FEDERAL LABOR RELATIONS AUTHORITY
CHICAGO REGION

MICHIGAN NATIONAL GUARD
(Agency/Petitioner)

and

SELFRIDGE AIR NATIONAL GUARD BASE, MICHIGAN
(Agency)

and

ASSOCIATION OF CIVILIAN TECHNICIANS
(Exclusive Representative/Petitioner)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
(Exclusive Representative/Petitioner)

Case Nos. **CH-RP-18-0032**
CH-RP-18-0034
CH-RP-18-0035
CH-RP-19-0006

DECISION AND ORDER

I. Statement of the Case

This proceeding is before the Region based on a petition filed on June 6, 2018 by the Association of Civilian Technicians (ACT) (as amended by ACT on August 24, 2018), Case No. CH-RP-18-0032; a petition filed on July 13, 2018 by the American Federation of Government Employees, AFL-CIO (AFGE), Case No. CH-RP-18-0034; a petition filed on July 30, 2018 by the Michigan National Guard (MING), Case No. CH-RP-19-0035; and a second petition filed on November 21, 2018 by AFGE, Case No. CH-RP-19-0006. The above four petitions were consolidated by an earlier order.

All four petitions in this matter resulted from a reorganization at the Michigan Air National Guard (Michigan ANG). Prior to the reorganization, the two unions involved (ACT and AFGE) represented distinct units of employees. ACT represented a statewide unit of Title 32 technicians[1] employed by MING and AFGE represented a unit of Title 5 civilian employees stationed at Selfridge Air National Guard Base (Selfridge ANGB) and employed by the Air Force. The reorganization blurred these distinctions. First, a portion of the employees in ACT's unit were converted from Title 32 technicians to Title 5 civilian employees. Second, all of the employees in AFGE's unit were transferred from the Air Force to the Michigan ANG.

The petitions filed by ACT (CH-RP-18-0032) and by AFGE (CH-RP-18-0034) make competing claims regarding the technicians who converted to Title 5 status. ACT seeks a determination that the converted Title 5 employees remain in its bargaining unit while AFGE seeks a determination that the newly converted Title 5 employees at Selfridge be included in its bargaining unit.

The Petition filed by MING (CH-RP-18-0035) seeks amended certifications related to the conversion of employees from Title 32 to Title 5. It also asserts that because MING, not the Air Force, is now the employer of employees in AFGE's bargaining unit, those employees should be accreted into ACT's statewide bargaining unit.

Finally, the second Petition filed by AFGE (CH-RP-19-0006) seeks a determination that if it is concluded that MING is now the employer of its unit employees, then MING is a successor employer and must recognize AFGE as the exclusive representative of those employees.

The Region held a hearing on these matters, after which ACT, AFGE, and MING filed briefs which I have fully considered. For the reasons discussed below, I find that the appropriate unit at the Michigan ANG is a statewide unit of Title 32 technicians and Title 5 employees, and that an election should be held to determine whether ACT or AFGE, if either, should be the exclusive representative of those employees.

II. Findings

The Michigan National Guard is comprised of the Michigan Air National Guard and the Michigan Army National Guard, and is headed by the Adjutant General of Michigan. Its mission is to fight our nation's wars, defend the homeland, and build global partnerships. The Michigan ANG includes the Selfridge Air National Guard Base (Selfridge ANGB), as well as facilities in Battle Creek, Alpena, and Lansing. Counting the total number of Title 5 civilian employees and Title 32 technicians, the Selfridge ANGB is by far the largest component in the Michigan ANG, with approximately 665 employees and technicians.[2] The Selfridge ANGB is located just north of Detroit, Michigan and sits on 3,000 acres of land, with 256 buildings and 44 tenants

[1] The Title 32 technicians are federal employees covered by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135.

[2] There are approximately 126 ACT bargaining unit positions at Battle Creek, 9 at Alpena, and 2 at Lansing.

occupying space in about 100 of those buildings. Components of the U.S. Air Force, Army, Navy, Marine Corps, Coast Guard and Customs & Border Protection, are located at Selfridge ANGB.[3]

The 127th Wing of the Michigan ANG is the main unit on Selfridge ANGB and is commanded by Brigadier General John D. Slocum, who reports to the Michigan Adjutant General. Overall, the 127th Wing is comprised of approximately 1700 personnel, including traditional members of the Michigan Air National Guard, Active Guard and Reserve (AGR) employees,[4] dual status Title 32 technicians,[5] Title 5 civilian employees, State of Michigan employees and contractors. The mission of the 127th Wing is to provide worldwide air mobility, airlift, air refueling and close air support, and combat search and rescue operations. This mainly entails maintenance, support, and operation of military aircraft.

