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

Via Electronic Mail

February 5, 2015

Gen. Frank J. Grass
Chief of the National Guard Bureau
111 S. George Mason Dr.
Arlington, VA 22204

Re: Proposed Changes to Dual Status Technician Discrimination Complaint Program

Dear Sir:

1. We recently participated in a briefing hosted by Mr. Charles Young, Chief of NGB's Employment Litigation Division, in which he described several proposed changes to the way dual-status technician discrimination complaints are processed. The most significant of these changes would be that, by being considered 'military' for discrimination purposes, dual-status technicians would no longer be afforded protections against discriminatory acts guaranteed to Federal employees under Title VII, Equal Employment Opportunity (EEO), nor would they be entitled to Union representation during the complaint process. Instead, under the proposed changes dual-status technicians would be processed under the Equal Opportunity (EO) provisions of Title VI, a program that offers fewer protections against discrimination in the workplace, and does not recognize a labor organization's rights to represent civilian employees.

2. The briefing was accompanied by a three-slide presentation that offered a (very high-flying) bird's eye point of view of the proposed changes, and two very detailed draft regulations (a manual and an instruction) outlining the new discrimination process. The slides were provided a few days prior to the actual brief, and frankly were not detailed enough for us to prepare questions or comments for the briefers. By contrast, the draft regulations were very detailed products, and based on the 'version' numbers ascribed to the documents it appears these were the 12th and 28th iterations of the instruction and manual, respectively. Unfortunately, the draft regulations were not provided until right before the briefing started, allowing little time to review the proposal in detail. In light of your Agency's tentative June 2015 implementation timeline, it's unfortunate that we were not provided more time to review the changes prior to being briefed.

3. Based on the briefing and the language contained in the draft regulations, the primary justification for the proposed changes is NGB's claim that 'Federal statutes and regulations applicable to civilian equal employment opportunity (EEO) programs do not apply to military related duties or job requirements.' This attitude towards technician discrimination complaints extends NGB's long-standing practice of claiming that the Equal Employment Opportunity Commission (EEOC) lacks subject matter jurisdiction over **any** EEO complaint brought forth by dual-status (and even non-dual status) technicians because, according to NGB, technicians are 'irreducibly military.' We couldn't disagree more. What NGB fails to appreciate, refuses to

accept, and/or deliberately ignores is that the process followed (Title VI vs. VII) when dealing with technician discrimination complaints should be determined by the nature of the complaint itself, not by the type of clothing the persons involved were wearing at the time the alleged discrimination took place. In accordance with Federal statutes, a dual-status technician 'is a Federal civilian employee' (10 USC § 10216(a)(1)) and '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' (32 USC § 709(e)). So, while it is true that dual-status technicians are required to fulfill certain military requirements as conditions of their Federal Civil Service employment, those military aspects of employment encompass a small and distinctive portion of a much broader civilian position; they are not the sole driving force behind the position itself. For example, a National Guard dual-status technician who's employed as a GS-0503-07 Financial Management Technician is no more 'irreducibly military' than their counterpart at the Department of Health and Human Services who's fulfilling the same duties. The only difference is that the National Guard technician is required to wear a military uniform to work (everyday) and is also required to maintain satisfactory membership as a reservist in the National Guard in order to keep their civilian job, but on a day-to-day basis their civilian duties are identical. It is inconceivable that intelligent individuals cannot, or refuse to, grasp this concept.

4. According to Mr. Young, NGB's overarching concern is that the Title VII EEOC process, as it concerns technicians, is broken, and that the changes proposed are meant to fix this broken system and ensure technicians with valid complaints receive justice quickly, not ten years later. Again, we agree with the problem, we disagree with the proposed solution. Some of the problems highlighted by NGB were:

