the Union argues, is that Scott was unaware of any other type of documents that had been lost the way the SF 1187s had.

### **Respondent**

The Respondent begins by asserting, "The FLRA does not have jurisdiction over the Adjutant General of Ohio, his department, the Ohio National Guard, or the Technicians he administers ...." Resp. Br. at 19. In this regard, it argues: (1) under the U.S. Constitution, Congress and the President have authority over state militias only when called into the service of the United

States;<sup>13</sup> (2) the Governor of Ohio is the commander in chief of the state's military and naval forces except when they are called into the service of the United States;<sup>14</sup> (3) the Adjutant General is appointed by the Governor of Ohio;<sup>15</sup> (4) the Adjutant General is a paid employee of the State of Ohio;<sup>16</sup> and (5) the Ohio National Guard is "an element of the organized militia of Ohio."<sup>17</sup> *Id.* at 19-20. Respondent further asserts that § 7103(a)(3) of the Statute's definition of an agency "does not include a state adjutant general, his/her department, or a state national guard organization." *Id.* at 20. The Respondent adds that under 32 U.S.C. § 314, the Adjutant General is

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<sup>13</sup> Respondent quotes from the U.S. Constitution, art. I, § 8, cl. 15 (empowering Congress to provide for "calling forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasions"); *id.* cl. 16 (empowering Congress to provide for "organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"); *id.* art. II § 2, cl. 1 (providing that the President is "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States"); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

<sup>14</sup> Ohio Constitution, Article III, § 10.

<sup>15</sup> Ohio Constitution, Article IX, § 3.

<sup>16</sup> Ohio Revised Code §§ 124.15, 141.02. Pursuant to § 141.02(e), I note that in addition to any state compensation, the Adjutant General of Ohio may retain "any federal pay, allowances, and compensation received because of any federally recognized officer status."

<sup>17</sup> Ohio Revised Code § 5923.01.

“required to perform the duties required of him under State law[]” and that 32 U.S.C. § 314 “does not ... ascribe federal employee status to The Adjutant General.”<sup>18</sup> *Id*

According to the Agency, the Federal Circuit Court of Appeals recognized these principles in its *Singleton* decision, where it ruled that federal agencies have no authority to give orders to the Adjutant General of Ohio. Specifically, the court stated:

The adjutant general of the [Ohio National Guard] is not a federal employee, as the term is defined in Title 5. Therefore, no order of the [Merit Systems Protection] Board may be directed to the adjutant general. The Governor of Ohio similarly is not a federal employee, and consequently no order of the [Merit Systems Protection] Board could command the Governor to order a corrective act to be taken by the adjutant general.

*Singleton*, 244 F.3d at 1336-37.

The Agency acknowledges that in *Lipscomb*, the Fifth Circuit Court of Appeals ruled that the Adjutant General of Mississippi “was an ‘Executive Agency’ for

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<sup>18</sup> As relevant here, 32 U.S.C. § 314 states:

(a) There shall be an adjutant general in each State.... He shall perform the duties prescribed by the laws of that jurisdiction.

....

(d) The adjutant general of each State and officers of National Guard, shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe, and shall make those returns and reports to the Secretary concerned or to any officer designated by him.

purposes of the ... Statute, and therefore could be ordered by the FLRA to permit a union election among its technicians.” Resp. Br. at 21. But Respondent insists that *Lipscomb* is flawed, because the court itself admitted that the language of the Statute (specifically § 7103(a)(3)) does not explicitly list the state national guards or adjutants general within the definition of “agency,” and because the court “never squarely addresses the Constitutional question of how a federal agency can assert authority over a state militia officer and gubernatorial appointee....” *Id.* (citing *Lipscomb*, 333 F.3d at 618). The Agency also cites *Fisher v. Peters*, 249 F.3d 433 (6th Cir. 2001) (*Fisher*) for the proposition that technicians are “irreducibly military in nature.” Based on *Fisher*, the Respondent argues that the Statute “does not apply to [technicians], and they may not unionize.” Resp. Br. at 24.

With respect to the ULP charges, the Respondent asserts as an initial matter that the September 28 memo was intended for management only. In any case, the statements made by Aukland and Colonel Giezie did not violate § 7116(a)(1) of the Statute. *Id.* at 24-25. Respondent contends that its officials are entitled to “[p]resent[] legal theories that the Union and GC do not like....” *Id.* at 34. Giezie and Aukland were simply asserting that the National Guard Technicians Act of 1968 “may have the effect of limiting the bargaining rights of [t]echnicians,” a point that the Authority itself made in *U.S. Dep’t of Def, Nat’l Guard Bureau*, 55 FLRA 657,663 (1999) (*National Guard Bureau*). Resp. Br. at 25-26. In addition, the Respondent points to the 2016 MOU to show that the Union and the Agency “agreed” that the

Agency “does not waive or concede any jurisdictional arguments’ regarding the applicability of the [Statute] to Respondent.” *Id.* at 34. The Respondent further contends that while it has “raised its jurisdictional concerns,” it has done so “while still performing under all the terms in the CBA,” and the Union “is still getting what it wants under the CBA.” *Id.*

The Respondent denies that it violated § 7116(a)(1) and (5) of the Statute by failing to abide by mandatory terms of the CBA. *See id.* at 27-28. With specific regard to grievances, it argues that it “did not refuse to process grievances in accordance with the CBA and did not refuse to participate in final and binding arbitration.” *Id.* at 27. Wayble and Higginbotham testified that they were able to resolve grievances with supervisors, and Colonel Giezie testified that management would continue to follow the grievance procedure in the CBA. *Id.* at 27. In addition, the Respondent argues that it was “always willing to grant appropriate official time,” and that Higginbotham’s claim to the contrary is unsubstantiated. *Id.* at 25, 27. Similarly, the Respondent asserts that it has not stopped providing the Union with advance notice of disciplinary actions, and managers have been advised to tell bargaining unit employees facing discipline that they have a right to be represented by the Union. *Id.*

The Respondent argues that it attempted to bargain with the Union over the new policy regarding union dues deductions, pointing to Colonel Giezie’s attempt to serve the Union with a copy of the proposed policy and his offer to engage in impact and implementation bargaining with Union President

Dohrmann in October 2016. Tr. 351; Resp. Ex. 8 at 8. Additionally, employees and Union officials were sent letters advising them of the policy in November 2016 and subsequent months. GC Ex. 13. Respondent contends, therefore, that it did not violate § 7116(a)(1) and (5) of the Statute in implementing the dues policy. Resp. Br. at 29.

The Respondent similarly contends that it complied with the Statute in implementing the new merit promotion plan. *Id.* at 32. In this regard, it argues that there was no material change between the old merit promotion plan and the new one, and that in any event it provided the Union with notice of the change. Specifically, Respondent asserts that “the plan” was mailed to union officials at their official addresses of record but “none of the union members would receive mail” there. Resp. Br. at 32-33; *see* Tr. 290-91.

The Respondent argues that it did not violate §§ 7115 and 7116(a)(1) and (8) of the Statute by terminating dues deductions for employees whose SF 1187s were missing from Agency files. Resp. Br. at 29. It insists that an SF 1187 “must be on file to justify a union dues allotment” and that an agency is “responsible to reimburse an employee if a deduction occurs without one.” *Id.* (citing DoD FMR ¶ 110202). It adds that union dues deductions were canceled to comply with “stringent audit readiness requirements established by the Department of Defense and monitored by the USPFO.” *Id.* at 30-31. Citing Rice’s testimony, Respondent asserts that the Union acknowledged at the hearing that the “notification process was fair.” *Id.* at 30. Even Union officials



Wayble and Rice refused to submit new or original SF 1187s for themselves, despite receiving notice of how to continue to have their dues deducted. Respondent argues that it was “legally required” to terminate Union dues deductions for employees without an SF 1187 on file, and that it was not a ULP for Aukland to say as much to Jung in his January 10, 2017 letter. *Id.* at 31.

Finally, the Respondent argues that it did not violate the Statute by advising employees that it reserved the right to terminate all Union dues deductions until there was a successor agreement. *Id.* at 31; *see* GC Ex. 8. With respect to Aukland’s statement to Jung that “until there is a CBA, no employee should be paying dues to AFGE consistent with the DoDFMR,” the Respondent asserts that Aukland was expressing “a reasonable interpretation of the DoD FMR, which Mr. Aukland can legitimately air.”, *Id.* at 32. To support this claim, Respondent asserts that the regulation provides that union dues allotments automatically terminate when the applicable CBA “ceases to be applicable to the employee,” and that the CBA was not applicable to employees because it had expired. *Id.* At the same time, the Respondent notes that it is still processing Union dues deductions for employees who have SF 1187s on file, and that it has “suspended its intent to recommend ... that all Union dues allotments be suspended, pending resolution of the issue” in this case. *Id.*

## ANALYSIS AND CONCLUSIONS

### The Authority Has Jurisdiction over the Respondent

Stepping briefly away from the factual minutia of this case, and looking first at the big picture of what has been happening within the Ohio National Guard in the last two years, it is breathtaking to contemplate how completely the Respondent has tried to divorce itself from history, from its own organizational structure, and from the legal precedents of the past fifty years. It seeks to ignore everything that its own leadership had done for decades, in order to pursue a legal theory that has been consistently rejected by the Authority, by the courts, and by Congress.

In 1971 (prehistoric times for the FLRA), a predecessor of the current union became the exclusive collective bargaining representative of a unit of Ohio Air National Guard technicians.<sup>19</sup> *See Adjutant General, State of Ohio, Ohio Air Nat'l Guard, Worthington, Ohio*, 21 FLRA 1062, 1079 (1986) (*Ohio ANG*). The parties negotiated a series of collective bargaining agreements, one of which expired in 1981, triggering a dispute over whether the agency could refuse to continue to be bound by certain permissive subjects such as uniforms. By that time, Congress had passed the Statute and created the Authority to adjudicate such disputes, and the Authority ruled that some of the subjects in dispute were indeed permissive - thus entitling the agency to stop observing them - while others were mandatory and must therefore

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<sup>19</sup> This unit apparently was consolidated with Army National Guard technicians in a statewide unit in 1990. *See GC Ex. 7.*

remain in effect, even after the CBA expired. *Id.* at 1065-72. Accordingly, the Authority ordered the Adjutant General to cease his unlawful conduct, bargain over mandatory subjects, and pay per diem and travel expenses that he had previously denied. *Id.* at 1073. The Adjutant General did not appeal this decision,<sup>20</sup> and it appears that he complied with the Authority's order - yet, somehow, neither the Constitutional fabric of our federal system nor the space-time continuum was destroyed.<sup>21</sup> Instead, the parties continued to engage in collective bargaining under the regulatory structure of the Statute for another 35 years, until certain agents of the Respondent recently got the idea that the Statute never actually covered its technicians, and that the

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<sup>20</sup> While I believe it is unnecessary for me to resolve the question, since none of the parties has raised or litigated it, it is arguable that the doctrines of equitable estoppel and res judicata might apply here, as additional bases for the Authority's jurisdiction over the Respondent and its employees." The Ohio Adjutant General acknowledged the FLRA's jurisdiction in the 1990 certification proceeding cited above, as well as in numerous ULP and arbitration proceedings; it has both won and lost cases before the Authority, and employees and Agency officials alike have acted in reliance on the Respondent's actions. Is it equitable for the Respondent to claim now that those decisions were invalid, or to argue that the actions of his own predecessors were improper?

<sup>21</sup> See also *The Adjutant General, State of Ohio*, 17 FLRA 957 (1985), and *The Adjutant General, State of Ohio*, 17 FLRA 360 (1985), in which the Authority ruled in the Agency's favor regarding the duty to negotiate on wearing uniforms.

Adjutant General had no obligation to abide by federal laws he doesn't like.<sup>22</sup>

Concurrent with the events in Ohio, unions have been representing dual status technicians in nearly every state and territory in the country, dating back at least to the late 1960s, under the regulatory oversight of the Authority and the Executive Orders which preceded the Statute.<sup>23</sup> Although there are a few cases of state National Guards unsuccessfully challenging the jurisdiction of the Authority and the Statute over them, there is not a single instance in which a state National Guard agency has been successful; on the other side of the ledger, there are hundreds of published cases in which all parties have acknowledged the statutory role of the Authority in regulating labor relations between civilian technicians and state adjutants general.

Congress passed the Technicians Act in 1968 and the Statute in 1978, and it is through the interplay of these two statutes that the case law governing labor relations in the state National Guards has evolved. In its early years, the Authority ruled that state National Guards were obligated to bargain over “broad scope” grievance-arbitration procedures, even those which

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<sup>22</sup> Mr. Aukland testified that he was General Counsel of the Ohio National Guard from about 1990 to 2014, so he presumably is well aware of these events and precedents. Tr. 268-69, 279-81. He even referred to a 1990 “decision” that he considered *res judicata*, but that case was never identified, either in his testimony or in the Respondent’s brief. See Tr. 280.

<sup>23</sup> As an example of the Respondent’s compliance with Executive Order 11491, see *Ohio National Guard, Worthington, Ohio*, 77 FSIP 36, 1977 WL 5332 (1977).

required outside arbitration of disputes concerning discipline and reductions in force. *NAGE, Local R12-132*, 5 FLRA 201 (1981) (*Local R-12-132*); *AFGE, AFL-CIO, Local 3486*, 5 FLRA 209 (1981). The Authority considered the legislative histories of the Technicians Act (particularly 32 U.S.C. § 709(e),<sup>24</sup> which prohibits appeals of disciplinary actions and certain other matters beyond the state adjutant general) and the Statute (particularly 5 U.S.C. §§ 7103 and 7121) and concluded that Congress intended to give employees who are subject to other personnel systems (such as the Title 32 system) the same grievance and appeal rights as Title 5 employees. *Local R-12-132*, 5 FLRA at 206-07. But the Third and Ninth Circuit Courts of Appeal quickly reversed the Authority's decisions in those two cases and held that Congress intended the Technicians Act, rather than the Statute, to govern in situations relating to appeals of adjutant general decisions in specific areas. *N.J. ANG*, 677 F.2d at 277-78; *see also Cal. Nat'l Guard v. FLRA*, 697 F.2d 874 (9th Cir. 1983).