The National Guard Bureau (NGB) is a joint activity of the Department of Defense. It promulgates rules and regulations concerning military technicians employed by the various National Guards, but does not serve as the employer of the technicians.[6] The NGB has issued regulations affecting numerous aspects of technicians' work life, and has developed uniform position descriptions. It acts as the resource manager for the federal money, material, and manpower allocated to the state National Guards, and implements Federal military policy as it affects the National Guards.

The AFGE bargaining unit at Selfridge ANGB

Between at least as far back as 1985 through May 15, 2018, the American Federation of Government Employees, Local 2077 (AFGE Local 2077) was recognized as the exclusive representative of the following unit of employees at Selfridge ANGB:[7]

Included:	All Air Force civilian employees assigned to the Selfridge ANGB and serviced by the 127th Wing Central Civilian Personnel Office.
Excluded:	All professional employees; management officials; supervisors; and employees described in 5 U.S.C. § 7112(b)(2), (3), (4), (6) and (7).

[3] A list of tenant organizations is also shown in AFGE Exhibit 8.
[4] AGR uniformed service members are on active duty within the US Armed Forces and perform duty organizing, administering, recruiting, instructing, or training the reserve components. 10 USC § 12310(a).
[5] 32 U.S.C. § 709(d).
[6] The National Guard Technicians Act of 1968, 32 USC § 709, authorizes the Secretaries of the Army and the Air Force to prescribe regulations concerning technicians' conditions of employment. The Secretaries delegated this authority to the NGB.
[7] Uncontroverted hearing testimony was that AFGE Local 2077 represented Title 5 employees for 60 years or more.

On May 15, 2018, the Regional Director of the FLRA's Dallas Regional Office amended the above certification to certify that the AFGE, and not AFGE Local 2077, is now the designated exclusive representative of employees in the above unit.

The unit currently represented by AFGE at Selfridge ANGB includes approximately 290 Title 5 bargaining unit employees.[8] The hearing revealed that until approximately November 30, 2018, these Title 5 employees' human resources needs were serviced by a NGB Civilian Human Resources Division—not a "127th Wing Central Civilian Personnel Office" as described in the above certification language. This is because the 127th Wing has no such central civilian personnel office. Although the responsibility of this NGB Civilian Human Resources Division at Selfridge ANGB is national in scope, up until November 30, 2018, it fully serviced the human resources needs of all of the Title 5 employees represented by AFGE. It never serviced the human resources needs of any Title 32 employees within the State of Michigan.

At Selfridge ANGB, the Title 5 employees represented by AFGE mainly perform base-wide support functions, as opposed to aircraft support functions undertaken by the current ACT employees. For example, air traffic control and civil engineering functions are almost exclusively performed by Title 5 employees represented by AFGE. The Civil Engineering Department contains the functions of the Fire Department; Operations; Resources; Engineering; and Environmental Management. The entire Fire Department, except for one employee, is comprised of Title 5 employees represented by AFGE. The vast majority of employees who work for the Chief of Operations and the functional branches he oversees are Title 5 employees represented by AFGE. The majority of the Resources employees are Title 5 employees represented by AFGE. And the vast majority of the employees within the Engineering and Environmental Management departments are Title 5 employees represented by AFGE. All but one employee of the 127th Wing Contracting office are Title 5 employees represented by AFGE. Despite the predominance of Title 5 employees in the departments referenced above, there remain Title 5 civilian employees and Title 32 technicians who work together in the same work units at Selfridge ANGB. For example, there are both Title 5 and Title 32 positions with the same job title working in the following departments: Vehicle Management, Deployments & Distribution, Materiel Management, Civil Engineering, Contracting, and Comptroller.

