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"…a **well organized**…militia" Th. Jefferson

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Via Email

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Re: Union Input – FY18 NDAA Section 574

Mr. Rogers:

LIUNA submits the following comments in accordance with (IAW) Sec. 574(c), which requires that the Secretary of Defense (SECDEF) consult with and include 'collective bargaining representatives' of technicians. Our comments only apply to technicians employed by the National Guard (NG):

1. REQUIRED REVIEW ELEMENTS:

a. Required Report Element #1: The extent to which technicians:

i. Are assigned military duties inconsistent with, or of a different nature than, their civilian duties:

LIUNA Comments

Technicians are constantly assigned duties of a military nature (to include being used as first responders in support of state emergencies) while in a civilian duty status, and these military duties are almost 100% of the time completely unrelated to their civilian position. This can include anything from being forced to accomplish tasks that are strictly related to their military membership in the NG (i.e., wearing chem-gear, participating in military training exercises, or qualifying at the weapons range), to acting as security guards, to manning points of food, water, and ice distribution during emergency response operations conducted at the request of a state governor.

It's important to point out that we're not talking about the work or nature of the equipment that they work on. Clearly, a technician who is an

Aircraft Mechanic or a Vehicle Mechanic within the NG will more than likely work on 'military' equipment, whether that be an F-15 Eagle air-to-air fighter aircraft, or an M1 Abrahams tank. So, while these civilian employees are certainly working on military equipment, that in and of itself does not make them military. We have thousands of purely civilian employees throughout DoD that work on military equipment yet they, themselves, are not military personnel, so it's important to get this factor out of the way.

The problem for military technicians is not necessarily borne out of the type of work they do, rather it's more the result of the environment they work in, an authoritarian military chain of command that refuses to see these folks for what they are…civilians. The fact that technicians are 'dual-status,' work in a 'military' environment, must wear a 'military' uniform to work, and are largely administered by 'military' personnel all contribute to a blurring of regulatory and legal boundaries to a degree that is not present in any other Federal civilian workplace, and helps to create an alternate and illegal reality for these employees. Because of this 'dual-status' label, and especially because they must wear a military uniform to work, their appointed leaders react accordingly and hence treat them as if they were military personnel. Add to this volatile mix the fact that these Federal employees are legally administered by a State-appointed military leader, the Adjutant General, and you have a system rife for confusion and abuse.

For comparison's sake, think of a nurse who works for the Veterans Administration. Can you imagine that nurse coming to work one day, ready to perform surgery, and his/her supervisor instructing them to take up an armed security post and guard the front entrance of the hospital because some of the guards called in sick and they are short-staffed? Or, how about asking an accountant that works for the Department of Housing and Urban Development to put their fiscal duties on hold because, today, instead of performing an audit, they're going to be transporting 18-wheelers tractor-trailers full of construction supplies from one location to another? Better yet, how about if that same nurse was asked to report to the grounds-maintenance department so they can cut grass or clean restrooms. Or, imagine that same accountant being ordered to plow snow from the sidewalk.

While these scenarios may seem far-fetched in a normal Federal setting, these are all too common within the NG technician system, and the only reason NG leaders try and often do get away with it is because of the 'military' label these employees are burdened with, which is interpreted by management to give them carte blanche over this work force. Further enabling the states to abuse technicians is the National Guard Bureau (NGB) which provides little to no oversight of the program other than putting out fires here and there if/when they are alerted to improprieties by either the Union or by an individual technician. Even then, and in light of

clear legal violations, NGB will often opt to cover for the bad actors rather than compel them to comply with Federal law.

We will sympathize with NGB by saying that, even in instances when there have been good personnel working at NGB willing to call states out on their bad deeds, the law provides NGB with zero enforcement powers. This is because IAW 32 USC 709, the individual Adjutant Generals 'administer' the technicians assigned to their state.

ii. The effect of such assignments on the career progression of technicians:

LIUNA Comments

This item is a little hard to gauge because, since the NG is such a 'military' organization, and since they have been operating unchecked for virtually 50 years, it not so much that a technician's performance of military duties interferes with their civilian career progression; it's that a technician who decides to challenge or complain about the illegal assignment of military duties is putting their career at risk.

In other words, employees who do not comply or conform with their deliberate misuse risk retaliation against them by the military command structure. This becomes ever more apparent later in an individual's career, especially once they reach 20 years of military service, as we explain in the next section.