The reasoning of the court in *N.J. ANG*, in upholding the final authority of adjutants general in certain matters, is important, as it directly affects our current dispute. First, the court recognized the role of the state National Guards as the Constitutional successors to the early state militias. 677 F.2d at 278. Yet it explained that the Guard

does not fit neatly within the scope of either state or national concerns; historically the Guard has

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<sup>24</sup> Pursuant to subsequent amendments, § 709(e) of the 1968 statute is now § 709(f).

been, and today remains, something of a hybrid. Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law.

677 F.2d at 278-79. Similarly, it said that the Technicians Act recognized the “sui generis” military-civilian status of technicians, as they were “declared to be federal employees, and were thereby afforded the benefits and rights generally provided for federal employees in the civil service. 32 U.S.C. § 709(d).”<sup>25</sup> *Id.* at 279. Simultaneously, however, the Technicians Act limited the rights of technicians in certain respects: for instance, matters relating to their discipline were to remain within the final discretion of the adjutants general. *Id.* The court summarized:

[W]e ... hold that the provisions of section 709[(f)] of the Technician Act remain as exceptions to the terms of the [Statute].... It bears emphasis that, under the [Statute], the Guard still must engage in collective bargaining with a union representing Guard technicians: the dispute here is not over coverage by the Act, but over the applicability of a few, concededly important, provisions of the Act.

*Id.* at 286. *See accord, Ind. Air Nat’l Guard, Hulman Field, Terre Haute, Ind. v. FLRA*, 712 F.2d 1187, 1191 (7th Cir. 1983) (holding that “§ 709[(f)] of the Technicians Act is a narrow exception to the Labor

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<sup>25</sup> Similarly, § 709(d) is now § 709(e). Hereafter, I will refer to the sections of the Technicians Act in their current form.

Management Act, thereby exempting the Guard from negotiating union proposals containing binding arbitration provisions which cover matters listed in §709[(f)].”)

The Authority acceded to the courts’ reasoning, and since that time it has enforced this fundamental accommodation between the Statute and the Technicians Act: technicians are accorded all rights to unionize and bargain collectively that other federal employees have under the Statute, except insofar as explicit provisions of the Technicians Act limit those rights. Accordingly, the Authority has recognized the responsibility of state adjutants general to control the military aspects of technician employment. *See, e.g., AFGE, AFL-CIO, Local 2953*, 7 FLRA 87, 90 (1981) (Technicians Act rendered nonnegotiable a union proposal limiting management’s ability to consider technician’s military performance in RIFs of civilian positions); *NFFE, Local 1623*, 28 FLRA 633, 643 (1987) (*Local 1623*) (proposal limiting management’s ability to find a technician’s civilian position “incompatible” with his military position was nonnegotiable, because matters relating to the military aspects of technician employment are not “conditions of employment” under the Statute). When the latter decision was reviewed and affirmed by the D.C. Circuit Court of Appeals, the court agreed that the subject of compatibility was a military matter, which is left entirely within the Adjutant General’s discretion by the Technicians Act. *NFFE, Local 1623 v. FLRA*, 852 F.2d 1349, 1352 (D.C. Cir. 1988). The court concluded:

The combined effect of the Labor-Management Act and the Technicians Act is to give National Guard technicians a limited right to negotiate over conditions of employment: But that right is circumscribed by the reality that a technician's military status will often impinge on his civilian status and that, when this happens, the needs of the military must prevail.

*Id.* at 1353. Similarly, the Authority stated in *Div. of Military & Naval Affairs, State of N.Y., Albany, N.Y.*, 15 FLRA 288,291 (1984), "while these technicians were granted status as Federal civilian employees by the Technicians Act, it is clear that Congress intended to organize and administer the technician program within the military framework of the National Guard."

On occasion, the Authority has erred in the opposite direction, by unduly restricting a technician's bargaining rights. Based on the language of 10 U.S.C. § 976(c)(2), which makes it a crime for any person "to negotiate or bargain ... on behalf of members of the armed forces, concerning the terms or conditions of service of such members," the Authority held that the National Guard could not bargain over union proposals relating to the assignment of training duties to technicians, even while they were in a civilian status. *Ass'n of Civilian Technicians, Wichita Air Capitol Chapter*, 58 FLRA 28 (2002). The appeals court disagreed. Starting from the premise, under 5 U.S.C. § 7102, that "[t]echnicians may engage in collective bargaining," the court noted that the criminal prohibition was an exception to that general right, and should be construed narrowly. *ACT Wichita*



*v. FLRA*, 360 F.3d at 196, 199. “When the Guard chooses to assign military training duties to technicians in their civilian capacity, those duties also become terms or conditions of civilian employment.” *Id.* at 198. Thus the bargaining proposal did not violate 10 U.S.C. § 976.

The consistent theme that emerges from the decisions of both the Authority and the courts is that the Technicians Act and the Statute must be construed together. While the Statute gives technicians broad rights to engage in collective bargaining (and imposes corresponding obligations on the state National Guards), those rights are limited by explicit provisions of the Technicians Act regarding the discretion of the state adjutants general over the military aspects of technician employment. Patrolling the border between the civilian and military aspects of technician employment is the difficult but essential job of the Authority,<sup>26</sup> and sometimes it produces difficult results.

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<sup>26</sup> Only recently, the Authority had occasion to reiterate this principle:

The Authority has explained that “[t]he two worlds [technicians] simultaneously inhabit are understandably governed by very different rules of employee-employer relations. As members of the Guard, technicians are subject to military authority; as civilian employees, they are covered by the ... [Statute], which permits them to bargain over conditions of their employment.”

*Laborers Int’l Union of N. Am.*, 70 FLRA 392,392 (2018) (citation omitted) (Member DuBester dissenting on other grounds).

This was never illustrated more clearly, or painfully, than in *Puerto Rico ANG*, cited earlier by the GC. In that case, the union representing civilian technicians announced that it would engage in informational picketing to protest working conditions. The base commander issued an order prohibiting them from picketing and told employees that they would be photographed if they did so. After the picketing began, the commander suspended the security clearances of twenty-five technicians who participated in the picketing and terminated a union official for organizing it. Notwithstanding the agency's contention that the Authority had no jurisdiction over it (because it was a state, not a federal, agency) or the dispute (because the entire controversy was a military matter), the Authority upheld its jurisdiction and concluded that the commander's order, his threats of surveillance, and the suspensions of security clearances all constituted unfair labor practices; therefore, it ordered the agency to take a broad range of remedial actions. 56 FLRA at 182-83. But the Authority also held that § 709(e) (now § 709(f)) of the Technicians Act deprived it of jurisdiction to review the retaliatory termination of the union official, because the Technicians Act prohibits appeals of adverse actions beyond the adjutant general. *Id.* at 181-82. While the majority recognized that this result leaves technicians with no protections against what was a clearly and flagrantly unlawful action, it held that the Technicians Act left them no choice. *Id.* at 182. The union, but not the agency, appealed the Authority's decision; the First Circuit Court of Appeals affirmed the Authority's decision that it could not review the union official's termination, but it

refused to examine Puerto Rico's claim that the Authority lacked jurisdiction of the entire case. *AFGE, Local 3936, AFL-CIO v. FLRA*, 239 F.3d 66, 69 n.l, 72 (1st Cir. 2001).

Thus we see that since the passage of the Statute in 1978, the Authority has been exercising jurisdiction over state National Guards and their adjutants general; regulating collective bargaining between the state National Guards and federally-certified unions; and developing a detailed case law that recognizes the limitations imposed by § 709(f) of the Technicians Act on the bargaining rights of technicians. We also see that the federal courts have uniformly recognized the Authority's jurisdiction in this area and enforced the federal statutory bargaining rights of technicians. When state National Guard officials violate these rules, the Authority and the courts have ordered state adjutants general to take remedial action, and they have complied. In most of these cases, the state officials did not directly raise a challenge to the Authority's jurisdiction, but the decisions of the courts were nonetheless clear that the Statute gave technicians federally enforceable rights. And in the few cases where the agencies did raise jurisdictional challenges, the Authority's jurisdiction has always been upheld.

The jurisdictional challenge to the Authority was most clearly and extensively addressed in the *Lipscomb* case, which was litigated initially in a representation proceeding at the Authority and then collaterally in a separate action brought by the Adjutant General of the Mississippi National Guard to enjoin the election ordered by the Authority. *Miss.*

*Army Nat'l Guard, Jackson, Miss.*, 57 FLRA 337 (2001) (*Miss. ANG*); *Lipscomb v. FLRA*, 200 F. Supp. 2d 650 (S.D. Miss. 2001), *aff'd* 333 F.3d 611 (5th Cir. 2003), *cert. denied sub nom. Cross v. FLRA*, 541 U.S. 935 (2004). The Authority reiterated points that it had recently made in its *Puerto Rico ANG* opinion: that the National Guard has both state and federal functions; that dual status technicians are federal employees; that when the state National Guards administer the technicians program they act in their federal capacity and thus are federal agencies; and that the Authority has jurisdiction over collective bargaining disputes involving technicians and state National Guards. 57 FLRA at 339-40. Additionally, it rejected the agency's argument that technicians are soldiers and their work is inherently military in nature. It noted the extensive case law showing that there is both a civilian and military component to technician employment, and the Authority has full jurisdiction to regulate the civilian aspects of that employment. *Id.* at 340.

After the Authority issued its decision, the Mississippi Adjutant General sought to have the U.S. District Court enjoin the election and declare that the Authority had no jurisdiction over him and his employees. Both the District Court and the Fifth Circuit Court of Appeals rejected all of the agency's arguments and agreed with virtually everything that the Authority had stated in its decision. The appeals court summarized its decision at the outset:

We hold that the civilian technicians, clearly federal employees by virtue of the National Guard Technicians Act ... are included under the terms of the FSLMRA as federal employees of an Executive

agency. We further find that the [Adjutant General] -- as an employer of these federal employees -- along with the MSNG and MSANG, which organizations operate under the AG's authority and direction, are federal agencies for the purpose of the FSLMRA, and consequently are subject to the jurisdiction of the Authority.

333 F.3d at 613. It then proceeded to shred the Adjutant General's arguments one by one.

Taking up the AG's constitutional argument first, the court stated that the modern-day National Guard is widely recognized as a hybrid entity combining both federal and state characteristics, a recognition that has been shared by the Supreme Court. *Id.* at 614. Congress embodied the dual nature of technician employment in the Technicians Act, § 709(e) of which "explicitly granted federal employee status" to technicians. *Id.* at 614, 616-17. The court next rejected the AG's assertion that even though he employs these "federal employees," he and the Mississippi National Guard are not federal Executive agencies under § 7103(a)(3) of the Statute, due to the purely state character of his office. The court cited *Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3rd Cir. 1974), a case not involving the FLRA, to reject this notion: "Section 709 'charges the adjutant generals with employment and administration of the civilian technicians who are federal employees. In view of the foregoing there can be no doubt that the Adjutant General of Delaware is an agency or an agent of the United States....' 333

F.3d at 618.<sup>27</sup> The *Lipscomb* court concluded that there was “no doubt that the hybrid character of the AG includes a federal component, which in his capacity as employer of the technicians renders him an ‘Executive agency.’” *Id.* Accordingly, the court agreed with “decades of settled practice and the decisions of our sister circuits, which have upheld the organizational rights of national guard civilian technicians under the FSLMRA.” *Id.* at 620.

This brings us to the most recent judicial statement on this issue, *FLRA v. Mich. ANG, supra*. The Authority found that the National Guard violated technicians’ rights under the Statute when the agency told the technicians’ union that it could communicate with employees regarding the proposed termination of two technicians only through the agency’s lawyer. The Sixth Circuit Court of Appeals enforced the Authority’s decision. The agency argued that § 709(f) of the Technicians Act prohibits the Authority from reviewing actions taken by the agency in a

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<sup>27</sup> On this same point, the Authority, in its decision in the representation proceeding of this case, quoted the language of § 709(d) of the Technicians Act (“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.”) as the basis for concluding that when the state National Guards administer the technicians program, they act in their federal capacity. 57 FLRA at 339. Or, as the District Court stated in its opinion, the adjutants general act explicitly as the designees of the federal service secretaries pursuant to § 709(d), and thus for purposes of compliance with the Statute, the adjutants general are, by federal law, the “duly authorized representatives” of the service secretaries. 200 F. Supp. 2d at 661.

termination proceeding, as the Adjutant General has unreviewable discretion in this area. 878 F.3d at 177. But the court responded that “the Technicians Act will only insulate the Guard’s communications ban from review if the ban *was* in fact a regulation of termination proceedings” - a premise the court rejected, because it also banned communications having nothing to do with the termination of the two technicians. *Id.*

More fundamentally, the Michigan National Guard argued that the Authority could not intervene in the case, because dual status technicians “operate in a capacity that is ‘irreducibly military in nature.’” *Id.* at 178. Reviewing the language and legislative history of the Technicians Act, the court reaffirmed the principle, articulated in *Lipscomb* and *N.J. ANG*, that dual status technicians are federal employees and have the right to engage in collective bargaining protected by the Statute. *Id.* at 174, 177. It held that while Congress took steps in the Technicians Act to protect the authority of state adjutants general regarding the military aspects of technician employment, it also required those officials to comply with the Statute’s requirements concerning collective bargaining. It concluded: “Military status, in short, does not flatly deprive dual-status technicians of their statutory right ‘to form, join, or assist any labor organization ... freely and without fear of penalty or reprisal,’ 5 U.S.C. § 7102.” *Id.* at 178-79.