The transfer involving Title 5 U.S Air Force employees at Selfridge ANGB

Section 932 of the National Defense Authorization Act (NDAA) of 2017 entitled "Enhanced Personnel Management Authorities for the Chief of the National Guard Bureau" amended 10 USC § 10508 by adding that the Chief of the National Guard Bureau ". . . may program for, appoint, employ, administer, detail, and assign persons under sections 2103, 2105, and 3101 of title 5, or section 328 of title 32, within the National Guard Bureau and the National Guard of each State . . . to execute the functions of the National Guard Bureau and the missions of the National Guard, and missions as assigned by the Chief of the National Guard Bureau." *National Defense Authorization Act For Fiscal Year 2017*, PL 114-328, December 23, 2016, 130 Stat 2000. Also, Section 932 of the 2017 NDAA provided:

[8] See MING Ex. 12.

(2) ADMINISTRATION THROUGH ADJUTANTS GENERAL.—The Chief of the National Guard Bureau may designate the adjutants general referred to in section 314 of title 32 to appoint, employ, and administer the National Guard employees authorized by this subsection.

(3) ADMINISTRATIVE ACTIONS.—Notwithstanding the Intergovernmental Personnel Act of 1970 (42 U.S.C. 4701 et seq.) and under regulations prescribed by the Chief of the National Guard Bureau, all personnel actions or conditions of employment, including adverse actions under title 5, pertaining to a person appointed, employed, or administered by an adjutant general under this subsection shall be accomplished by the adjutant general of the jurisdiction concerned. For purposes of any administrative complaint, grievance, claim, or action arising from, or relating to, such a personnel action or condition of employment:

(A) The adjutant general of the jurisdiction concerned shall be considered the head of the agency and the National Guard of the jurisdiction concerned shall be considered the employing agency of the individual and the sole defendant or respondent in any administrative action.

Following the passage of the 2017 NDAA, the Chief, National Guard Bureau, General Joseph Lengyel, issued a February 16, 2017 memorandum designating The Adjutant Generals (TAGs) (or anyone serving as a TAG) to appoint, employ, and administer persons employed to execute the missions of the of the National Guard in the respective TAG's State, in accordance with 10 USC § 10508 as amended by the FY 2017 NDAA.[9]

On August 9, 2017, the NGB issued a Notice entitled "Title 5 National Guard Position Conversion," which stated, "[t]he CNGB [Chief, National Guard Bureau] has designated the TAGs to appoint, employ, and administer NG employees IAW [General Lengyel's February 16, 2017 memorandum]. Subject to clarifying guidance from the NGB, this designation may also include existing T5 currently assigned to positions in the States. TAGs will follow NGB guidance for conversion."

The record evidence revealed that in the months leading up to November 2018, the NGB Human Resources office initiated telephonic conference calls with the MING Human Resources Office (HRO) (along with other states' HROs)—and held at least one meeting in Washington, D.C.—to prepare the HROs of the various state National Guards to begin servicing the human resources needs of Title 5 employees.

Then, in an undated memo digitally signed on November 16, 2018, the Director of the NGB's Human Resources Office, Caren Foard, issued a memo to the MING HRO entitled "Agency Transfer for Air Force Employees currently assigned to the Michigan National Guard." In Ms. Foard's memo she wrote, "[i]n accordance with CNGB memo dated 21 February 2017,

[9] General Lengyel also signed an identical memo dated February 21, 2017, for unknown reasons.

request an agency transfer be accomplished to assign any current Air Force Employees working on behalf of the Michigan National Guard to a National Guard employee status no later than 25 November 2018." Ms. Foard named as the point of contact for the action "Ms. Debra Schuster, Chief Civilian Human Resources Division, NGB/HRC."

Beginning on or about November 30, 2018, the Title 5 employees at Selfridge ANGB who are represented by AFGE began receiving emails from the MING HRO attaching SF-50's (Notification of Personnel Action forms) with an effective date of November 30, 2018. The emails stated, "[a]ttached you will find your SF 50 personnel action transferring you from the Department of the Air Force to the Michigan National Guard as a competitive service employee."[10] These emails further announced that the MING HRO would be their servicing HRO. The MING Human Resources Officer, COL Meyers, also testified that the MING HRO is now the human resources office for the Title 5 employees represented by AFGE. Testimony by a subordinate to Debra Schuster at the NGB Civilian Human Resources Division located at Selfridge ANGB (Mr. Haan) was that the NGB Civilian Human Resources Division was operating as the "losing agency" for the transfer of employees.