> a. Problem 1. That the time it takes to process complaints under the current system is unacceptable. While we strongly agree that NGB's EEO complaint process is broken and it needs fixing, we categorically disagree that it is the program that needs to be changed; it is the management of the program, itself, which is deficient. Here's why:
>
> > i. The EEOC process, while not ideal, is well established and can work when used properly by all concerned. Aside from the fact that NGB has no legal authority to assume control of or change the current program, there's also much to be said against what appears to be an attempt by NGB to reinvent the wheel. The system isn't the problem, it is the individuals managing the program, starting at the EEO Counselor level and culminating with NGB's Complaints Management and Adjudication Division (CMAD), who have mishandled the discrimination complaint process (some inadvertently and some deliberately) for several decades, rendering it useless as a means to address discriminatory misconduct. If NGB truly wants to fix the problem and is interested in justice then they should:
> >
> > > A. Allow justice to take place rather than attempt to prevent it by misleading technicians concerning their rights under the law, and mischaracterizing the nature of individual complaints before the EEOC and Federal courts.
> > >
> > > B. If/when a technician's complaint finally gains traction via the EEO process then NGB should become an advocate for the process and do everything it can to ensure justice is served, instead of continuing their

current practice of hijacking, or helping the Adjutants General to hijack, the EEO process by either ignoring EEOC's orders, and/or filing a never-ending slew of dismissal motions claiming that the EEOC lacks jurisdiction over purely-civilian technician complaints. We use the word 'technician' broadly because NGB has consistently filed (or helped file) motions to dismiss for lack of jurisdiction in regards to both dual and non-dual status complaints. Instead of trying to re-write or circumvent the law, NGB just needs to follow it, and should concentrate its efforts on herding the individual states/territories through the current EEO process.

ii. Your staff's position that the EEOC lacks jurisdiction is the criminal equivalent of obstructing justice. Just as civilian adjudicators, like the EEOC, properly distance themselves from military matters, so should NGB defer to the EEOC on whether an employee's complaint is within their jurisdiction. From a lay perspective, it is hypocritical for NGB to claim jurisdiction and expect legal deference over military matters, yet ignore an agency like the EEOC when they have asserted jurisdiction over a civilian complaint. The EEOC's own 'case-by-case analysis' approach more than supports their jurisdiction over cases borne out of purely civilian matters. Their jurisdictional determination 'focuses on the nature of the discriminatory act rather than the nature of the complainant's position. *See Garcia v. Department of the Air Force (Air Force National Guard Bureau)*, EEOC Appeal No. 01A61442 (August 7, 2006) ("federal [dual-status] technicians are covered by Federal nondiscrimination law only when the alleged discriminatory action arises from their capacity as civilian employees and not when personnel decisions affect their capacity as uniformed military personnel").'

b. Problem 2. That Title VII fails to appreciate that only the TAG has authority to grant relief; and, that it ignores court decisions which have found dual-status technicians are inherently military. We disagree:

Differing Court Decisions

i. NGB rightly points out that there have been previous court decisions finding technicians are 'inherently military' as a way to support their claims that civilian procedures do not apply to dual-status technicians, and bolster their proposal to process technician discrimination complaints via Title VI (military) channels. However, they conveniently ignore many other federal court decisions which have found that claims of discrimination from dual-status technicians must be analyzed on a case-by-case basis to determine the nature of the discriminatory acts, and that they may raise a claim if the discrimination related to their civilian capacity.

ii. One of the main reasons for the number of differing court decisions concerning a technician's status and their ability to bring forth a claim under Title VII is largely due to the irresponsible practice by most at NGB who either incorrectly or deliberately muddy the judicial waters citing lack of jurisdiction due to a technician's dual-status. NGB obstructionists will often cloud very clear cut cases of civilian-borne discrimination with claims of technicians being 'irreducibly

military' regardless of what the facts are surrounding an individual case, and even in cases where the complainant is a non-dual status technician whose position entails zero military requirements or employment conditions other than the fact that they work within the National Guard.

iii. We agree that precluding or denying judicial review of inherently military aspects of a technician's position is established legally. The law is fairly clear as to what is inherently military and civilian in nature when it comes to technician employment. For example, the Federal Labor Relations Authority (FLRA) has issued numerous decisions affirming what is military and out of the scope of review, what is military in nature but not out of the scope of review, and what aspects of technician employment are purely civilian. For example, the right to collective bargaining is based solely on a technician's status as a Federal Civil Servant. One of the most interesting aspects about this is that Adjutants General have repeatedly relied on the FLRA just as heavily as the Unions have in adjudicating labor disputes arising out of a technician's clear civilian status under the law. This begs the question as to why states would have no problem either petitioning or submitting to the Authority to arbitrate disputes arising out of Federal employment matters and the Labor Statute, never once in our experience citing constitutional barriers, yet when it comes to the matter of technicians appealing to the EEOC, for example, the constitution is being waved in earnest.