Now that I have retraced the case law regarding collective bargaining in the state National Guards, there is very little left to say about the jurisdictional arguments raised by the Respondent in this case. For

all intents and purposes, their arguments have already been rejected by the Authority and every federal court to date. The few court decisions they cite in their favor have involved agencies other than the FLRA and laws other than the Statute, and even those decisions appear to have been superseded by recent Congressional action.

Respondent claims that the Authority lacks jurisdiction over technicians because they are “irreducibly military in nature.” Resp. Br. at 24 (citing *Fisher v. Peters*, 249 F.3d 433, 439 (6th Cir. 2001)). The problem with this argument is two-fold. First, the premise has been consistently rejected by the courts, in the context of the Statute and the FLRA’s jurisdiction. As I have already discussed, all federal courts that have addressed the coverage of the Statute to National Guard technicians have examined the constitutional structure and history of the National Guard, recognized the hybrid military-civilian nature of dual status technicians, and concluded that technician employment is not “irreducibly military.” See *Lipscomb*, 333 F.3d at 614-15, and cases cited there; *N.J. ANG*, 677 F.2d at 286; see also *Local 1623*, 28 FLRA at 643, where the Authority ruled, and the DC Circuit agreed, that union proposals connected to the military aspects of technician employment are not negotiable. The D.C. Circuit’s statement in *ACT Wichita v. FLRA*, 360 F.3d at 198, which I quoted earlier, similarly reflects the view of all the courts that the military and civilian aspects of technician employment can indeed be separated, and that technicians have the right to bargain collectively over the civilian aspects, under the jurisdiction of the Authority.



Second, the court which authored the *Fisher* decision cited by Respondent has expressly held that the rationale of that case is not applicable to the Statute. *FLRA v. Mich. ANG*, 878 F.3d at 178. In *Fisher*, the Sixth Circuit had referred to the “irreducibly military” nature of technician employment to bar lawsuits by individual technicians under the Civil Rights Act of 1964, and it cited similar language in *Leistiko v. Stone*, 134 F.3d 817, 818 (6th Cir. 1998), which barred individual lawsuits under the Rehabilitation Act.<sup>28</sup> Despite the Michigan National Guard’s insistence that the cases were indistinguishable, the court cited the widespread judicial application of the Statute’s collective bargaining system to state National Guard technicians as evidence that the military and civilian aspects can be separated. 878 F.3d at 178-79. And while the court did not make this point, I would add that (unlike the case law regarding dual status technicians under Title VII and the Rehabilitation Act) the Authority has developed an extensive body of law recognizing the distinction between a technician’s military and civilian duties, and it has given considerable deference to the adjutants general in identifying matters that are essential to the military preparedness of the National Guard. This belies the Respondent’s contention that technicians’ duties are irreducibly military.

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<sup>28</sup> As I will explain shortly, recent amendments to the Technicians Act likely overrule the legal basis of the *Fisher* and *Leistiko* decisions, even within the narrow confines of the Civil Rights and Rehabilitation Acts.

The specific issues in our case illustrate how the Respondent's alleged ULPs relate only to the civilian aspects of technician employment. To take one example, the Respondent has admitted that it stopped deducting union dues from employees; pay. Whatever the factual or legal justifications it may have had for that action, this subject had nothing whatsoever to do with the technicians' military duties; it was not based on the Adjutant General's responsibility for ensuring the military preparedness of his technicians. Furthermore, pursuant to § 7114(c) of the Statute, the Department of Defense had reviewed the CBA negotiated by the parties in 2011, to ensure that it was "in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation...." If any of the negotiated terms related to the military duties of technicians or interfered with the Adjutant General's military responsibilities, DoD had the opportunity at that time to disapprove those provisions. Indeed, DoD did disapprove some portions of the CBA and returned it to the parties for renegotiation, after which the revised CBA was approved. *See* First Attachment to GC Exhibit 9. The Respondent is now arguing, in effect, that both the Adjutant General and the Department of Defense negotiated or endorsed a contract that was unlawful in its entirety, as it compromised the "irreducibly military" nature of technician employment. I find this to be a wholly untenable position, both factually, legally, and equitably.

Next, the Respondent claims that the Authority lacks jurisdiction over "the Adjutant General of Ohio, his department, the Ohio National Guard, or the Technicians he administers," because they are state,

not federal, officials or agencies. Resp. Br. at 19. But *Lipscomb* and several of the other cases cited earlier refute this theory. The court in *N.J. ANG*, 677 F.2d at 278, discussed the hybrid state-federal nature of the National Guards and noted that while they are state agencies, “the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law.” Respondent’s witnesses at the hearing acknowledged that they and the Ohio Adjutant General are governed by regulations and instructions issued by the Department of Defense and the National Guard Bureau. Tr. 179- 81, 270-73, 275-77; GC Ex. 2; Resp. Ex. 1. Although the state National Guards are not in the same command structure as the National Guard Bureau, DoD and the Bureau own much of the state agencies’ property and control most of their financing. Despite admitting that they are bound by this complex web of DoD regulations - regulations that they obey - the Adjutant General insists that he is not bound by the Statute. This is a claim that smacks of convenience, not law. It certainly has not garnered any judicial support.

Most importantly for our purposes, § 709(d) of the Technicians Act provides that the Army and Air Force secretaries “shall designate the adjutants general ... to employ and administer the technicians authorized by this section.” In other words, the state adjutants general carry out their functions in employing technicians, and receive their legal authority to do so, through the direct order of the service secretaries. Both the Authority (in *Puerto Rico ANG*, 56 FLRA at 178, and in *Miss. ANG*, 57 FLRA at 339) and the Fifth Circuit (in *Lipscomb*, 333 F.3d at 613) pointed to § 709(d) as proof that when the state National Guards

act as employers of dual status technicians, they do so in their federal capacity. The *Lipscomb* court found this conclusion to be “incontrovertible.” *Id.* at 617. See also *NeSmith v. Fulton*, 615 F.2d 196, 198 (5th Cir. 1980), and cases cited there. So do I.

Essentially, the only case the Respondent can cite in its favor on this matter is *Singleton*. There, an Ohio National Guard technician claimed at the Merit Systems Protection Board that he had been denied a promotion in reprisal for his protected activity. The MSPB ruled, and the Federal Circuit Court of Appeals agreed, that even if he could prove unlawful reprisal, it could not provide him with any effective relief, because an order of the MSPB is not enforceable against the Ohio National Guard. 244 F.3d at 1336-37. The court reasoned that even if Singleton were to prevail in his reprisal claim, a remedial order could not be directed to the Ohio Adjutant General, who is not a federal employee. The MSPB could possibly order the Ohio National Guard to take corrective action, since the MSPB has ruled that a state National Guard is a federal agency, but the Guard can act only through its adjutant general, and the MSPB lacks any authority to order the adjutant general to do anything. *Id.*

With all due respect to the Federal Circuit, this reasoning sounds both circular and defeatist. Even though the court acknowledged that the Ohio National Guard may indeed be a federal agency - against which both the Board and the Authority, under their separate statutes, can issue remedial orders - it refused to entertain the possibility of issuing an order against the Guard itself. Federal

courts issue orders to federal agencies all the time, but the *Singleton* court offered no explanation for passing over that avenue of relief and singling out the adjutant general as the only entity to whom the order must be issued. And then, as for the possibility of ordering the adjutant general to take action, the court simply threw up its hands and concluded that the MSPB had no authority to order the AG to take any action. *Id.* at 1337. But the case law is replete with examples of courts and federal agencies ordering agencies to take actions, as well as ordering the heads of those federal agencies to do so. None of the federal circuit courts that have enforced orders under the Statute have expressed the slightest difficulty in issuing such orders in cases against state National Guards, and the *Lipscomb* court was quite emphatic that the Mississippi Adjutant General himself and the Mississippi National Guard were federal agencies, subject to orders issued by the Authority or the court. 333 F.3d at 613, 617-18; *see also* cases cited by the Authority in *Miss. ANG*, 57 FLRA at 339. The Authority has similarly ordered state National Guards, as well as state adjutants general, to take specific actions in far too many cases to list,<sup>29</sup> and circuit courts have enforced those orders, when called upon.<sup>30</sup>

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<sup>29</sup> *See, e.g., Mich. ANG*, 69 FLRA at 397; *Office of the Adjutant General, Mo. Nat'l Guard, Jefferson City, Mo.*, 58 FLRA 418,422 (2003); *Ohio ANG*, 21 FLRA at 1072-73.

<sup>30</sup> *See, e.g., FLRA v. Mich. ANG*, 878 F.3d at 180; *Ass'n of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA*, 353 F.3d 46 (D.C. Cir. 2004). In most cases when the Authority has ordered a

Regardless of the merits of the *Singleton* decision, it was a decision of the Federal Circuit, which does not handle FLRA cases or deal with the Statute; it analyzed the particular statutory language regarding the jurisdiction and remedial powers of the MSPB, not the FLRA. When the Sixth Circuit (which does have jurisdiction over the Respondent and the FLRA) addressed this same argument in *FLRA v. Mich. ANG*, it ruled that it (and the Authority) could order the state National Guard to remedy its unfair labor practice. 878 F.3d at 180. The *Lipscomb* court addressed this point in greater detail, finding that the Authority could order the state adjutant general, and the state National Guard, to take a wide range of actions. 333 F.3d at 617-20. Thus the *Singleton* decision sheds no light whatsoever on our current case.

Moreover, it appears that recent Congressional action has further narrowed, if not eliminated, the applicability of *Singleton*, *Fisher*, and *Leistikio*. On December 19, 2016, Congress amended the Technicians Act, including § 709(f) and (g). National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000, § 512 (2016). Through these amendments, Congress now bars appeals of personnel actions such as RIFs and adverse actions beyond the adjutant general only “when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components[.]” 32 U.S.C. § 709(f)(4) (2016). In

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state National Guard or adjutant general to take specific actions, the order has not been challenged in court.

other words, technicians are free to challenge adverse actions beyond the adjutant general (for instance to an arbitrator in a negotiated grievance procedure, or to the Authority), if their claims arise from their civilian duties. A new paragraph (f)(5) also permits many technicians to appeal RIFs and adverse action to the MSPB and the Equal Employment Opportunity Commission. 32 U.S.C. § 709(f)(5) (2016). As Congress noted, these amendments were not intended to create new rights for technicians, but simply to “clarify” their existing rights and protections. *See* S. Rep. No. 114-255, at 139 (2016); H.R. Conf. Rep. 114-840, at 1016-17 (2016). By virtue of these amendments, it is clear that Congress recognizes that the civilian and military aspects of technician employment can indeed be separated, and that many personnel decisions of adjutants general can be reviewed by courts and other authorities. Because § 709 now expressly permits technicians to appeal certain matters to the MSPB, and because these appeal rights make sense only if they can result in enforceable MSPB orders, *Singleton’s* conclusion that MSPB orders cannot be enforced against the National Guard is almost certainly wrong. And if *Singleton* was wrong about the obligation of an adjutant general to obey the order of a federal agency, then the Respondent has no support whatsoever in its argument.

Applying this precedent, I conclude that the Adjutant General of Ohio, as an employer of federal civilian technicians who are employees within the meaning of the Statute, is an agency within the meaning of § 7103(a)(3) of the Statute. Further, because the Ohio Adjutant General’s Department and the Ohio National Guard are entities that operate

under the authority and direction of the Adjutant General, I find that they too are agencies within the meaning of § 7103(a)(3) of the Statute. Accordingly, the Authority has jurisdiction over the Respondent.

I will now consider the unfair labor practices alleged in the complaints. These allegations fall into three general categories: the independent violations of § 7116(a)(1), the termination of employee dues allocations, and the unilateral changes in conditions of technicians' employment.

The Agency's Communications Interfered with and Restrained Employees in the Exercise of their Rights

I will first address the allegations that the Respondent committed independent violations of § 7116(a)(1) of the Statute, because those allegations are relevant to many other aspects of this case. The Agency's communications to employees - the September 28 memo and several other written statements thereafter - cast a shadow over the Agency's subsequent relations with the Union and with employees, and they affect my consideration of the other alleged unfair labor practices. In essence, the September 28 memo and its frequent reaffirmations poisoned the atmosphere in which labor-management relations could occur.

Under § 7102 of the Statute, an employee has the right to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal. In addition, it protects the right to "engage in collective bargaining with respect to conditions of employment through representatives chosen by employees...." *Id.* Section 7102 protects (among other things) employees' right to file and



process grievances under a collective bargaining agreement. *Scott AFB*, 34 FLRA at 965.

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. *Mich. ANG*, 69 FLRA at 396. For instance, the Authority has held that an agency violates § 7116(a)(1) by indicating that “there would be no point” in filing a grievance,<sup>31</sup> or by asserting that an employee had no rights or recourse under the negotiated grievance procedure because the agreement had expired.<sup>32</sup> Additionally, an agency’s violation of § 7115 can interfere with an employee’s right under § 7102 to form, join, or assist any labor organization. *AFGE, AFL-CIO*, 51 FLRA 1427, 1438 (1996).