The emails sent from the MING HRO to AFGE bargaining unit employees, attaching new SF-50's, led to confusion among these employees, who still possessed identification cards (called Common Access Cards) that state they are Air Force civilian employees and had access to computer systems identifying them as Air Force employees.

Leading up to the hearing in this matter, the Department of the Air Force (Air Force) Legal Operations office was served the October 11, 2018 Order scheduling the December 4, 2018 hearing; the October 22 Prehearing Order directing that specific witness testimony and documentary evidence be provided at the hearing; and the November 14, 2018 Notice of Hearing Location. However, the Air Force did not participate in the hearing. Rather, on November 27, 2018 the Air Force sent the Region a letter to "disclaim any interest in the consolidated petitions." The Air Force stated that Title 5 employees at Selfridge ANGB "have historically been employed by the Air National Guard under the authority of the Secretary of the Air Force (and) have worked alongside their Title 32 counterparts in various positions within the 127th Wing, Selfridge ANGB (Michigan)." The Air Force's letter further stated:

> The Department of the Air Force does not however, dispute the Michigan National Guard's contention that they should be considered the employer of the employees presently in the AFGE unit given the dictates of the 2017 National Defense Authorization Act § 932. Pursuant to 10 U.S.C. § 10508 and a subsequent designation of authority from the Chief of the National Guard Bureau, the Michigan Adjutant General took control of the Title 5 employees. The Michigan Adjutant General currently has control over all Title 5 employees at Selfridge pursuant to the above-stated authorities. As a result, the Department of the Air Force does not take a position on the petitions filed by AFGE or ACT in these consolidated cases.

[10] See e.g., AFGE Ex. 6.

With the transfer of the Title 5 Air Force employees to the MING, employees from both the AFGE bargaining unit and the ACT bargaining unit are subject to MING's employment policies and practices, serviced by the MING HRO, share MING's mission, and are included in a chain of command that runs up to the Michigan Adjutant General.

The ACT bargaining unit in the State of Michigan, including employees at Selfridge ANGB

On May 28, 1969, pursuant to Executive Order 10988, the Adjutant General of Michigan, on behalf of the Department of Military Affairs of the State of Michigan, signed a Letter of Recognition which recognized ACT as the exclusive representative of a unit of employees "consisting of all non-supervisory and non-managerial wage board and classified Air National Guard Technicians in the State of Michigan."[11]

A military technician (dual status) is a Federal civilian employee who—(A) is employed under section 3101 of title 5 or section 709(b) of title 32; (B) is required as a condition of that employment to maintain membership in the Selected Reserve[12]; and (C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces. 10 USC § 10216(a).[13] Thus, the "dual status" nature of the military technicians assigned to the Michigan National Guard is that they are Federal civilian employees who also must maintain membership in the Michigan National Guard (part of the Selected Reserve) as a condition of their employment.

Approximately 439 Title 32 military technicians (dual status) of the Michigan Air National Guard are represented by ACT.[14] Of these, approximate 302 work at Selfridge ANGB. The vast majority of the remaining ACT bargaining unit employees throughout the State of Michigan work at the ANGB in Battle Creek, Michigan. For many years, MING's HRO in Lansing, Michigan has provided human resources services for these Title 32 technicians.

The "conversion" of Title 32 employees to Title 5 employees at Selfridge ANGB

The NDAA for fiscal year 2016 required the Department of Defense to convert not fewer than 20 percent of dual status military technicians to a Title 5 status. Subsequently, the CNGB issued an August 9, 2017 notice that all non-dual status technicians and select dual status technician positions ". . . will convert to Title 5 NG positions no later than 01 October 2017."[15] The NDAA for fiscal year 2018 amended this figure down to 12.6%. Consistent with these authorities, the MING began converting Title 32 employees at Selfridge ANGB to a Title 5 status beginning in April 2018 and through October 2018. In all, approximately 29 Title 32

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[11] See Joint Ex. 1.
[12] The Selected Reserve consists of units of the Ready Reserve which are liable for active duty. 10 USC § 10143.
[13] The Michigan National Guard no longer has non-dual status technicians, who when hired were not required to maintain membership in the Selected Reserve.
[14] The Laborers International Union of North America, AFL-CIO represents all non-professional employees assigned to the Michigan Army National Guard.
[15] See MING Ex. 5.