iv. One of the most hotly contested of these topics over the years has been the issue of technicians and the wear of the military uniform. This has been a long fought provision, and has been a loser and a winner each time for labor organizations. Time and again, the FLRA has ruled that the actual wear of the uniform is a military matter, but negotiating on accouterments, allowances, or number of uniforms issued is not. These cases are also an interesting example of how a 'quasi-judicial' body can and does have authority over Adjutants General, an authority that has been accepted and recognized for quite some time. In 58 FLRA No. 103 the Union alleged that the Adjutant General of Missouri violated § 7116(a)(1) and (5) of the Federal Labor Statute by failing to provide employees three additional sets of duty uniforms in contradiction of their collective bargaining agreement. The FLRA found in favor of the Union and ordered the Missouri Adjutant General to 'cease and desists' and take 'affirmative action in order to effectuate the purposes and policies of the Statute.' With the FLRA being a 'quasi-judicial' body, much like the EEOC, if we were to follow NGB's logic concerning entities like the EEOC's lack of subject matter jurisdiction, it would be fair to expect that Missouri could have refused the FLRA's order for violating the sovereign immunity principles of the 11th Amendment. We don't recall the Supreme Court ever hearing such case.

<u>TAG Authority</u>

v. As much as NGB and the states will argue that 32 USC § 709 is a sort of carefully crafted legal balancing act that was devised to maintain constitutional harmony between the federal and state government, the reality is much less exciting. Dual-status technicians in their civilian capacity **<u>are not</u>** the Militia. As

such, the authority granted the Adjutants General by 32 USC § 709 to administer technicians is not derived from the US Constitution, and therefore not absolute. As such it should not take an act of Congress to require an Adjutant General to comply with Federal law, no more than it takes an act of Congress to require the Secretary of Defense to comply with discrimination laws as they apply to civilian employees of the DoD.

vi. The reality is that an Adjutant General's authority to administer National Guard technicians is statutorily granted by Congress, and it is delegated to them thru the individual service branch Secretaries. There is nothing that constitutionally prohibits a body such as the EEOC from enjoying jurisdictional oversight concerning the proper administration of those same employees the Adjutants General have been statutorily allowed to administer. This is what agencies like the EEOC are charged with doing. To claim that the EEOC has no authority to adjudicate or grant relief concerning a technician complaint solely because the statute grants administrative control to the Adjutants General is laughable. By that logic, no employer (federal or otherwise) would be required to abide by a lawful order issued by an entity such as the EEOC, and yet that is not the case. Unless the governing statute specifically exempts technicians from using EEO then they are covered by it. For example, much like National Guard technicians, employees of the Transportation Security Administration (TSA) are primarily administered by a statute other than Title 5. TSA employees are administered under 49 USC § 40122, which has detailed provisions concerning a number of administrative employment functions, including which portions of Title 5 apply and which ones don't. One of those exemptions is that a TSA employee cannot appeal adverse action decisions to the Merit Systems Protection Board (MSPB). This is similar to the limitations on MSPB appeals which apply to technicians under 32 USC § 709(g). However, since the law does not specifically bar TSA employees from Title VII coverage then they are allowed to raise complaints of discrimination through the EEO process, and DHS has to comply with rulings made by the EEOC. Adjutants General are no different. Unless the law specifically bars technicians from Title VII then the EEOC has jurisdiction and enforcement authority to grant relief.

vii. The key legal point to remember is that Congress allows the service branch Secretaries to delegate administrative control of technicians to the Adjutants General. Any restrictions contained within 32 USC § 709 against appeals beyond the Adjutants General of certain administrative employment actions (i.e., adverse actions, reductions in force, or furloughs) are legislative not constitutional. If this were the case, then it could be argued that bodies like the FLRA, the Department of Labor (DOL), or even the Office of Personnel Management (OPM) also have no legal authority over Adjutants General, at least no more than they would have over any other Federal employee administrator. The fact that these other Federal agencies enjoy oversight and jurisdiction over civilian aspects of technician employment prove that the jurisdictional arguments based on the non-federal employment status of an Adjutant General are superficial and serve only to deny due process to technicians in their civil service capacity. Again, we feel it is extremely important to emphasize that the authority granted to an Adjutant