The test for determining whether a statement or conduct violates § 7116(a)(1) is an objective one. *Mich. ANG*, 69 FLRA at 396. Although the circumstances of each case are taken into consideration, the standard is not based on the subjective perceptions of the employee or on the intent of the employer. Rather, the question is whether, viewed objectively, the agency’s action or statement would tend to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Statute, or whether the employee could reasonably have drawn a coercive inference from the action or statement. *U.S. Dep’t of Transp., FAA*, 64 FLRA 365, 370 (2009). A statement can be coercive if it would have a “chilling effect” on

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<sup>31</sup> *Scott AFB*, 34 FLRA at 966.

<sup>32</sup> *George AFB*, 4 FLRA at 23, 29-30.

protected activity, or if it would cause a reasonable employee to “think twice” before exercising a protected right. See *Lowry AFB*, 16 FLRA at 960. Violations of § 7116(a)(1) can pertain to interference with the rights of a union as well as of an individual. *U.S. Dep’t of the Air Force, 62nd Airlift Wing, McChord AFB, Wash.*, 63 FLRA 677,679 (2009). And an agency can violate § 7116(a)(1) in its dealings with a union representative, even if the representative is not an employee of the agency. See *U.S. Dep’t of the Army, Army Corps of Eng’rs, Portland Dist., Portland, Or.*, 60 FLRA 413,417 (2004).

With these rules in mind, I evaluate the General Counsel’s allegation that the September 28 memo interfered with, restrained, and coerced employees in the exercise of their protected rights. It is important to understand the context in which Colonel Giezie made the statements in that memo. It was sent a few days after Giezie and Aukland had sent a letter to the Union, notifying it that “[t]he Agency no longer recognizes the existence of any portion of the former [CBA].... Until a new CBA is in effect, the Agency will continue to assert.... jurisdictional defenses to the Federal Services Labor Management Relations Act.” Resp. Exs. 3 & 4. In the September 28 memo, Giezie indicated that he had already notified the Union that management would no longer be bound by the CBA and would challenge the applicability of the Statute to technicians.<sup>33</sup> Therefore, the memo was sent to

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<sup>33</sup> Although the September 19 letter was not actually delivered to the Union until November 30, the September 28 memo effectively informed everyone of the contents of that letter.

provide “guidance to supervisors for management of their ... Technician workforce.” GC Ex. 2, ¶ 3. Giezie advised recipients that the Agency “is not bound by any provision of the CBA” and “does not consider itself obligated to abide by the FSLMRA.” *Id.*, ¶¶ 1, 2. In the absence of the Statute and the CBA, “grievances will be forwarded to the HRO for ad hoc resolution.” *Id.*, ¶ 3. Other “matters formerly the subject of the CBA” (including absence and leave, awards, and discipline) would be governed by internal personnel regulations. *Id.*, ¶¶ 3, 4. Moreover, while Giezie testified that he intended the memo to be sent only to supervisors and managers, in fact it was sent - at his direction and by his assistant - to over 2,000 people, including 284 bargaining unit employees.

The objective meaning of these statements is clear: technicians would no longer have any of the legal protections given to federal employees under the Statute; neither technicians nor their union would be able to utilize the CBA’s grievance procedure to enforce any of the conditions of employment contained in the CBA; and management would be guided only by its own regulations in dealing with employees. And while the memo did not explicitly spell out the consequences of the Agency’s disavowal of the Statute, those consequences were equally clear: the FLRA would (at least in the Agency’s view) no longer be able to utilize any of the procedures contained in the Statute to regulate collective bargaining at the Agency. In other words, bargaining impasses would no longer be resolved at the FSIP; negotiability disputes would no longer be resolved by the Authority; contract disputes could no longer go to arbitration; and if management retaliated against a technician for

engaging in union activity, the Authority would not be able to protect him. Employee witnesses at the hearing confirmed that they understood the memo in this manner, but I do not need their personal impressions to understand both the explicit and implicit meaning of Giezie's words.

Without question, Colonel Giezie's statement that grievances would no longer be resolved through the CBA's grievance procedure, but instead through an "ad hoc" process administered by the HRO, was likely to coerce employees and interfere with their right to file grievances. This conclusion is most directly illustrated by the *George AFB* case. There, when an employee sought to file a grievance, she was told that because the agency's CBA with its union had expired, there was no negotiated grievance procedure. The judge stated, and the Authority affirmed, that "any action by an employer which discourages or interferes with an employee's filing of a grievance pursuant to a negotiated agreement inherently interferes with the rights assured employees under Section 7102 of the Act." 4 FLRA at 29-30. He further concluded that the agency official's "statements to the employee that she had no rights or recourse under the negotiated grievance clause, clearly discouraged or interfered with Crocker's filing of her grievance" and violated 7116(a)(1). *Id* at 30. It follows, therefore, that Colonel Giezie's statement in the September 28 memo - that the negotiated grievance procedure would no longer be followed - discouraged technicians from filing grievances and violated 7116(a)(1). *See also U.S. Dep't of Labor, Emp. & Training Admin., S.F, Cal., 43 FLRA 1036, 1039-40 (1992) (finding that § 7102*

protects an employee's assertion of a right emanating from a CBA).

But as I have already noted, the September 28 memo did not simply eliminate the negotiated grievance procedure; it also advised employees that the entire CBA was null and void. In other words, none of the multitude of contract provisions negotiated by the Union over many years, concerning all sorts of conditions of employment, had any validity whatsoever, and employees were subject entirely to the dictates of the Agency. None of the rules regarding leave, hiring, promotion, safety, seniority, RIFs, and discipline, which technicians had become accustomed to following, could be relied upon any more. But the memo went even further: not only was the Union powerless to protect employees regarding the conditions of their employment, but so was the FLRA. Asserting their rights would not only be a futile act for employees, but a dangerous one. Technicians would be totally at the mercy of the Adjutant General and his HR office. I can think of nothing that would have a greater chilling effect than statements like these. Once employees have been told that the Union and the federal government are powerless to protect them in their dealings with the Agency, they understand that both their civilian and military careers can be jeopardized by challenging a supervisor's or an HR official's directions.

The Respondent argues that Giezie was merely expressing the Agency's legal opinion on the jurisdiction of the Statute. Resp. Br. at 24-25. This claim is both disingenuous and dangerous. It is one thing for an agency to pursue a legal theory in court

or before me; it is another thing entirely to publicly advise managers and employees that employees have no legal right to bargain collectively, file grievances, or engage in union activity, or that a negotiated agreement will no longer be complied with. The Respondent (citing *National Guard Bureau*, 55 FLRA at 663) correctly notes that the Authority itself has often stated that under the Technicians Act, the collective bargaining rights of technicians are more limited than most other federal employees. But that is a far cry from telling technicians they have no federally enforceable rights whatsoever, as the Agency did here. In *National Guard Bureau*, and in numerous other cases already discussed, the Authority and the courts have ruled that National Guard technicians have a wide range of rights under the Statute, even though their rights are more constrained than those of other federal employees. *See, e.g., N.J ANG*, 677 F.2d at 286.

The Agency reiterated the coercive message of its September 28 memo on several occasions. Hours after the memo was sent, Colonel Giezie and Tabler sent the same recipients another email in which Giezie asserted, “[T]he union has been notified that the agency no longer recognizes any portion of the previously existing CBA.” GC Ex. 20. This email also contained the September 28 memo as an attachment. The coercive message was reiterated by Aukland in his January 10 letter to Jung and in his March 1 letter to Rice. In the January 10 letter, Aukland repeated Giezie’s earlier assertion that the CBA was null and void, and he denied “that the FLRA has some lawful authority over The Adjutant General of Ohio.” GC Ex. 3 at 2. He further asserted that “until there is a CBA,

no employee should be paying dues to AFGE.” *Id.* Aukland went beyond Giezie’s prior comments by stating further that “[w]hile the Agency plans to start with those employees not having SF 1187 on file, the Agency reserves the right to terminate all union dues allotments until there is a CBA.” *Id.* On March 1, after Rice objected to the proposed termination of his union dues allotment and threatened to file a grievance (GC Exs. 6 & 15), Aukland told Rice that he could not file a grievance under the CBA because the CBA had expired and was therefore a “nullity,” and that Rice could only use “the process deemed appropriate by the HRO Director or his designee.” GC Ex. 6 at 1-2. By asserting that a contractual grievance could not be filed because the CBA had expired, Aukland interfered with, restrained, and coerced Rice in the exercise of his right to file grievances pursuant to a negotiated grievance procedure. *George AFB*, 4 FLRA at 29-30.

The letters sent to employees on April 4 compounded the Agency’s interference with employees’ right to assist the Union, by telling them that the Agency “will recommend the termination of your Union Dues Allotment by the Defense Finance and Accounting Service (DFAS) because there is no collective bargaining agreement with AFGE Local 3970.” GC Exs. 8 & 14; Tr. 98-99. This was a fulfillment of Aukland’s earlier promise to Rice to terminate all employees’ dues allotments. The April 4 letters were sent to 41 technicians whose SF 1187s were still on file with the Agency; nevertheless, the Agency told these employees that it would seek DFAS approval to stop their dues allotments. While the Agency subsequently deferred acting on this plan, it

has not rescinded its notices to the 41 technicians, and the coercive effects of the April 4 letters linger unabated. These letters communicate not only to the 41 affected employees, but to the Union and the entire bargaining unit, that the Agency will utilize the lack of a CBA as the basis for cutting off the Union's financial support -- an action that would impair the Union's ability to represent dues-paying and non-dues-paying employees alike.

Most recently, the Agency interfered with employee rights in its May 9 letter to current Union President Wayble, by telling Wayble that while the Agency was willing to negotiate a new CBA with officials of Local 3970, it would not permit officials of the AFGE's national or regional offices to participate in such negotiations, and it would not allow those officials onto state property. GC Ex. 28. Additionally, it indicated that it would resume contract negotiations only "[i]f the FLRA's complaint is dismissed ... and ... provided the other conditions outlined above are met." *Id.* at 2. Section 7102 of the Statute "encompasses a union's right to designate its representatives, including a non-employee who will have access to an agency's premises to conduct representational activities." *Bureau of Indian Affairs, Isleta Elementary School, Pueblo of Isleta, N.Mex.*, 54 FLRA 1428, 1438 (1998); *see also Phila. Naval Shipyard*, 4 FLRA 255, 266-68 (1980). The May 9 letter clearly violates the Union's right to designate regional or national officials to assist them in negotiations.

I reject the Respondent's argument that, because the September 28 memo was intended only for supervisors and managers, the Agency should not be



held liable for it. This claim simply is not credible, given the facts of this case. Although the record is unclear whether Ms. Tabler (the HR assistant who distributed the memo) was an agent of the Respondent, it is undisputed that she worked directly for Colonel Giezie and sent the memo (twice in one day) at his direction. She told Giezie that she had no management-only distribution list, and Giezie told her to go ahead and use the “A” and “D” lists. As the director of this department, it is clear that Giezie sent out considerable correspondence to both employees and supervisors, and even if he did not explicitly understand who would be receiving the memo, he certainly should have. His willful ignorance of that fact does not excuse the reality that the memo was directly received by nearly 300 bargaining unit members, and subsequently passed on undoubtedly to hundreds more. Giezie admitted as much at the hearing. Tr. 412-13.

Even if Colonel Giezie intended the September 28 memo to be distributed only to management officials, the contents of the memo make it clear that the “guidance” contained in it was meant to be passed on to the entire bargaining unit.<sup>34</sup> He was telling supervisors that the Agency was no longer bound by the CBA, and that it didn’t consider itself obligated to

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<sup>34</sup> The fact that the memo was sent to over 2000 people in all, is somewhat mind-boggling in itself. The number of supervisors and managers in the Ohio National Guard is certainly nowhere near 2000; thus it appears that the memo was sent not only to those supervisors and to 284 bargaining unit technicians, but also to hundreds of nonsupervisory, nonbargaining-unit employees.

comply with the Statute. Giezie told his supervisors that until these disputes were resolved, the terms of the CBA and the negotiated grievance procedure would not be observed, and the HRO would set its own rules on conditions of employment that had previously been the subject of the CBA. GC Ex. 2. Thus, the Agency was not merely “expressing its opinion” or exercising its freedom of speech: instead, the Agency was directing all supervisors to ignore the CBA and submit all labor relations problems to the HRO for unilateral resolution. If a technician were to approach a supervisor with a potential grievance, and the supervisor told him he had no right to file a grievance, the supervisor would be acting fully within the scope of the memo’s “guidance.” If a supervisor or investigator were to question an employee about an incident that might result in disciplinary action, it would be perfectly understandable (in light of this memo) for the interrogator to refuse a request for union representation. If a union representative were to request official time to meet with employees or management about a problem, his supervisor would be acting fully within the scope of the September 28 memo if he told the representative he was no longer entitled to official time. Thus it is preposterous for the Respondent now to claim that it bears no responsibility for the fact that hundreds of technicians received a copy of a memo that was intended to be applied to them anyway.

Finally, I note that the Agency has never retracted the contents of the September 28 memo. At some point in the weeks after September 28, it was inevitable that word spread back to supervisors and HR officials that the memo had been sent to technicians. There was

ample time for Colonel Giezie to advise all technicians, publicly and in writing, that the Agency would continue to observe the terms of the CBA and the Statute until its legal claims were resolved, but he did not do so; instead, he and Aukland doubled down on the September 28 memo and continued to assert publicly that the CBA was void and that the Statute didn't cover them. The Agency must, therefore, accept the legal liability for the unlawful statements it has made.