employees represented by ACT at Selfridge ANGB were converted to a Title 5 status during this timeframe.[16]

The record evidence established that the conversion of employees represented by ACT from Title 32 to Title 5 status has not changed their day-to-day conditions of employment. In this regard, recently converted Title 32 employees continue to support the same mission within the same organizations and under the same chains of command. They have the same job titles, work assignments, and similar or related job duties that they had prior to the conversion. Their benefits, such as health and retirement benefits, did not change and their human resources needs continue to be serviced by the MING HRO. One main change is that as new Title 5 employees, they no longer wear the military uniform during their workweek when they are in a Title 5 status. Another major change is that the converted employees are no longer required to maintain membership in the National Guard as uniformed service members as a condition of their Title 5 employment. All Title 32 employees who were converted to a Title 5 status received a new SF-50 to confirm the conversion.[17]

III. Position of the Parties

On the issue of the status of the "transferred" Title 5 employees represented by AFGE

MING argues that the NDAA (FY's 2016-2019) authorized the transfer of AFGE bargaining unit employees from the US Air Force to the Michigan National Guard. MING further argues that the CNBG memorandum from February 2017 and the CNGB Notice from August 2017 authorize the transfer and that "those employees are no longer U.S. Air Force employees." MING asserts that the US Air Force, through its Statement of Interest, agrees that the transferred employees are not US Air Force employees. MING further believes that a single, statewide bargaining unit made up of all the eligible Michigan Air National Guard employees (including the Title 5 employees currently represented by AFGE and Title 32 technicians currently represented by ACT) would be appropriate. In support of this end-state, MING argues that the only reason separate bargaining units existed before was because the AFGE unit employees were US Air Force employees serviced by a different human resources office. MING further emphasizes that the record evidence did not show a clear delineation between the AFGE unit and ACT unit employees. Finally, MING asserts that it, as well as AFGE and ACT, agreed at the hearing that an election is an appropriate way to determine the exclusive representative of the proposed statewide-unit of Title 5 and Title 32 Michigan National Guard employees.

AFGE contends that the NDAA, the CNGB memo and Notice and the memo from the NGB's Director of Human Resources, Ms. Foard, do not authorize a transfer of the US Air Force Title 5 employees it represents to MING. Arguing in the alternative, AFGE further asserts that should such a transfer be deemed authorized, the Authority's community of interest criteria

[16] Throughout ACT's statewide bargaining unit, an additional 15 Title 32 employees were converted to a Title 5 status during this period. These additional 15 employees are employed at the Battle Creek ANGB. Thus, a total of 44 ACT Employees were converted from Title 32 to Title 5. See ACT Ex. 3.
[17] See MING Ex. 8.

nevertheless compels a finding that the existing AFGE bargaining unit of Title 5 employees remains appropriate. In this regard, AFGE described the distinction between the base maintenance and mission support functions at Selfridge ANGB as a clearly identifiable differentiation between the ACT bargaining unit and the AFGE bargaining unit. Finally, AFGE asserts that if it is determined that MING is now the employer of the AFGE bargaining unit employees, AFGE should continue to represent the unit employees under the Authority's successorship doctrine.

ACT's post-hearing brief only addressed the "conversion" issue, *infra*, with which it is most concerned. In its opening remarks during the hearing, the ACT suggested an election may be needed to determine the exclusive representative of the Title 5 employees.

On the issue of the status of the "converted" Title 32 to Title 5 employees represented by ACT

ACT asserts that the Title 32 employees who were recently converted to a Title 5 status continue to be appropriately represented in the ACT bargaining unit, and the certification language should be updated to include the converted Title 5 employees. In support of this desired outcome, ACT emphasizes that the converted Title 32 technicians still maintain and perform the same positions, grades, duty locations and other entitlements and benefits.

MING agrees with ACT that the converted Title 32 employees should remain in the ACT bargaining unit, with merely a technical change to the ACT bargaining unit certification language. MING emphasizes that the Authority in at least two recent cases found bargaining units appropriate even though they contained both Title 32 technicians and Title 5 employees.

AFGE at the start of the hearing remarked that the newly converted Title 5 employees fit more properly into the AFGE bargaining unit. However, AFGE did not further discuss the issue during the hearing or in its posthearing brief.