LIUNA Recommendation on Report Item #1: Legally and regulatorily, technicians should not be assigned duties that are beyond the scope of their official position, regardless of whether these duties are considered military or not. This includes the use of Federal technicians to respond to state and local emergencies. In other words, the practice by the National Guard of assigning duties to their technician employees that are beyond the scope of their civilian job description needs to cease, and Congress should make it clear, either via report language or with legislation, that using these civilian employees to accomplish military-type functions is a violation of *5 CFR Part 2635 Standards of Ethical Conduct for Employees of the Executive Branch.* Specifically, 5 CFR 2635.705(b), which states:

> *(b) Use of a subordinate's time. An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.*

Congress should also further amend 10 USC 10508 and provide the Chief of NGB with oversight and enforcement powers over the individual Adjutant Generals in cases where they are in deliberate violation of Federal law and regulation.

Lastly, to remove the most visible source of consternation and confusion within this program, congress should repeal the requirement that technicians wear the military

uniform as a condition of employment. While this may have been a 'good idea' in 1968 when the Act was originally passed, it is now obsolete. The justification that wearing of the uniform is conducive to good order and discipline is ludicrous. For leaders to argue that they need these folks to wear a military uniform in order to keep them in line is an indictment on the Guard's own leadership. If they seriously need these folks to wear a uniform, any uniform, to maintain control over them then the problem lies with those in charge, not with the employees themselves. Also, removing the uniform requirement would save the US Government millions of dollars per year, conservatively speaking. This is money that could be used to, for example, pay for any increase in the defense budget that may arise from extending TRICARE Reserve Select to those same technicians.

b. Required Report Element #2: The use by the Department of Defense (especially within the National Guard) of selective retention boards to separate National Guard and Reserve technicians from military service (with the effect of thereby separating them from civilian service) before they accrue a full, unreduced retirement annuity in connection with Federal civilian service, and whether that use is consistent with the authority in section 10216(f) of title 10, United States Code, that technicians be permitted to remain in service past their mandatory separation date until they qualify for an unreduced retirement annuity:

LIUNA Comments

To fully discuss this item, we really need to look beyond current statutory authorities and take a look at what Congress intended when they authorized the NG technician program. The primary purpose of the National Guard Technician Act of 1968 (the Act) was to standardize the retirement and fringe benefits of National Guard technicians by granting them Federal employee status. The Act also required dual-status technicians to maintain satisfactory military membership in their respective branch of service as a condition of their civilian employment.

Reading beyond the black and white of the Act, codified at 32 USC § 709, it's clear that Congress had other intentions, one of those being that technicians remain employed until civil service retirement age was reached. On this front, the NG has not honored Congress' original intent as they continue to expose technicians to arbitrary military retention boards. Senate Armed Services Committee (SASC) Report No. 1446 dated July 22, 1968, made it clear that technician employment was expected to be career employment, with retention of qualified technicians in the military until age 60.

Concerning technicians who are officers, the report states:

> The bill…contains a provision which will permit the Secretaries of the Army and the Air Force on a permissive basis to retain Reserve officers who are technicians in an active military status until age 60, notwithstanding the operation of the Reserve personnel laws which would eliminate them because of promotion pass-over or length of service.

Concerning technicians who are enlisted, the report states:

> Under present regulations technicians holding enlisted grades are permitted to enlist in the Guard up to age 60. The committee has been informally advised that the National Guard intends to continue this policy, with the result that enlisted members should not be involuntarily retired through separation of job due to military promotion or elimination factors. In other words, so long as an enlisted technician properly performs his job there should be no grounds for his involuntary retirement.

In spite of SASC's original intent, and in spite of assurance made by the NG to Congress back in 1968, current regulations do not exempt technicians from either the Army's Qualitative Retention Program (AR 135-205) or the Air National Guard's Selective Retention Program (ANGI 36-2606). As a result, technicians are often involuntarily separated from military service by these review boards before reaching full civil service retirement age even though they are properly performing their civilian job and are in full compliance of military standards.

Not only is this practice detrimental to the employee's career and their ability to make a living, it is also detrimental to the US Government, itself, considering that the NG is arbitrarily terminating hundreds and perhaps thousands of experienced and skilled employees annually from the Federal civil service workforce without any real reason or justification. The amount of time and training that it takes to replace one of these experienced and capable individuals is probably costing the government even more in terms of human capital and training resources, and it is definitely affecting readiness and National Security when you consider what a trained and long-time (loyal) employee is capable of compared to a novice that has not yet demonstrated a long-term commitment to Uncle Sam.