General to administer technicians is legislative, not constitutional, and any argument to the contrary is deliberately ludicrous and disruptive.

viii. The MSPB itself, a quasi-judicial body which statutorily has no jurisdiction over administrative technician matters, as recently as 2008 (See Fitzgerald, 108 M.S.P.R. at 620) stated that:

> " a person…., who was employed under 32 U.S.C. § 709(a), must be a military technician (dual status) as defined in section 10216(a) of title 10, United States Code. 32 U.S.C. § 709(b). Section 10216(a)(1), in turn, provides that, for purposes of that section "and any other provision of law," a military technician (dual status)…"is a Federal civilian employee." In fact, under 32 U.S.C. § 709(e), an NGT "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." See Ockerhausen, 52 M.S.P.R. at 488 (even though National Guard technicians work for state organizations under the authority of a state official, they must be considered civilian employees of the Department of the Army or the Department of the Air Force to the same extent as other employees of the Department of the Army or the Department of the Air Force). Such an NGT position is simply "outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard." 32 U.S.C. § 709(e). Given that military technicians…are considered, for purposes of "any other provision of law," to be federal civilian employees, and that they are also considered to be employees of the Department of the Air Force and the United States to the same extent as other employees of the Department of the Air Force, we hold that the AJ correctly concluded that the appellant is an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii) because he completed 1 year of current continuous service under other than a temporary appointment..."

ix. Several other areas of Federal law and regulation confirm the Adjutants General as mere 'employers' of technicians, and more importantly make a clear distinction as to whether a technician is considered a state or federal employee in certain complaint proceedings. For example, 20 CFR Part § 1002.306 makes clear that 'a National Guard civilian technician is considered a State employee for USERRA purposes, although he or she is considered a Federal employee for most other purposes.' This is important because it shows that Federal regulations have specified situations under which a technician is considered a state versus federal employee. There is no legal or regulatory exclusion that NGB can rely on to say that Title VII does not apply to technicians, or to support their contention that the Commission lacks jurisdiction over Adjutants General.

x. The bottom line is that Federal law and regulation clearly establishes that Adjutants General are employing authorities merely because Federal law has deemed them as such. To further clarify that status as an employer, 38 USC 4303(4)(A) states that 'except as provided in subparagraphs (B) and (C), the term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment.' The exception in 38 USC 4303(4)(B) states that 'in the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the adjutant general of the State in which the technician is employed.' Again, the reason this is so is because Congress legislated it as such. The power granted to the Adjutant General is done so by statute, and as such Congress could and has certainly dictated, legislatively, how said power will be enjoyed.

4. This brings us to the most compelling argument against NGB's overt attempt to thumb its nose at Federal law. Even though Mr. Young failed to mention anywhere in his brief the need for NGB to request legislative action in order to implement these proposed changes, the most obvious hurdle is that NGB lacks the statutory authority to process complaints arising out of a dual-status technician's civilian employment. During the briefing Mr. Young was asked under what authority NGB was making these changes, to which he quickly replied '32 USC, 709.' As always, § 709 is the catchall. Based on NGB's interpretation, § 709 theoretically allows the Adjutants General to do whatever they want with zero oversight or liability. This is just plain ridiculous. Such interpretation ascribes almost magical powers to the Adjutants General. In fact, § 709 may very well be the most powerful legal provision in the entire United States Code. This is just plain false. Furthermore, if this were truly the case, NGB would have made these proposed changes decades ago. They didn't, and now, even as we speak, NGB continues to help Adjutants General ignore and refuse to comply with EEOC judge's orders and valid requests for action in support of pending technician discrimination complaints.