IV. Analysis and Conclusions

A. The Title 5 employees represented by AFGE were transferred and are now employees of MING.

The documentary evidence MING provided to support its argument that it now employs the AFGE unit employees is not particularly clear. Initially, it should be noted that a Prehearing Order was issued in this case whereby parties were directed to provide "documentary evidence, including SF-50s and payroll documents...which establish for each employee whether she/he is employed by the Department of the Air Force, the National Guard Bureau, the Michigan National Guard, Selfridge Air National Guard Base, or some other entity."[18] In support of its claim that the AFGE bargaining unit employees were reassigned from the Air Force to MING, MING points to: 1) Section 932 of the 2017 NDAA, which permitted the NGB to designate TAGs to employ certain Title 5 employees; 2) a 2017 memo from the NGB Chief designated

[18] Auth. Ex. 1(i).

TAGs to employ persons pursuant to the 2017 NDAA; 3) a 2017 NGB Notice which referenced the 2017 NGB memo and stating that, "subject to clarifying guidance," the designation "may...include existing T5 currently assigned to positions in the States;" and 4) a November 16, 2018 memo from the NGB HR Office at Joint Base Andrews to the NGB Civilian HR Division at Selfridge ANGB requesting the transfer of Air Force employees to "a National Guard employee status no later than 25 November 2018."

While it is not clear whether Section 932 of the 2017 NDAA and the 2017 NGB Chief's memo were intended to apply to "legacy" Title 5 employees, rather than solely employees converted from T32 to T5, the 2017 NGB Notice indicates an intention to apply the 2017 memo to these employees. In any event, establishing an intention to designate adjutants general as employers of Title 5 civilian employees not converted from Title 32 does not prove that MING is now the employer of the AFGE bargaining unit employees. Similarly, the memo from the NGB to the MING requesting that a transfer be completed no later than November 25, 2018 is not evidence that the transfer actually occurred.

MING also submitted SF-50 (Notice of Personnel Action) forms for most, but not all of the employees at issue. Employees began receiving these documents on or about November 30, the Friday before the hearing commenced in this matter on Tuesday, December 4. The SF-50s were apparently being prepared for each employee in alphabetical order, so that the SF-50s placed in the record only cover employees whose last name began with "A" through "S." At the hearing, MING counsel explained "that's as far as they had gotten when I had them printed on Monday."[19]

But the SF-50s themselves are also problematic. While the forms appear to show a reassignment from the Michigan Air National Guard Headquarters[20] to the Michigan TAG (also at the Michigan Air National Guard Headquarters), key components of these forms are confusing. For example, block 46 of the SF-50's for these employees shows the Employing Department or Agency as "Department of the Air Force (NGAF)" and the payroll office in block 44 is identified as "DOD Payroll Office, Indianapolis (Air Force) (DE) DE." Furthermore, the Legal Authority listed for the action is cited as Reg. 315.601, which appears to pertain to former Panama Canal employees.

MING argues that the Air Force supports its position that MING is now the employer of the AFGE bargaining unit employees. However, while the Air Force stated in its November 27, 2018 letter that it did not dispute MING's claim, it also disclaimed any interest in this matter and did not participate in the hearing. Under these circumstances, where the Air Force did not provide documentary evidence or testimony subject to further examination, little weight is given to this assertion. MING also states that similar transfers of Title 5 employees to the state TAGs "have taken place in several other states" and its actions in this case are "part of an authorized process that is taking place nationwide." However, the testimony MING relies on for that point

[19] Tr. at 280.

[20] It should be noted that the SF-50 forms show the transfer of the employees "from" the Michigan Air National Guard Headquarters, and not the Department of the Air Force.

suggests that any such transfers to date involved small numbers of non-bargaining unit employees.

While there is limited documentary evidence that the AFGE bargaining unit employees are now employed by MING, the weight of the evidence supports the conclusion that such a transfer occurred, even if the transfer was not entirely completed by the time of the hearing in this matter. In this regard, it is clear that the continued processing of SF-50 forms for the remainder of the AFGE bargaining unit employees was planned to occur and the completion of this task was imminent at the time of the hearing. *Defense Logistics Agency, Defense Contract Mgmt. Dist. North Cent., DPRO-Thiokol, Brigham City, Utah*, 41 FLRA 316, 327 (1991). Furthermore, MING witnesses testified that the transfer had occurred.[21] While several employees testified that they remained Air Force employees based upon their continued possession of Air Force identification and computer access, this is explained by the timing of the transfer in relation to the hearing in this matter.