For all of these reasons, I find that the Respondent's statements in the September 28 memo; the January 10 letter to Jung; the March 1 letter to Rice; and the April 4 letters interfered with, restrained, and coerced employees in the exercise of their rights under the Statute, in violation of § 7116(a)(1).

The Respondent Violated § 7116(a)(1) and (5) of the Statute by Refusing to Be Bound by Mandatory Terms of the CBA, including Provisions Concerning the Grievance-Arbitration Procedure and Official Time

Now that I have established the unlawfulness of the Agency's ongoing communications with employees between September 2016 and at least May 2017, we can better evaluate the GC's allegations that the Agency repudiated mandatory terms of the CBA, thereby refusing to negotiate in good faith with the Union, in violation of § 7116(a)(1) and (5) of the Statute.

The GC alleges that the Agency refused to comply with the CBA's grievance procedure, as well as CBA

provisions regarding official time and discipline.<sup>35</sup> The Agency insists that it continued to “perform[] under all the terms in the CBA” despite raising its “jurisdictional concerns[.]” Resp. Br. at 34. Colonel Giezie testified that he instructed supervisors to follow the CBA grievance procedure, although no grievances had been filed. Tr. 383. While the GC’s evidence of explicit refusals to comply with some of the CBA provisions is vague, evidence of other refusals is convincing, and all of the evidence must be evaluated in the context of the Agency’s repeated announcements that the CBA was void and would not be honored.

Over the years, the Authority has reversed itself and modified many of its interpretations of the Statute, but one rule has remained constant. In one of its earliest cases (which actually drew upon precedent under the Executive Order), the Authority stated: “the existing personnel policies and practices and matters affecting working conditions -- including negotiated grievance and arbitration procedures -- must continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties to the contrary or unless modified in a manner consistent with the Statute.” *George AFB*, 4 FLRA at 23. That rule has been consistently applied in the ensuing forty years, most recently in *IUPEDJ*, 68 FLRA at 1004. Along the way, this same rule was applied in a case involving the Ohio Adjutant General,

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<sup>35</sup> The GC also alleges that the Agency unilaterally changed conditions of employment regarding union dues allotments and merit promotion, but I will discuss them in subsequent sections.

in the *Ohio ANG* case, 21 FLRA at 1087. Therefore, it is somewhat perplexing that a labor relations professional such as Mr. Aukland, who served as General Counsel of the Ohio National Guard for twenty-five years and has since worked as a labor relations assistant there, could issue legal pronouncements, such as the September 28 memo, which fly in the face of longstanding precedent.

In applying this rule, the Authority has specified that while terms and conditions of employment resulting from permissive bargaining may be unilaterally terminated by either party when the CBA expires, conditions of employment involving mandatory subjects of bargaining must be maintained. *U.S. Dep't of Justice, INS, Wash., D.C.*, 52 FLRA 256, 260 n.3 (1996); *see also U.S. Food & Drug Admin. Ne. and Mid-Atl. Regions*, 53 FLRA 1269, 1275-76 (1998), for discussion of what constitutes a permissive subject. In accordance with this principle, the Agency's Human Resources Officer notified the Union in 2014 that it would stop complying with certain permissive terms of the soon-expiring CBA, while continuing to follow the remainder of the agreement. GC Ex. 10. Among the issues that have been held to be mandatory subjects of bargaining are: matters pertaining to negotiated grievance and arbitration procedures;<sup>36</sup> official time;<sup>37</sup> procedures for discussing potential disciplinary matters informally;<sup>38</sup> consultation with a union prior to changing the area

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<sup>36</sup> *IUPEDJ*, 68 FLRA at 1004.

<sup>37</sup> *Materiel Command*, 49 FLRA at 1119.

<sup>38</sup> *Local 3, Int'l Fed'n of Prof'l & Tech. Eng'rs, AFL-CIO*, 25 FLRA 714, 720 (1987).

of consideration;<sup>39</sup> and procedures for deducting and remitting union dues.<sup>40</sup> After a CBA has expired, an agency that unilaterally terminates a contractual provision (or provisions) that constitutes a mandatory subject of bargaining violates § 7116(a)(1) and (5) of the Statute. *SSA*, 44 FLRA at 881.

In stating that the Agency “is not bound by any provision of the CBA,” the September 28 letter clearly repudiated those CBA terms involving mandatory subjects of bargaining. GC Ex. 2. These terms include the grievance and arbitration procedure in Article 16, the official time provisions in Article 11, and the provisions concerning discipline in Article 15 of the CBA.

Not only did the September 28 memo repudiate the CBA in general, but it specifically imposed a new, “ad hoc” grievance procedure, to be administered by the HRO. GC Ex. 2 at 2. This corroborates what Auckland stated in his March affidavit, in which he said: “I do not view us as having a grievance procedure per se. [W]e’re not going to process them under the five-step process under the expired CBA.” GC Ex. 1(r), Auckland Affi. at 8. This was clearly done unilaterally, without notifying or bargaining with the Union. Although Colonel Giezie claimed at the hearing that his office has instructed supervisors to observe the CBA and the negotiated grievance procedure (Tr. 382-84), there is no evidence that employees have been advised of this, and I find it incredible. Giezie himself acknowledged

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<sup>39</sup> *SSA*, 44 FLRA at 880-81.

<sup>40</sup> *U.S. Dep’t of the Treasury, U.S. Mint*, 35 FLRA 1095, 1099 (1990) (*U.S. Mint*).

that the September 28 memo gave employees the impression that they had no grievance rights under the CBA, and that employees would only learn otherwise if they spoke directly to him. Tr. 384. The testimony of Wayble and Higginbotham, that they were able to resolve a few employee complaints informally with supervisors (Tr. 49, 107), does not establish that the CBA grievance procedure was being followed, but only that some supervisors continued to meet with Union officials. The overwhelming evidence shows that the Agency made it clear to employees that their only recourse was to follow an ad hoc procedure under the final control of the HR director. Accordingly, I find that the Respondent unlawfully changed the technicians' conditions of employment by imposing a new, ad hoc grievance procedure and by repudiating the negotiated procedure.

With respect to official time, Higginbotham testified that he approached his supervisor after September 28 about a problem that required his attention as a Union steward, and he requested official time to handle it. His supervisor called the HRO while Higginbotham waited in the room, and when he got off the phone the supervisor told Higginbotham that official time was no longer being recognized. Tr. 94-95, 102-03. Auckland confirmed that after September 28, the Agency no longer accepted the provision in Article 11 entitling the Union President to 100 percent official time, but he was ambiguous as to whether management granted official time to other Union officials. Tr. 335-36. No management witness offered any specific evidence showing that it continued to grant official time. In light of the sweeping language of the September 28 memo, and the above-

cited testimony of Higginbotham and Aukland, I find that the Agency told at least one Union steward that official time was no longer being granted, and that the Agency renounced its contractual obligation to grant 100 percent official time to the Union President. Accordingly, the Respondent violated § 7116(a)(1) and (5) by changing its policy regarding official time.

However, the GC has not established that the Agency changed its policy or practice regarding disciplinary actions. I note first that the GC offered no evidence of specific instances in which an employee was disciplined and the Union was not allowed to discuss it with the supervisor. Higginbotham's testimony was quite vague, saying only that after September 28 "I didn't get hardly any calls from anybody, other than maybe an employee." Tr. 96. Compounding the difficulty, Article 15 of the CBA is similarly vague as to the supervisor's duty in such situations. It requires that before disciplinary action is initiated, "the affected employee and a union representative will be given the opportunity to informally discuss the problem ... with the supervisor." GC Ex. 9 at 11. Whether this means the supervisor has an affirmative obligation to notify the Union, or whether the supervisor simply is obligated to meet with the Union on request, is unclear, and the hearing testimony did not shed light on this issue. While I recognize that the Agency's repeated statements that the CBA was void, and that the Statute didn't protect them, likely deterred employees from seeking Union assistance in disciplinary situations, I have already found that those statements constituted independent violations of § 7116(a)(1) of the Statute. I don't believe that the evidence supports



a further finding that the Respondent changed its policy regarding disciplinary actions.

The Respondent Violated § 7116(a)(1) and (8) of the Statute by Terminating the Union Dues Allotments that Employees had Authorized

Section 7115 of the Statute provides, in pertinent part:

- (a) If an agency has received from an employee ... a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. . . . Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.
- (b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when--
  - (1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or
  - (2) the employee is suspended or expelled from membership in the exclusive representative.

Section 7115(a) imposes an affirmative duty on an agency to honor current dues assignments of unit employees by remitting regular and periodic dues

deducted from their accrued salaries to their exclusive representative. *U.S. Mint*, 35 FLRA at 1098. The legislative history of § 7115 indicates that the employee alone controls the manner of dues payment and that an agency's obligation to honor dues check-off authorizations is mandatory and nondiscretionary. *Id.* While agencies and unions may negotiate procedures for deducting and remitting union dues, Congress intended the Statute, and not the collective bargaining agreement covering a unit, to govern the subject of dues withholding. *Id.* at 1099; *see also Mare Island*, 47 FLRA at 1292 ("The initiation and termination of dues withholding is controlled by section 7115 of the Statute, not by a dues allotment agreement between the parties."); *Readiness Command*, 7 FLRA at 199 ("[S]ection 7115(a) of the Statute does not make dues assignments dependent upon a written agreement between the parties but rather permits an employee in an appropriate unit to authorize dues allotments if he so desires."). Accordingly, an agency is obligated to honor the dues assignments of unit employees and make allotments even if no agreement is in effect at the time. *See U.S. Mint*, 35 FLRA at 1099-1100.

An agency's failure to comply with the requirements of § 7115 of the Statute violates § 7116(a)(1) and (8) of the Statute. *U.S. Air Force, 2750th Air Base Wing, Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 16 FLRA 872, 875 (1984). Remedies for an agency's violation of § 7115 may cover an employee who did not submit a dues assignment if the agency's actions indicated that it would have been futile for the

employee to have submitted the assignment. *See U.S. Mint*, 35 FLRA at 1100.

An agency is permitted to terminate an employee's dues deductions only when it follows the requirements set forth in § 7115(b) of the Statute. *Mare Island*, 47 FLRA at 1293. Section 7115(b)(1) provides that allotments shall terminate "when the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee." 5 U.S.C. § 7115(b)(1). Examples of what it means for an agreement to "cease to be applicable to an employee" can be seen in Authority precedent, legislative history, and administrative opinions. In this regard, the Authority has noted that § 7115(b)(1) requires the termination of an employee's union dues deductions when the employee ceases to be part of an established bargaining unit. *U.S. Air Force, 2750th Air Base Wing Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 16 FLRA 872, 874-75 (1984).

Looking at the legislative history of § 7115, the House Report stated:

Subsection (b) ... requires that an allotment terminate when ... the existing collective bargaining agreement between the agency and labor organization ceases to be applicable to the employee (*the employee is promoted to a management position or leaves the employ of the agency*) ....

H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 48 (1978) (emphasis added).

The Comptroller General has adopted this interpretation of § 7115(b), stating: "Section

[7115](b)(1) applies to situations where the employee is promoted to a management position or leaves the employ of the agency.” *In re Margaret Jackson - Withdrawal of Allotment of Union Dues*, B-196978, 1980 WL 18062 (Comp. Gen. Aug. 14, 1980). Similarly, and as noted above, the DoD FMR states that a collective bargaining agreement ceases to be applicable to the employee when: (1) the employee is separated from the employing agency; (2) the employee is promoted or reassigned to a supervisory position; or (3) the labor organization loses eligibility for exclusive recognition. Resp. Ex. 1.

There is no serious dispute that the Agency stopped deducting union dues for at least 89 bargaining unit employees - including Craigo, Rice, and Wayble - who did not have SF 1187s on file, even though the employees had initially authorized the deductions,<sup>41</sup> and even though the employees had not asked the Agency to terminate the deductions. See GC Exs. 1(b) & 1(d); Tr. 227. These terminations were valid only if they met one of the criteria set forth in §

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<sup>41</sup> It is important to note that while the Agency contends that it couldn't find SF 1187s for this group of employees, it never claimed that the employees did not initially submit 1187s. We have affirmative testimony that some of the employees had indeed filed 1187s many years ago, and that the Agency had been deducting their union dues for many years; conversely, we have no testimony or other evidence that the Agency had been deducting dues from employees against their wishes. Thus, while the Agency may have lost or inadvertently destroyed their SF 1187s, it is clear that these technicians were (to paraphrase the language of § 7115(a)) employees from whom the Agency had received written assignments authorizing the deduction of union dues from their pay.

7115(b). One of those two criteria - termination when the employee is suspended or expelled from union membership - clearly does not apply here. Thus the Agency's only justification for terminating these employees' dues allotments is that the CBA "cease[d] to be applicable" to the employees when the CBA expired. 5 U.S.C. § 7115(b)(1). However, the above-cited examples of when § 7115(b)(1) applies - an employee becomes a supervisor, the employee leaves the employ of the agency, and the union loses eligibility for exclusive recognition - are not present in our case. Moreover, because the Authority has indicated that an agency must honor dues assignments **even if no agreement is in effect at the time**, it follows that an agreement's expiration cannot be a basis for terminating an employee's authorized deductions.