5. If § 709 truly grants Adjutants General such unfettered authority then even what Mr. Young has proposed is out of reach because the authority § 709 grants is to the Adjutants General, specifically, and not to any other person or entity, not even a state governor, and NGB themselves claim no legal authority exists for them to direct technician employment decisions. Any action by NGB concerning technician employment matters can only be interpreted, legally, as policy/technical/legal advice and nothing more. Again, if NGB is truly interested in seeking and expediting justice then it should be expanding a technician's ability to achieve said justice rather than further limiting it, and even removing their ability to do so.

6. As we mentioned, the EEOC has statutory jurisdiction over technician complaints, and NGB knows it lacks the legal authority to do what they're claiming they can do. This attempt to 'back-door' a change to the technician discrimination complaint process is a blatant violation of Federal law, and it is a re-hash of a similar attempt 2 years ago. In 2013, NGB's Complaints Management and Adjudication Division (CMAD), specifically Mr. Young, prematurely and without legal authority informed state EEO representatives that anyone who wore a uniform would process their complaints through military channels. Shortly after Mr. Young made his announcement we were made aware of your Agency's attempt to change the statute and gain control of the technician discrimination complaint process by trying to insert the following language into the FY14 National Defense Authorization Act (NDAA). The language below was never included in the final version of the NDAA, in part due to LIUNA's strong opposition:

> *§ ___. FORUM FOR PROCESSING OF COMPLAINTS OF WRONGFUL DISCRIMINATION BY NATIONAL GUARD MILITARY TECHNICIANS (DUAL STATUS).*
>
> *(a) IN GENERAL - Section 709 of title 32, United States Code, is amended by adding at the end the following new subsection:*
>
> *"(j) A complaint of wrongful discrimination by a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) shall be considered a complaint of wrongful discrimination by a member of the armed forces."*
>
> *(b) EFFECTIVE DATE-The amendment made by subsection (a) shall apply with respect to a complaint of wrongful discrimination initiated on or after the date of the enactment of this Act.*

7. Aside from the legal or regulatory technicalities, the real tragedy is that every time your staff helps an Adjutant General deny a complainant of their right to report and seek relief from discrimination they are condoning the behaviors which generated the complaint to begin with, while at the same time encouraging the offenders. Sadly, the worst offenders are usually those in positions of power who either commit the offenses themselves, or enable those under them to commit discriminatory offenses, to include retaliating against those that come forward with complaints. These behaviors include some of the most disturbing types of discrimination and harassment one can imagine, especially against women and minorities (although the discrimination knows no racial or gender boundaries). Many instances of discrimination last for years, some escalating to violence, and some even resulting in the victim committing suicide because they never achieve resolution, especially since (more often than not) they are victimized all over again by the system which is supposed to protect them. All of these tragic acts are allowed to exist because your staff enables them to continue.

8. The concerns above notwithstanding, the other issue that we see with the changes proposed is that instead of providing a simpler and more clear cut path to complaint resolution, the new system seems to be even more complicated with absolutely zero guaranteed safeguards against management's failure to comply. It's also going to be hard to administer because it is a completely new process without anyone available who can expertly guide or advise an employee on how to maneuver all the new waypoints and timelines. Also, Mr. Young did not sound very encouraging as to whether the changes would even work as he constantly kept saying that they still needed to get 'TAG buy-in,' and kept qualifying his statements with a slew of 'hopefully, maybe, and we feel' statements, and a number of other uncertain and open-ended remarks. In other words, Mr. Young did not convey confidence that they would be in any better position to corral the same Adjutants General which NGB has conferred de facto-monarch status upon, further lending credence to the reality that NGB has zero legal authority to compel the states to act one way or another.

9. As stated earlier, we do agree that major change is needed. However, instead of what Mr. Young has proposed we suggest a more deliberate and centralized approach, like joining us in seeking legislative changes limiting the authority of the Adjutants General and installing enforceable oversight and appeal mechanisms in the law when it comes to technician administrative employment actions. You could also consider transferring wholesale oversight of National Guard EEO complaint processing to DoD considering they have a much better understanding of Federal Civil Service law and the issues associated with managing a full-time civilian workforce within the confines of a pure military environment.

10. For these, and a number of other reasons, we oppose the proposed changes. Point of contact is the undersigned via email at benbanchs@liuna-ngdc.org, or telephone at (985) 249-2315.

Respectfully,

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