While AFGE does not dispute that the transfer occurred, it argues that the transfer was unauthorized based upon the wording of the 2017 NDAA. However, for purposes of this decision it is important to determine whether a transfer occurred, rather than the appropriateness or legality of the transfer. Here, the weight of the evidence supports the conclusion that the AFGE bargaining unit employees were transferred from the Air Force to MING and are now MING employees.

B. Following the reorganization at issue in this matter, the appropriate unit is a statewide unit of Michigan Air National Guard employees.

1. A single unit of employees within the Michigan Air National Guard is appropriate.

Under Section 7112(a) of the Statute: "The Authority shall determine the appropriateness of any unit." Appropriate units "ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved." 5 U.S.C. § 7112(a).

With respect to the community of interest criterion, the Authority examines such factors as whether the employees in the unit are a part of the same organizational component of the agency; support the same mission; are subject to the same chain of command; have similar or related duties, job titles and work assignments; are subject to the same general working conditions; and are governed by the same personnel and labor relations policies that are administered by the same personnel office. *U.S. Dep't of Navy, Fleet and Industrial Supply Center, Norfolk, Va.*, 52 FLRA 950, 960-61 (1997) (*FISC*). The Authority also examines factors such as geographic proximity, unique conditions of employment, distinct local concerns, degree of interchange between other organizational components, and functional or operational

[21] OPM regulations define a "transfer" as "a change of an employee, without a break in service of 1 full workday, from a position in one agency to a position in another agency." 5 C.F.R. § 210.102(b)(18).

separation. *U.S. Dep't of the Navy, Naval Facilities Eng'g Command SE, Jacksonville, Fla.*, 62 FLRA 480, 487 (2008). The purpose of this criterion is to ensure that employees can deal collectively with management as a single group. *U.S. Dep't of the Air Force, Travis Air Force Base, Cal.*, 64 FLRA 1, 6 (2009) (*Travis AFB*).

In determining whether a unit promotes effective dealings, the Authority examines such factors as the past collective-bargaining experience of the parties; the locus and scope of authority of the responsible personnel office administering personnel policies covering employees in the proposed unit; the limitations, if any, on the negotiation of matters of critical concern to employees in the proposed unit; and the level at which labor relations policy is set in the agency. *FISC,* 52 FLRA at 961. Concerning the efficiency of operations requirement, the Authority examines whether the unit bears some rational relationship to the operational and organizational structure of the agency, and the effect of the unit on agency operations in terms of cost, productivity, and use of resources. *FISC*, 52 FLRA at 961-62.

Here, following the reorganization that resulted in these petitions, MING employs all of the current ACT and AFGE unit employees. While there are some distinct elements in the mission of ACT employees working in the 127th Wing, the evidence supports the conclusion that all of these employees work in support of the mission of MING. In addition, while there are numerous different components within the Michigan ANG, all employees are within a chain of command ending with the Michigan Adjutant General. While the employees' job titles and work assignments differ based upon their assigned component, they are related in that they support the operations of the Michigan Air National Guard, either through support and maintenance of aircraft or support and maintenance of the base where the aircraft are stationed. Furthermore, the weight of the evidence supports the conclusion that general working conditions, as well as personnel and labor relations policies, will be established by MING and administered by the MING HRO.

It is true that there are some differences in personnel regulations that apply to Title 5 and Title 32 employees, including regulations pertaining to employment, promotion, and performance appraisals. Title 32 employees are not eligible for overtime. 32 U.S.C. § 709(h). Dual status technicians must wear a uniform and maintain military membership as a condition of their employment and have limited appeal rights with regard to activities occurring while they are in a military pay status or with regard to a matter concerning fitness for duty in the reserves. However, technicians, like Title 5 employees, do have appeal rights to the Merit Systems Protection Board and Equal Employment Opportunity Commission. Both have protections under the Federal Service Labor-Management Relations Statute (Statute). Furthermore, to a greater or lesser extent depending on the particular component involved, there are many examples of Title 5 and Title 32 employees working in the same work unit and under the same supervision, in some cases with the same job title. As such, these individuals still share an overall community of interest and a statewide unit of all Michigan ANG employees is not rendered inappropriate simply because it includes both Title 32 and Title 5 employees *See Travis AFB*, 64 FLRA at 7.