This interpretation is bolstered by the fact that § 7115(b) refers to the contract no longer being applicable to a single "employee," rather than a group of employees, which would be the case if dues could be terminated upon the expiration of a contract. For these reasons, the phrase in § 7115(b), that an allotment shall terminate when the agreement "ceases to be applicable to the employee," does not mean that an allotment terminates when a collective bargaining agreement expires. *See U.S. Mint*, 35 FLRA at 1099-1100.<sup>42</sup> Continuing dues deductions

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<sup>42</sup> What the Authority stated there is equally applicable here:

[O]nce the temporary employees were included in the bargaining unit, the Respondent was obligated to honor dues assignments from those employees and make appropriate allotments notwithstanding the terms of the parties'

post-expiration is consistent with the statutory purpose of providing a greater measure of union security, thereby fostering stability in federal labor-management relations. *See Readiness Command*, 7 FLRA at 198-99. This same interest in fostering stability was the basis for the *George AFB* rule that mandatory conditions of employment must be continued after a CBA expires. 4 FLRA at 23. For all these reasons, the Agency's termination of employees' authorized union dues deductions was unlawful.

The Respondent's justifications for its actions are unconvincing. It contends that ¶ 110202 of the DoD FMR requires that an SF 1187 be on file to justify a union dues allotment. Resp. Br. at 29. But this provision requires only that SF 1187s be submitted to initiate dues deductions, a requirement that was satisfied in our case. Resp. Ex. 1 at 11-5, -6; *see also* Tr. 186,189,403. Nothing in ¶ 110202 requires that SF 1187s be maintained in order for dues deductions to be continued. Resp. Ex. 1 at 11-5, 11-6; Tr. 303. Accordingly, this justification does not withstand scrutiny.

Citing ¶ 110202, Respondent also argues that it would have been responsible for reimbursing an employee if a deduction occurred without an SF 1187

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collective bargaining agreement. Indeed, even though the procedures that an agency will follow in deducting and remitting the regular and periodic dues to a union are matters subject to the duty to bargain, the Respondent would have been obligated to honor the dues assignments of unit employees and make allotments even if no agreement had been in effect at the time.

*U.S. Mint*, 35 FLRA at 1099-1100 (citation omitted).

on file. But the FMR requires reimbursement only when an agency has failed to terminate dues deductions for an employee who has left the bargaining unit, a situation that did not occur in our case. Resp. Ex. 1 at 11-7. Moreover, ¶ 110201 indicates that an agency “has no liability in connection with any authorized allotment,” and the allotments at issue in our case were authorized. Resp. Ex. 1 at 11-5; GC Exs. 1(b) & 1(d); *see also* Tr. 186, 189,403. Additionally, an agency’s potential liability is not in itself a basis for terminating an allotment, as set forth in § 7115 of the Statute. Therefore, this argument also lacks merit.

The Respondent contends that it terminated the technicians’ dues deductions to comply with “stringent audit readiness requirements” established by the U.S. Department of Defense and monitored by the USPFO. However, it has not provided any documentary evidence to substantiate this claim. In particular, Respondent offered no documentation defining the “audit readiness” requirements or stating that an agency must terminate an employee’s authorized union dues deductions if the agency loses the employee’s SF 1187. Further, while Colonel Demberger, Colonel Giezie, and Aukland testified that it was necessary for the Agency to maintain employees’ SF 1187s on file, they did not cite a law or regulation specifically requiring an agency to terminate an employee’s authorized union dues deductions when the employee’s SF 1187 is lost. *See* Tr. 171-72, 177-80, 287, 377. And I doubt that such a strict requirement exists, given that the Agency permitted dues deductions to continue even though it knew for years that some employees’ SF 1187s were missing. It was also unreasonable for the Agency to

put the burden on employees to rectify the problem of the missing SF 1187s, given that it was the Agency's responsibility to maintain those forms, and given that it was most likely the Agency's document retention policy that caused the loss of the forms. *See* Tr. 186, 198,303.402. Finally, and ultimately most importantly, an agency's internal audit requirements are not a reason listed in § 7115 justifying the termination of an employee's authorized union dues deductions.

The Respondent counters that Wayble and Rice refused to submit new or original SF 1187s for themselves. But again, the language of the Statute is a brick wall that will not yield to the Respondent's self-created paperwork exigencies. There is nothing in § 7115 or in the case law that permits the Agency to punish an employee's refusal to provide such documentation by terminating the employee's previously authorized dues deductions. As already noted, Congress has stated that the employee alone controls the matter of dues payment. These employees had previously told the Agency that they wanted their union dues deducted, and the Agency had received nothing from them to indicate that they wished to revoke that authorization. Accordingly, the Agency was required to continue the deductions.

Moreover, while the Agency invited employees to submit a new or original SF 1187, an employee could reasonably conclude, as Rice did, that submitting the form would be pointless, in light of the Agency's oft-stated position that it was not bound by the CBA or the Statute. *See* Tr. 114-15. The futility of submitting a new SF 1187 seems to have been demonstrated by



the Agency's response to Craig's submission of a new SF 1187. Resp. Ex. 2; Tr. 252. Although Craig had clearly told the Agency she wanted to continue having her union dues deducted, the Agency refused to carry out her request, simply because her form lacked the signature of a Union official. In light of the Statute and the case law, this response is simply unacceptable, and it demonstrates a predisposition on the Agency's part to eliminate employee dues allotments whenever possible. The futility of cooperating with the Agency was further demonstrated: (1) by Auckland's March 1 letter to Rice, stating that he could not ensure that the Respondent would honor a new SF 1187 "without a new CBA" (GC Ex. 6 at ¶ 3); (2) by the April 4 letters (GC Ex. 8) sent out to dozens of additional employees, telling them that the Agency was recommending that all dues allotments be terminated; and (3) by Wayble's testimony that he was unable to get the Agency to process an employee's SF 1187 (Tr. 76-77). Finally, the Agency's repeated statements to employees regarding the Agency's refusal to accept the Statute or the FLRA's jurisdiction reasonably justified a fear among employees that they would be subjected to retaliation if they submitted an SF 1187. In light of these facts, the Agency can hardly shift the blame to employees or the Union for refusing to submit additional documentation. See *U.S. Mint*, 35 FLRA at 1100.

Based on the foregoing, I find that the Respondent violated § 7116(a)(1) and (8) of the Statute by terminating employees' authorized allotments of union dues.

Respondent Violated § 7116(a)(1) and (5) of the  
Statute by Unilaterally Implementing the New  
Policy Regarding Union Dues Deductions

I have already addressed the allegations that the Agency unilaterally stopped complying with provisions in the CBA concerning grievances, official time, and discipline, in violation of § 7116(a)(1) and (5). In this section and the next, I will consider the related allegations that the Agency violated its duty to bargain in good faith by changing its dues deduction and merit promotion policies. Unlike its actions regarding the grievance procedure and official time, however, the Respondent argues that it implemented the dues deduction and merit promotion changes after notifying the Union of its proposed changes, and after the Union waived its right to bargain. Therefore, it is necessary here to confront the unexplained turnover in Union leadership and the Agency's difficulties in notifying the Union of changes in conditions of employment.

In the previous section, I discussed how the Agency's termination of dues allotments for at least forty-eight technicians violated §§ 7115(a) and 7116(a)(1) and (8) of the Statute. As I noted there, the termination of those allotments violated the individual statutory rights of those employees. The 7116(a)(1) and (5) allegations, on the other hand, concern the Agency's obligations to the Union. But regardless of whether the Agency violated its statutory duty to bargain with the Union over these actions, it has violated the rights of the technicians and must remedy those violations.

Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change is likely to have more than a de minimis effect on conditions of employment. *U.S. DHS, U.S. Customs & Border Prot., El Paso, Tex.*, 70 FLRA 501,503 (2018) (*Customs El Paso*); *U.S. Dep't of the Air Force, AFMC, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland AFB*). Adequate notice of a proposed change triggers the union's responsibility to request bargaining over the change. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999). Failure to request bargaining in response to adequate notice of a proposed change in conditions of employment may be construed as a waiver of the union's right to bargain. *Id.*

Notice of a proposed change must be sufficiently specific and definitive to adequately provide the union with a reasonable opportunity to request bargaining. *U.S. Dep't of Def, Def Commissary Agency, Peterson AFB., Colo. Springs, Colo.*, 61 FLRA 688, 692 (2006) (*Peterson AFB*). The notice "must apprise the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change." *Corps of Engineers*, 53 FLRA at 82. A union may waive its right to bargain over a proposed change, either explicitly or implicitly through inaction. *AFGE, Local 3974*, 67 FLRA 306, 309 (2014). Where an agency asserts a waiver of bargaining rights as a defense, it bears the burden of establishing that the

union received adequate notice of the change. *USP Leavenworth*, 55 FLRA at 715. A union does not waive its right to bargain over a change when the change is announced as a *fait accompli*. *U.S. DHS, U.S. Customs & Border Prot.*, 64 FLRA 916, 921 (2010) (*CBP*).

Determining whether an agency's action changed conditions of employment requires an inquiry into the facts and circumstances of the agency's conduct and the employees' conditions of employment. *92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701, 704 (1995). As applied by the Authority, the term "conditions of employment" means an issue that pertains to bargaining unit employees and has a direct connection to their work situation or employment relationship: *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 237 (1986); *see also U.S. Dep't of Justice, U.S. INS, El Paso Dist. Office*, 34 FLRA 1035 1040 (1990). In determining whether the impact of a change is more than de minimis, the Authority looks to the nature and extent of either the effects, or reasonably foreseeable effects, of the change on bargaining unit employees' conditions of employment at the time of the change. *Kirtland AFB*, 64 FLRA at 173.

The evidence demonstrates that the Agency changed its procedures and rules for continuing to deduct union dues on November 14, 2016, when it began sending SF 1187 letters to dozens of technicians. Resp. Ex. 8 at 7-8; GC Ex. 13. Indeed, the Agency does not seem to dispute this, as Colonel Giezie testified that he understood the new dues collection procedures to be "a mandatory term of negotiation ...." Tr. 354. His November 14 letter to

Dohrmann referred to “a new Agency policy for Union Dues Allotments.” Resp. Ex. 8 at 7. The case law confirms that the procedures an agency will follow in deducting and remitting union dues are subject to the duty to bargain. *U.S. Mint*, 35 FLRA at 1099. Thus the Authority held that a change in the amount of union dues an agency collected had greater than de minimis effects on conditions of employment. *See Army & Air Force Exch. Serv., Dall., Tex.*, 35 FLRA at 838 (respondents had duty to bargain over collecting dues from employees in an amount higher than the previous amount). It is thus apparent that the new policy constituted a change in conditions of employment. Further, Craigo’s difficulty in submitting an SF 1187 illustrates that the requirements imposed by the Agency here constituted more than a trivial burden on employees; indeed, the requirements could spell the difference between an employee’s dues deduction request being accepted or rejected. The real dispute here is whether the Agency provided the Union with adequate notice of the new policy before implementing it. *See Corps of Engineers*, 53 FLRA at 82-83.

Colonel Giezie testified that prior to adopting the new dues policy in November, he sent Dohrmann an email on approximately October 6, enclosing “a previous draft” of the policy, asking for his “comments and feedback,” and offering to “negotiate impact and the implementation” of the policy. Tr. 351, 392. Dohrmann did not respond to Giezie, so the Agency proceeded to implement a revised version of the policy.

The first problem that arises from these events is the turnover in the Union’s leadership, and

Dohrmann's refusal to accept any documents on behalf of the Union. The Agency had only recently sent another letter to Dohrmann, on September 20, notifying the Union that the CBA was void and that management would pursue its "jurisdictional defenses" to the Statute. Resp. Ex. 4. The Agency made numerous attempts to serve the September 20 letter on the Union, without success, until Dohrmann told them on November 30 that they should send such correspondence to the AFGÉ regional office. Thus, for a critical two-month period, there was essentially a void in Union leadership. At a time when the Agency was renouncing its obligations under the CBA and the Statute, nobody at the Union was accepting responsibility or stepping up to respond.<sup>43</sup>

In most situations like this, I would say that the absence of Union leadership was the Union's problem, not the Agency's. If a union expects to receive notice of changes in conditions of employment, it needs to have an office or address that will receive and respond to those notices. The problem with the Agency's waiver defense, however, is that its offer to "negotiate" is contradicted by its own words and actions. First, the Respondent failed to introduce Giezie's purported October 6 email to Dohrmann into evidence; thus we don't really know what Giezie told Dohrmann about the proposed dues policy in October, and we can't properly assess whether he accurately apprised the

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<sup>43</sup> The possible chilling effects, on Union officials, of the Agency's statements that technicians were not protected by the Statute, cannot be discounted here. But since I find that the Agency's notice was inadequate for other reasons, it is unnecessary to consider that issue.

Union of the scope and nature of the proposed change, or the certainty or timing of the change. And as I have previously noted, the testimony of both Giezie and Aukland regarding their attempts to communicate with the Union is so frequently ambiguous and inconsistent that I cannot accept their testimony at face value, without documentary corroboration.<sup>44</sup>

We do have Giezie's November 14 letter to Dohrmann, however, and it does corroborate that Giezie had previously sought the Union's input regarding the dues policy. Resp. Ex. 8 at 7. But it tells us nothing about the substance of the earlier proposed policy or its timing, making it extremely difficult to assess the legal adequacy of the notice. Moreover, the November 14 letter uses the phrase "impact and ... implementation" to describe Giezie's offer to bargain, and this reflects a misunderstanding on the Agency's part of its duty to bargain. The changes to the Agency's dues allotment policy were not an exercise of its management rights under § 7106(a) of the Statute; rather, they were changes that were fully and substantively negotiable. The Agency was required to bargain over the changes in their entirety, not merely on their impact and implementation. And more to the point, the Agency was not actually offering to negotiate within the meaning of the Statute at all.

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<sup>44</sup> The Respondent's failure to offer the October 6 email into evidence stands in contrast to its submission of a new, proposed performance appraisal policy. Resp. Ex. 9. Its inability to produce a document that might support its testimony makes me doubt whether the document exists, much less whether the document constituted legally adequate notice.

