- INFORMATION PAPER -

NGB-HRL
1 March 2003

SUBJECT: Union Representation and the National Guard

1. Purpose. To review the role of the National Guard as a military asset and outline some approaches to altering the current exclusive representation status for all Title 32 technicians.

2. Background

a. Unions represent approximately 40,000 Title 32 technicians (both military and non-dual status) as federal employees. Title 32 technicians exist in the states and territories, not at NGB. Title 10 active duty and Title 5 civilian employees staff the NGB. There are in excess of 65 collective bargaining units and agreements with four national unions for these 40,000 employees. The fact that the National Guard, a military asset, has unions is often surprising to senior administration officials.

b. Cases that result from negotiated grievance procedures and unfair labor practices wind up in the Federal Labor Relations Authority (FLRA) jurisdictional system. Matters of discrimination typically are handled by the EEOC.

c. Currently Executive Order (EO) 11491, as amended by EO 11636 (Also during Nixon Administration) sets labor-management relations in the federal service. Section 3 of the EO as amended, defines to whom the order applies, with a listing of the exceptions. The National Guard currently has no exception to the right of federal employees to organize and bargain.

3. Discussion. Now is a good time for the National Guard to declare a national security role that eliminates its members from the right to collectively bargain. The following discusses several avenue of approach to achieving this status.

a. Obtain coverage in EO 11491: Many higher officials in the Department of Defense are unaware that the National Guard has 40,000 members with exclusive representational rights. The Assistant Secretary of Defense for Reserve Affairs or the Deputy Under-Secretary of Defense for Personnel Policy have apparently expressed some interest in reviewing this entire status issue.

b. Seek legislative remedy to remove eligibility of the National Guard from exclusive representation as are all other members of the uniformed services.

(1) For example, amending 5 USC7103(a)(2)(B)(ii) to read as follows: " a member of the *uniformed* services, ***to include the National Guard;"*** **.** (Bold text is the amendment.**)** This phrasing would apply to dual status technicians only and reflects a definition that is based on "employee" "status. The National Guard is a military asset of the United States of America. It is ludicrous to think that unions would represent the active Army or Air Force, and they do not! It is equally ludicrous for members of the National Guard who, as a condition of employment under 32USC709, must be a member of the National Guard, to have exclusive representation.

(2) Another method would be to amend 5 USC 7103(a) (3) by adding a new subsection called 5 USC7103(a)(3)(I) ***: "the National Guard Bureau , the National Guards of the various sttes and territories, and the Commanding General of the District of Columbia."***

National Guard members and the National Guards of the 54 States and Territories to the "Agency " exclusion list. This would apply to both dual and non-dual status employees. This is a in opposition to the "employee" exclusion.

(3) 10 USC 976 defines members of the *armed* forces. The term "member of the armed forces" is defined at 10 USC (a)(1) (B) to include the following: "a member of the National Guard who is serving on active duty". This definition could possibly be changed to read ***"a member of the National Guard ~~who is serving on active duty".~~***

c. Petition the Federal Labor Relations Authority to remove the National Guard from exclusive representation rights, citing national security interests. Unions can petition the FLRA for exclusive representation. Agencies can petition for removal of that same exclusive representation. NGB could seek exclusion under 5 USC 7112 (b)(6).

d. Security Clearance. A final approach is to place greater importance on the meaning of the Security Clearance as it relates to the national security interest, homeland security and threat defense concerns as an employment factor.

(1) During peace time, some significant aspects of almost all jobs are seldom performed. Frequently those portions of the work as defined in a position description, are only performed at heightened security levels. Since 11 September 2001, that aspect of the work is more important. Further, we must consider all aspects of the work when determining security issues, not just some aspects of the work. Even the Social Security Administration has eliminated many of its clerical positions from exclusive representation because they have access to data that is vital to the national security interest.