To add insult to injury, the reasons why a particular individual may be retained or non-retained in the NG is often completely subjective, and without any basis on merit or performance. In fact, it could be purely based on whether they are related to the right person or not. Add to this the fact that there is no appeal of the decision (not even to the Secretary of Defense or a Federal Court) and you have yet another system rife for abuse.

LIUNA Recommendation on Report Item #2: A technician who is fully qualified in their military position and is properly performing their technician duties should be retained until they reach full civilian retirement age, regardless of how long they've served in the military. It makes absolutely zero sense for the NG to justify non-retaining an individual that is meeting all their job requirements simply (arbitrarily) because they have more than 20 years of military service. This could be easily and voluntarily remedied by the NG by modifying their retention board regulations. However, up to this point, the NG has refused to voluntarily address this longstanding issue, and we doubt they will voluntarily comply with Congress' original intent. As a result, Congress should amend Federal law to make sure the National Guard honors said intent of retaining technicians until they are eligible for their civilian annuity.

c. Required Element #3: The impact on recruitment and retention, and the budgetary impact, of permitting National Guard technicians who receive an enlistment incentive before becoming a technician to retain such incentive upon becoming a technician:

Most members of the NG receive enlistment and re-enlistment bonuses of up to $25,000 or more; they are also eligible for student loan repayment. The NG, however, denies technicians the same right to enlistment bonuses and student loan programs that are offered to other Guard members as recruitment and retention incentives. Some individuals join the Guard, receive a bonus or student loan assistance, and only later become a NG technician (as opposed to joining the Guard and becoming a technician concurrently). Those individuals are required, under current law, to repay the bonus, or to terminate participation in the loan program. However, most individuals typically use the bonus funds immediately for things like a down payment on a house or to pay their children's school tuition, etc. and do not have the funds available to pay back the Guard if/when they become a technician. Aside from the personal lack of funds availability, the program is also detrimental to morale because it creates a system where two individuals, working side-by-side and under the same requirements, are not afforded the same benefits.

The last time Congress took a look at this issue was around 2010. A LIUNA provision to bar repayment of bonuses by technicians and to continue student loan program participation was included in an en bloc amendment to the FY 11 NDAA (Sec. 672 of HR 5136 in the original House bill). The FYI 11 bonus/loan amendment prohibited "the requirement to repay bonuses or terminate participation in a college loan repayment program if the bonuses were paid or the participation in the loan repayment program began prior to the military technician employment period." However, the same language was not included in the Senate bill and was eliminated in conference.

Several members of Congress have tried to tackle this matter at LIUNA's request. Rep. Andrews included this language in the NG Technician Equity Act in both the 111th (HR 3345) and 112th Congresses (HR 1169), and as a member request to HASC for inclusion prior version of the NDAA. Rep. Sutton also requested this provision as a member request to HASC for the FY 12 NDAA. The language was also in Rep. Courtney's bill in the 111th Congress. In spite of widespread support, these provisions have always failed to make it into law, primarily due to budgetary concerns. In spite of our lack of success, it's clear that this is an issue that has widespread support in Congress, primarily because it is the right thing to do. It makes no sense to entice an individual with bonuses as a way to compel their enlistment in the military, and then take away that monetary incentive purely for technical reasons that can be easily corrected by legislation.

LIUNA Recommendation #3: We would propose that language be included in the FY19 NDAA to allow technicians to retain bonuses, and also provide eligibility to student loan repayment programs offered to other enlistees of the National Guard.

2. CONCLUSION:

We are not satisfied with the way DoD has decided to apply the requirements of Sec 574. We interpret Congress' intent that Unions be consulted on this study as something more formal than just a request for written comments. The positions included here are no secret to DoD and NGB leaders. We've held these positions for quite a long time, and the only way to truly explore the challenges and solutions to some of these pressing problems is to convene in person so that substantive discussion can take place. The problems identified by Sec. 574 are some of the most detrimental to technician employees, and there is widespread agreement on both sides (management and labor) that these issues need to be addressed for the long term. It's hard for us to understand why DoD would not want to sit down with the Unions and have in-depth discussions on these topics. Once again, it seems that stubbornness on the part of a few poisons the well for the rest, and the only ones that suffer are the technicians themselves, the ones keeping our skies safe, and our borders and battlefields clear of the enemy. The least senior DoD and NGB leaders could do is sit down and give these employees, through their Union spokespersons, the time of day.

On behalf of all National Guard technicians,

Ben Banchs
Business Manager