As I have said before, the Agency's implementation of its new dues allotment policy must be understood in the context of all the events starting in September of 2016: specifically, the September 20 notice to the Union that the Agency was repudiating the CBA in its entirety and its own obligations to comply with the Statute; and the September 28 memo, advising technicians and supervisors of what it had just notified the Union, and announcing that the Agency would thereafter apply its own policies on all matters formerly the subject of the CBA. In this light, how can Colonel Giezie's request for "comments and feedback" from the Union be taken seriously as a request to bargain under the Statute? If he disagreed with the Union about the negotiability of a proposal, would the Agency have submitted itself to the Authority's negotiability procedures? If the parties had reached an impasse on the policy, would the Agency have allowed the dispute to go to the Impasses Panel? Clearly not. The Agency was offering only a pale imitation of bargaining, as it had repeatedly and emphatically asserted that the Statute itself did not apply to the National Guard or its technicians, and that it would not comply with the Statute until a CBA was negotiated.

Therefore, while the absence of any Union leadership in the autumn of 2016 certainly made it difficult for the Agency to engage with the Union regarding its loss of the SF 1187s and the Agency's proposed solution to that issue, the Union did not waive its right to bargain over all aspects of that subject, because the Agency never properly made an offer to fully bargain with the Union. Accordingly, I conclude that the Respondent failed to negotiate in



good faith with the Union over the dues policy, in violation of § 7116(a)(1) and (5) of the Statute.

Respondent Violated § 7116(a)(1) and (5) of the Statute by Unilaterally Implementing the New Merit Promotion Plan

The Agency implemented its new merit promotion plan on February 6, 2017. GC Ex. 4. The old plan (GC Ex. 21) provided that job announcements would normally be posted for thirty days, while the new plan reduces that posting time to fifteen days. The new plan also utilizes a new process for scoring candidates; specifically, it incorporates a “full soldier-airman concept” in evaluating applicants and promotes the Agency’s diversity and inclusion goals by allowing the selection board to consider additional factors, including past experience, resumes, and references, and by reducing the influence that any single manager has on the determination of an applicant’s score. Tr. 385-87.

The changes encompassed in the new merit promotion plan - specifically, a reduction in the number of days for which technician job announcements, including promotions, were posted, and a new process for scoring candidates- involved changes to employees’ conditions of employment. Taking into account the distinction between “working conditions” and “conditions of employment,” as articulated recently by the Authority in *Customs El Paso*, 70 FLRA at 503-04, the changes were not routine modifications of employees’ work routine, but rather were policies incorporated in an agency-wide personnel regulation designed to reduce the time applicants would have to apply for a vacant position

and to enable the Agency to select better-qualified applicants. The changes therefore could directly affect an employee's ability to apply for a position and the employee's likelihood of being selected. *See Dep't of Def., Dep't of the Navy, Naval Ordnance Station, Louisville, Ky.*, 4 FLRA 760, 776-77 (1980) (requirement that vacancy announcements be posted for five days is negotiable as a procedure; procedure for rating and ranking candidates is negotiable).

Further, I have no doubt that these changes - which could affect whether an employee had enough time to apply for a promotion and whether the employee would receive the promotion - had greater than de minimis effects on conditions of employment. *See U.S. Dep't of the Treasury, IRS*, 66 FLRA 528, 530 (2012) (noting that changes affecting an employee's earning potential are greater than de minimis). The Agency claims these changes were not "material," but it cites no case law to support that claim, and Auckland's assertion that there were no material differences between the old and new merit promotion plans is contradicted by the documents themselves. Tr. 293. While the new plan retained the bulk of the old plan, the changes directly affected the ability of technicians to move laterally and upwards at the Agency. Therefore, the Agency was obligated to provide the Union with adequate notice of the planned change.

The Agency insists that it met this requirement. It asserts that it mailed copies of the new merit promotion plan to Union officials at their addresses of record but that "none of the union members would receive mail" there. Resp. Br. at 32, citing Tr. 290.

Therefore, the Agency argues that the Union waived its right to bargain. But this defense runs into the same problems that I discussed regarding the change in the Agency's dues deduction policy.

First, I am not convinced that the Agency ever sent the Union a copy of the proposed merit promotion plan, much less offered to negotiate over it. Aukland's and Giezie's testimony on this point was vague and contradictory, and there is no documentary evidence to corroborate it. (See my discussion of this at footnote 10.) I credit Colonel Giezie's testimony that he had Aukland "reach out" to the Union's then-President Reynolds in January 2017, but I do not believe that the Agency ever sent a written notice of the proposed plan to the Union, and we certainly have nothing to show what might have been contained in such a document, even if it existed.

Second, even if the Agency had mailed the Union a copy of its proposed changes to the merit promotion plan prior to its implementation, that still is not sufficient to demonstrate that it gave the Union adequate notice of the change. We have no evidence indicating that the Agency explained its intentions to the Union, advised the Union about the planned timing of the change, or even invited the Union to bargain. Merely sending the Union a copy of a proposed change, without any specific explanation of the change, its certainty, or its timing, is not enough to provide the Union with adequate notice of the planned change. *See Corps of Engineers*, 53 FLRA at 82-84. And in the particular facts of this case, sending the Union a copy of the new plan without an explanation of the proposed changes or an invitation

to bargain, in the wake of the Agency's repeated statements that it was not bound by the Statute or the CBA, suggests that the Agency was announcing the change as a *fait accompli*. Finally, as I noted regarding the change in dues deductions, any purported offer by the Agency to "bargain" was not an offer to bargain within the meaning of the Statute.

Therefore, I find that the Respondent violated § 7116(a)(1) and (5) of the Statute by unilaterally implementing the new merit promotion plan.

#### The Remedy

The Respondent has committed a wide range of unfair labor practices: it has made numerous coercive statements to the entire bargaining unit, telling them that they have no legal protections under the Statute, and that the terms of the CBA are void; it has refused to abide by specific provisions of the CBA, including the grievance procedure and official time; it has unilaterally implemented changes in conditions of employment; and it has improperly terminated union dues deductions to at least eighty-nine employees and threatened to terminate deductions for all other employees. Moreover, it has committed, and repeated, these actions over several months.

The Authority has developed a variety of traditional remedies for these types of violations, which the GC endorses and asks me to order. I agree. The GC also requests two nontraditional remedies: that the Authority's notice to employees be distributed to managers and supervisors, as well as employees, and that Agency officials be required to retract its coercive statements by reading the Authority's notice aloud at meetings around the state attended by both

employees, supervisors, and HR staff. I agree with the first of these remedies, but not the second.

Most of the Respondent's unfair labor practices can be adequately addressed by one or more of the traditional remedies. The Agency's refusals to comply with all or some of the provisions of the CBA can be remedied by ordering it to comply with, and abide by, all mandatory provisions of the CBA, and to make whole any employees adversely affected. *See U.S. Dep't of Justice, Fed. Bureau of Prisons*, 68 FLRA 786, 790 (2015) (ordering compliance with an agreement the agency had repudiated); *Ohio ANG*, 21 FLRA at 1079 (ordering agency to cease refusing to give effect to a CBA); *George AFB*, 4 FLRA at 22-23 (agency ordered to stop refusing to process a grievance under the negotiated grievance procedure in an expired CBA). The Authority recognizes that a central objective of its remedial authority is "to recreate the conditions and relationships that would have been had there been no [ULP]" and to restore, as far as possible, the status quo that existed before the ULPs. *U.S. Dep't of VA, VA Med. Ctr., Martinsburg, W. Va.*, 67 FLRA 400,402 (2014). When a ULP causes employees or unions to suffer monetary losses, the Authority requires the offending party to pay backpay, restore leave, or otherwise reimburse them. *U.S. Dep't of Labor, Wash., D.C.*, 37 FLRA 25, 39-41 (1990). And when agencies have violated the dues deduction requirements of § 7115, the Authority routinely orders them to reinstate the dues allotments of individuals in the unit whose dues allotments were unlawfully terminated, and to reimburse the union in an amount equal to the amount of dues it would have received, but for the agency's unlawful conduct. *See, e.g., U.S.*

*Mint*, 35 FLRA at 1100; *Def Logistics Agency*, 5 FLRA 126, 131-33 (1981).

With respect to the Agency's unilateral changes to its dues deduction and merit promotion policies, the appropriate remedy depends on whether the change involved an issue that is substantively negotiable, or whether it required only impact and implementation bargaining. When an agency refuses to bargain over the substance of a matter that is within the duty to bargain, the Authority orders a status quo ante remedy, including rescission of the new policy, absent special circumstances. *Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 53 FLRA 1664, 1671 (1998); *Veterans Admin., West L.A. Med. Ctr., L.A., Cal.*, 23 FLRA 278,281 (1986). However, when an agency exercises a management right and is obligated only to bargain over the impact and implementation of the change, the Authority applies the criteria set forth in *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982) (*FCI*) to determine whether or not a status quo ante remedy is appropriate. These factors include: (1) whether, and when, an agency notified the union concerning the change; (2) whether, and when, the union requested bargaining over procedures for implementing the change or appropriate arrangements for employees adversely affected by the change; (3) the willfulness of the agency's conduct in failing to bargain; (4) the nature and extent of the impact upon adversely affected employees; and (5) whether, and to what extent, a status quo ante remedy would disrupt the agency's operations. *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 13 (2000).

As I stated earlier, the procedures an agency follows in deducting and remitting union dues are substantively negotiable; as such, and since the Respondent has not offered evidence of any special circumstances regarding the dues deductions, I will order the Respondent to rescind its policy adopted in November 2016 regarding the deduction of union dues for employees whose SF 1187 is missing, and to bargain with the Union, on request, before making any changes in the previously existing procedures for dues deductions.<sup>45</sup>

For purposes of evaluating a remedy, I will presume that the new merit promotion plan involved the exercise of management's rights under § 7106(a), and I will apply the *FCI* criteria to the facts of this case. All of the factors support a status quo ante remedy here. As I have already discussed, the Agency failed to give the Union adequate notice of the change, and the Union was thus excused from a requirement to request bargaining. Moreover, the Agency acted willfully. By the time it sought to implement its dues deduction policy, it already knew that it could not reach Dohrmann at his post office box, but it made no additional effort to contact him personally at his work site. I consider the Agency's effort to "reach out" to the Union to be half-hearted at best, and more likely a convenient excuse for the Agency to act unilaterally, in light of Colonel Giezie's September 28 memo and the Agency's numerous announcements to employees

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<sup>45</sup> Regardless of whether the changed dues deduction policy violated the Union's rights under § 7116(a)(1) and (5), it violated the employees' statutory rights under § 7115; as such, the dues policy would need to be rescinded anyway.

and managers that the CBA was void and the Statute inapplicable. As I have also noted, the Agency's concept of "bargaining" with the Union after September 28 was not the process required by the Statute; therefore it cannot be credited with any good faith here. For these reasons, the first three factors support a status quo ante remedy. With respect to the fourth factor, employees were adversely affected by having fifteen fewer days to apply for positions. And while there may have been many valid reasons for the Agency changing the way it scored candidates, such changes inevitably result in "winners" and "losers," and the Union should have had a say in addressing the potential adverse effects of the new process. As for the fifth factor, there is no evidence that a return to the old merit promotion plan would disrupt or impair the efficiency or effectiveness of the Agency's operations. As the Respondent has itself pointed out, the new plan did not radically alter the regulation that had been in use for many years. Returning to the earlier merit promotion plan will also serve to encourage the Respondent to engage in good faith negotiations to implement a new plan. For these reasons, a status quo ante remedy is warranted.

The GC also requests nontraditional remedies. The Authority discussed the legal and factual parameters for both traditional and nontraditional remedies in *FE. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (*Warren AFB*):

[A]ssuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to



“recreate the conditions and relationships” with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct.

These guidelines were applied more recently in *Fed Bureau of Prisons, Fed Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221,223 (2014) (*BOP*), with regard to the electronic posting of notices. The questions highlighted in *Warren AFB* are essentially factual. 52 FLRA at 161.

Nontraditional remedies are not warranted merely because they would further a salutary objective; rather, they are appropriate only when traditional remedies would not adequately redress the wrong incurred by the ULP. Moreover, remedies for ULPs may not be punitive. *BOP*, 67 FLRA at 223-24.

The GC requests that the “Notice to All Employees” - which is always sent to bargaining unit employees - also be sent to supervisors and management officials. This is a nontraditional remedy. *USP Florence*, 53 FLRA at 1394. Nonetheless, I believe it is a remedy that is particularly suitable to the circumstances of our case, as it would directly refute the contrary message the Agency sent to supervisors, managers, and employees on September 28. While the September 28 memo was inadvertently disseminated to employees, it was primarily intended to provide guidance to supervisors and managers on how to handle personnel matters in the absence of a CBA and Statute. By sending today’s notice directly to managers and supervisors, the Authority would begin to alleviate the unlawful message that the Agency

sent them on September 28, in a manner that could not be accomplished by a notice sent only to bargaining unit employees. Sending the notice to managers and supervisors would promote compliance, ensure a uniform understanding throughout the Ohio National Guard, and reduce the risk that the Order would be misinterpreted or ignored. Given the erroneous theories that the HRO has espoused (not only in the September 28 memo but in many other communications as well), it is especially important to give managers and supervisors a clear explanation of their duties under the Statute. By widely educating managers and supervisors about the Respondent's obligations under the Statute, the remedy will deter future violations of the Statute. In addition, the knowledge that notices will be sent to managers and supervisors will give employees confidence that they will not be ignored, second-guessed, or retaliated against when asserting rights under the Statute. Finally, the Respondent has not cited any legal or public policy arguments against imposing this remedy, and none are apparent. For all of these reasons, I believe this remedy is warranted.