(2) NGB and the states could review all position descriptions to ensure the requirement for a Secret or a Top Secret Clearance is properly noted. Then by policy, NGB would declare that no technician whose job requires a Secret or Top Secret Clearance could be a member of a union. All of these personnel would receive BUS Code 8888, which means the position is exempt from exclusive representation action. We can expect the exclusive representative to file a "clarification of unit."

e. Exercise Title 10 authority (if you have it) to preclude collective bargaining. We have seen this most recently in the actions of two agencies. The Undersecretary of Transportation for Security declared TSA screeners to be precluded from collective bargaining. Recently, the National Image Mapping Agency (NIMA) Director also precluded all of his agency's employees because of the agency missions. The National Guard Bureau , according to the Chief, Federal Advisory Service (FAS), Civilian Personnel Management Service (CPMS) of the Department of Defense, does not have that Title 10 authority.

4. Recommendation: In order of timing, political interest, comprehensiveness of action, and sheer work for the Bureau and the 54 Adjutants Generals.

a. First Priority:

(1) Obtain an update to Executive Order (EO) 11491 to include the National Guard. This is a temporary solution and would allow a quicker resolution to the challenges represented by union representation within a military asset. Sponsorship for such an amendment could come from the Deputy Under Secretary for Personnel Policy or the Assistant Secretary of Defense for Reserve Affairs in the Department of Defense. The executive order was last reviewed during the Clinton administration and the review effort died very early. We have a different political climate now.

(2) Another approach is provided by 5 USC 7103(b)(2) which gives the POTUS the authority to "issue and order suspending any provision of this chapter with respect to any agency,..., if the president determines that the suspension is necessary in the interests of national security." (See EO 12171 which lists certain agencies and/or subdivisions excluded by the Federal Service Labor-Management Relations Statute (FSLMRS).)

b. Second: Seek legislative remedy as a permanent solution. Congressional action to include sponsorship, etc. is a much more political event and may be harder to do. A first decision would be to decide what to target - all Title 32 National Guard employees would afford or just the dual status military technician (which the others. Certainly legislation is not a quick fix. Certainly it is preferred. What reaction one could expect from NGAUS, AGAUS, ROA, etc. would be hard to gauge

(1) 5 USC 7103(a) (3)	Agency exclusion and cleanest change of all.
(2) 5 USC 7103(a) (2) (B) (ii)	Exclusion by adding reference to the National Guard member as a member of the uniformed services.
(3) 10 USC 976 (a)(1)(B)	Change to definition of National Guard in statute so that FSLMRS exclusion applies.

c. Third: Petitioning the FLRA to negate exclusive representation. This would require extensive legal argument and coordination by the National Guard Bureau. In the great "Consolidation Case" of years past, NGB had extensive brief filing requirements and spirited participation by all 54 states and territories. Unfortunately, this affords all of the various unions time to apply political pressure and make general mischief at the local and national level. We understand, however, that was the approach originally considered by NIMA before they decided to invoke the Title 10 authority. NIMA decided to invoke the Title 10 authority when the unions starting filing petitions for exclusive representation with the FLRA.

d. Fourth: Security Clearance designation is a manpower intensive solution (I resisted saying labor intensive - no pun intended) because of the need to review hundreds of positions descriptions either at NGB or in each state. However, the FAS thinks this has a compelling argument that would probably be successful, despite the intensive aspect. This would lead to an interpretation by the FLRA of applicability of 5 USC 7112 (b)(6).

(1) It would leave some positions invariably still eligible for exclusive representation. We would now have very small organizations left who would still take our limited time and resources to negotiate contracts and would still probably be very ineffective. This would have a negative effect on the unions because of reduced dues paying member numbers. This could also be long and painful in process.

(2) The problem with this solution is that states must be held to consistent application of classification standards across the board. That may be difficult. Also it requires that the BUS Coding on personnel transactions remain accurate. As people transfer they may move in and out of positions requiring a clearance and therefore, a non-eligibility for membership. This is a labor-intensive solution. However, it is one that bears merit since it may be the only choice. Certainly as we start to eliminate eligibility for membership, we could expect the national unions to start filing appeals. These will all, no doubt, result in a Clarification of unit action by the unions.

e. Title 10 agency head declaration is not an option for the National Guard according to FAS/CPMS/DoD.

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