The GC also requests that the Agency be ordered to read the notice aloud at meetings around the state, and cites *USP Leavenworth* for support. In that case, the Authority found that the agency, through the warden, violated the Statute over the course of a seven-month period by, among other things, making threatening, anti-union statements at a mandatory meeting of all employees. The Authority determined that because the warden made these "egregious, anti-Union statements at a mandatory meeting," it was reasonably necessary to "require those statements to

be retracted, via a reading aloud of the notice, at another meeting of all employees.” 55 FLRA at 719. In finding this remedy appropriate, the Authority noted that the action it ordered would reach “the same group of employees that witnessed the offense” and thus was “calculated to have a countervailing impact similar to the initial offense.” *Id.* The Authority added that because the warden called the mandatory meeting and made the unlawful comments in his “representational capacity as the warden of the penitentiary,” it was appropriate to require either that the warden read the notice at the mandatory meeting, or that the warden be present while the notice was read by an Authority agent. *Id.*

Like the agency in *USP Leavenworth*, the Respondent in our case has acted egregiously. However, I believe that the remedies I have already recommended are sufficient to recreate the conditions and relationships with which the Respondent’s violations interfered. The Respondent’s most egregious and harmful violations were carried out through written messages, so it is appropriate to remedy the violations by sending managers and supervisors, along with bargaining unit employees, copies of the Notice. Further, while a notice read aloud by the warden (or an Authority agent with the warden present) was a fitting punishment designed to counteract the statements the warden made to employees at a large, mandatory meeting, there was no similar type of meeting in our case. Requiring management to perform public readings of the notice would be superfluous, if not an attempt to humiliate management officials, a remedy which borders on being punitive. Additionally, because the

Respondent's employees work at disparate locations around the state, and HR and management officials do not necessarily work there, attempting to organize such meetings with bargaining unit employees and managers would present unnecessary logistical challenges. For these reasons, I deny the GC's request for this remedy.

Based on the foregoing, I recommend that the Authority adopt the following order:

### **ORDER**

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of Defense, Ohio National Guard (Respondent), shall:

1. Cease and desist from:

(a) Failing and/or refusing to recognize and comply with the mandatory terms of the expired collective bargaining agreement (CBA) between the American Federation of Government Employees, Local 3970, AFL-CIO (Union) and the Respondent, including those terms regarding grievances and arbitrations, official time, and hiring and promotion.

(b) Failing and/or refusing to maintain existing personnel policies and practices and matters affecting working conditions to the maximum extent possible.

(c) Unlawfully removing employees from union dues withholdings, or threatening to do so.

(d) Informing employees, supervisors, and managers that the Respondent does not consider itself bound by the Statute, and that the CBA between the

Respondent and the Union, including the grievance procedure, is a nullity.

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

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

(a) Post at its facilities where bargaining unit employees 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 of the Ohio National Guard, 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 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) Disseminate a copy of the Notice signed by the Adjutant General through the Respondent's email system to all bargaining unit employees and to all managers and supervisors in the Ohio Army and Air National Guard.

(c) Reinstate to dues withholding status all bargaining unit employees removed from dues withholding since September 28, 2016, who did not fill out dues revocation forms in the anniversary month of their allotment.

(d) Reimburse the Union for the dues it would have received had the Respondent not removed employees unlawfully from dues withholding.

(e) Rescind any changes to the mandatory terms of the CBA and to any existing personnel policies and practices and matters affecting working conditions since September 28, 2016, including restoring the CBA's grievance and arbitration procedure, rescinding the February 2017 changes to the Merit Promotion Plan, restoring reasonable amounts of official time, and making employees whole for any other losses resulting from the Respondent's unlawful changes.

(f) Upon request, bargain with the Union to the extent required by the Statute.

(g) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

Issued, Washington, D.C., June 18, 2018

/s/ Richard A. Pearson

RICHARD A. PEARSON

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 U.S. Department of Defense, Ohio National Guard (the Ohio 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 EMPLOYEES THAT:**

The Statute gives dual status technicians of the Ohio 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 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 reprisal.

The Ohio National Guard will not violate any of these rights.

More specifically:

**WE RECOGNIZE** and will comply with the mandatory terms of the expired collective bargaining agreement (CBA) between the American Federation of Government Employees, Local 3970 (the Union) and the Ohio National Guard, including the provisions concerning grievance and arbitration procedures, official time, and hiring and promotion.

**WE RECOGNIZE** that our employees have the right to file grievances under the CBA, bring unfair

labor practice charges, and seek and receive Union representation.

**WE RECOGNIZE** our obligation to honor the dues withholding allotments of bargaining unit employees, even after the CBA has expired.

**WE WILL** maintain the personnel policies and practices and matters affecting working conditions that were in effect on September 28, 2016.

**WE WILL** restore the mandatory terms of the expired CBA and the preexisting personnel policies, practices, and matters affecting working conditions to the maximum extent possible.

**WE WILL** rescind the February 2017 changes to our Merit Promotion Plan.

**WE WILL** grant Union officials reasonable official time to carry out their representational responsibilities.

**WE WILL** reinstate to dues withholding status those employees who were unlawfully removed from that status and reimburse the Union for the dues it would have received, but for our unlawful actions.

**WE WILL** give the Union notice and an opportunity to bargain prior to making changes to existing personnel policies, practices, and matters affecting working conditions.

**WE WILL NOT** fail and/or refuse to maintain the mandatory terms of the CBA and the existing personnel policies, practices, and matters affecting working conditions to the maximum extent possible.

**WE WILL NOT** refuse to grant union officials reasonable official time.



**WE WILL NOT** unlawfully remove employees from dues withholdings without their authorization.

**WE WILL NOT** tell employees, verbally or in writing, that the CBA is a nullity, or that the Ohio National Guard is not required to comply with the Statute.

**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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(Ohio 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.

**APPENDIX D**

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Case No. 20-3908

THE OHIO ADJUTANT GENERAL'S  
DEPARTMENT; MAJOR GENERAL JOHN C.  
HARRIS, JR., IN HIS OFFICIAL CAPACITY AS  
THE ADJUTANT GENERAL OF THE OHIO  
NATIONAL GUARD; UNITED STATES  
DEPARTMENT OF DEFENSE/OHIO NATIONAL  
GUARD,

*Petitioners,*

v.

FEDERAL LABOR RELATIONS AUTHORITY,

*Respondent,*

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 3970, AFL-CIO,

*Intervenor.*

**FILED**

Feb 14, 2022

DEBORAH S. HUNT, Clerk

ORDER

**BEFORE:** DAUGHTREY, COLE, and CLAY, Circuit  
Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the cases. The petition then was circulated to the full court.<sup>1</sup> No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER  
OF THE COURT**

/s/ Deborah S. Hunt  
Deborah S. Hunt, Clerk

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<sup>1</sup> Judge Murphy recused himself from participation in this ruling.

## **APPENDIX E**

The Constitution's second Militia Clause:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress

Art. I, §8, cl. 15, 16.

**5 U.S. Code § 101 - Executive departments**

The Executive departments are:

The Department of State.

The Department of the Treasury.

The Department of Defense.

The Department of Justice.

The Department of the Interior.

The Department of Agriculture.

The Department of Commerce.

The Department of Labor.

The Department of Health and Human Services.

The Department of Housing and Urban Development.

The Department of Transportation.

The Department of Energy.

The Department of Education.

The Department of Veterans Affairs.

The Department of Homeland Security.

**5 U.S. Code § 102 - Military departments**

The military departments are:

The Department of the Army.

The Department of the Navy.

The Department of the Air Force.

**5 U.S. Code § 103 - Government corporation**

For the purpose of this title--

- (1) "Government corporation" means a corporation owned or controlled by the Government of the United States; and
- (2) "Government controlled corporation" does not include a corporation owned by the Government of the United States.

**5 U.S. Code § 104 - Independent establishment**

For the purpose of this title, “independent establishment” means--

- (1) an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and
- (2) the Government Accountability Office.



**5 U.S. Code § 105 - Executive agency**

For the purpose of this title, “Executive agency” means an Executive department, a Government corporation, and an independent establishment.

**5 U.S. Code § 7103 - Definitions; application**

**(a)** For the purpose of this chapter--

**(1)** “person” means an individual, labor organization, or agency;

**(2)** “employee” means an individual--

**(A)** employed in an agency; or

**(B)** whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include--

**(i)** an alien or noncitizen of the United States who occupies a position outside the United States;

**(ii)** a member of the uniformed services;

**(iii)** a supervisor or a management official;

**(iv)** an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the Agency for International Development, the Department of Agriculture, or the Department of Commerce; or

**(v)** any person who participates in a strike in violation of section 7311 of this title;

**(3)** “agency” means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Publishing Office, and the Smithsonian Institution 1 but does not include--

- (A)** the Government Accountability Office;
- (B)** the Federal Bureau of Investigation;
- (C)** the Central Intelligence Agency;
- (D)** the National Security Agency;
- (E)** the Tennessee Valley Authority;
- (F)** the Federal Labor Relations Authority;
- (G)** the Federal Service Impasses Panel; or
- (H)** the United States Secret Service and the United States Secret Service Uniformed Division.

**(4)** “labor organization” means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include--

- (A)** an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

**(B)** an organization which advocates the overthrow of the constitutional form of government of the United States;

**(C)** an organization sponsored by an agency;  
or

**(D)** an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

**(5)** “dues” means dues, fees, and assessments;

**(6)** “Authority” means the Federal Labor Relations Authority described in section 7104(a) of this title;

**(7)** “Panel” means the Federal Service Impasses Panel described in section 7119(c) of this title;

**(8)** “collective bargaining agreement” means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

**(9)** “grievance” means any complaint--

**(A)** by any employee concerning any matter relating to the employment of the employee;

**(B)** by any labor organization concerning any matter relating to the employment of any employee; or

**(C)** by any employee, labor organization, or agency concerning--

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) “supervisor” means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term “supervisor” includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) “management official” means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) “collective bargaining” means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of

employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

**(13)** “confidential employee” means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

**(14)** “conditions of employment” means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--

**(A)** relating to political activities prohibited under subchapter III of chapter 73 of this title;

**(B)** relating to the classification of any position; or

**(C)** to the extent such matters are specifically provided for by Federal statute;

**(15)** “professional employee” means--

**(A)** an employee engaged in the performance of work--

**(i)** requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or

a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

**(ii)** requiring the consistent exercise of discretion and judgment in its performance;

**(iii)** which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

**(iv)** which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

**(B)** an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

**(16)** “exclusive representative” means any labor organization which--

**(A)** is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

**(B)** was recognized by an agency immediately before the effective date of this chapter as the

exclusive representative of employees in an appropriate unit--

(i) on the basis of an election, or

(ii) on any basis other than an election, and continues to be so recognized in accordance with the provisions of this chapter;

(17) “firefighter” means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) “United States” means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)

(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that--

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.



**(2)** The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

**5 U.S. Code § 7105 - Powers and duties of the Authority****(a)**

**(1)** The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

**(2)** The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority--

**(A)** determine the appropriateness of units for labor organization representation under section 7112 of this title;

**(B)** supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

**(C)** prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

**(D)** prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

**(E)** resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

**(F)** prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

**(G)** conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

**(H)** resolve exceptions to arbitrator's awards under section 7122 of this title; and

**(I)** take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

**(b)** The Authority shall adopt an official seal which shall be judicially noticed.

**(c)** The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

**(d)** The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other

individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

**(e)**

**(1)** The Authority may delegate to any regional director its authority under this chapter--

**(A)** to determine whether a group of employees is an appropriate unit;

**(B)** to conduct investigations and to provide for hearings;

**(C)** to determine whether a question of representation exists and to direct an election; and

**(D)** to supervise or conduct secret ballot elections and certify the results thereof.

**(2)** The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

**(f)** If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay

of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of--

- (1) the date of the action; or
- (2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

**(g)** In order to carry out its functions under this chapter, the Authority may--

- (1) hold hearings;
- (2) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and
- (3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

**(h)** Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

**(i)** In the exercise of the functions of the Authority under this title, the Authority may request from the

Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

**32 U.S. Code § 709 - Technicians: employment, use, status**

**(a)** Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in--

**(1)** the organizing, administering, instructing, or training of the National Guard;

**(2)** the maintenance and repair of supplies issued to the National Guard or the armed forces; and

**(3)** the performance of the following additional duties to the extent that the performance of those duties does not interfere with the performance of the duties described by paragraphs (1) and (2):

**(A)** Support of operations or missions undertaken by the technician's unit at the request of the President or the Secretary of Defense.

**(B)** Support of Federal training operations or Federal training missions assigned in whole or in part to the technician's unit.

**(C)** Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of--

**(i)** active-duty members of the armed forces;

**(ii)** members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

**(iii)** Department of Defense contractor personnel; or

**(iv)** Department of Defense civilian employees.

**(b)** Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

**(1)** Be a military technician (dual status) as defined in section 10216(a) of title 10.

**(2)** Be a member of the National Guard.

**(3)** Hold the military grade specified by the Secretary concerned for that position.

**(4)** While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

**(c)**

**(1)** A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10 ) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

**(2)** The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

**(d)** The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.



**(e)** A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

**(f)** Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned--

**(1)** a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who--

**(A)** is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

**(B)** fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

**(2)** a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

**(3)** a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

**(4)** a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned; and

**(5)** a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

**(g)** Sections 2108 , 3502 , 7511 , and 7512 of title 5 do not apply to a person employed under this section.

**(h)** Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

**(i)** The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.