It is also true that a statewide bargaining unit of Michigan ANG employees includes individuals stationed at Selfridge, as well as individuals stationed at Battle Creek, Lansing, and

Alpena. However, these employees all work in Michigan at Michigan ANG facilities. They are all subject to personnel and labor relations policies of the MING and are all serviced by the MING HRO. Furthermore, the long-standing ACT bargaining unit includes employees at all four locations and there is no basis to conclude that a statewide bargaining unit would be rendered inappropriate with the addition of the Title 5 employees at Selfridge.

Regarding effective dealings and efficiency of operations, while prior collective bargaining involving the employees at issue in this matter necessarily involved two separate HR offices, with the transfer of AFGE unit employees to MING all dealings for a statewide unit of Michigan Air National Guard employees will be handled by a single personnel office, the MING HRO. Furthermore, there is no basis to conclude that dealings between the MING HRO and a union representing such a unit would not be effective. A statewide unit of all employees is also rationally related to MING's structure and reduces bargaining unit fragmentation which supports efficient agency operations. There is no evidence that a single statewide unit would result in additional costs or resources, or a loss of productivity.

Accordingly, I find that employees assigned to the Michigan ANG, including the Title 5 employees transferred from the Air Force in AFGE's current unit, the Title 32 technicians in ACT's current unit, as well as the Title 32 technicians who converted to Title 5, share a clear and identifiable community of interest and that a bargaining unit including those employees would promote effective dealings with MING and efficiency of MING's operations.

2. MING is not a successor employer of the AFGE unit employees because a stand-alone unit of Title 5 MING employees at Selfridge ANGB is not appropriate.

When a group of represented employees transfer from one employer to another, the Authority will consider whether the new employer, under successorship principles, must continue to recognize the union as the exclusive representative of the acquired employees. Successorship is found when:

(1) An entire recognized unit, or a portion thereof, is transferred and the transferred employees: (a) are in an appropriate bargaining unit . . . after the transfer; and (b) constitute a majority of the employees in such unit;

(2) The gaining entity has substantially the same organizational mission as the losing entity, with the transferred employees performing substantially the same duties and functions under substantially similar working conditions . . . and;

(3) It has not been demonstrated that an election is necessary to determine representation.

Naval Facilities Eng'g Serv. Ctr., Port Hueneme, Cal., 50 FLRA 363, 368 (1995).

Of primary concern in a reorganization case such as this (where a stand-alone bargaining unit is sought separate from the gaining organization's larger bargaining unit) is whether the transferred employees have significant employment concerns or personnel issues that are

different or unique from those of employees in the gaining organization. *FISC*, 52 FLRA at 960. If they do, depending upon the remaining appropriate unit criteria, the separate, stand-alone units may be deemed appropriate. However, if the employees in the stand-alone bargaining unit do not have significant employment concerns or personnel issues that are different or unique from those of employees in the gaining organization, the stand-alone unit cannot be deemed appropriate. *Id.*

Following the transfer of the AFGE unit employees from the Air Force to MING and the change of servicing NGB HR office to the MING HRO, there is no evidence of significant employment concerns or personnel issues that are different or unique from other employees at the Michigan ANG. While Title 5 and Title 32 employees are subject to certain differing personnel regulations, such does not give rise to significant differing employment concerns or personnel issues. *Travis AFB*, 64 FLRA at 7. It is also true that the Title 5 employees are predominately involved in base-wide support duties, while the Title 32 employees generally maintain and support aircraft. For example, the Selfridge ANGB fire department is almost entirely made up of Title 5 employees, while the 127th Aircraft Maintenance Squadron is almost entirely made up of Title 32 technicians. However, all of these employees work at Selfridge Air National Guard Base, are serviced by the MING HRO, are subject to employment labor relations policies established by MING, and report up to the Adjutant General of Michigan. Furthermore, according to the various MING organizational charts, there are other work units at the Michigan Air National Guard where Title 5 and Title 32 employees work together, such as the Contracting Division, the 127th Wing Communication Flight, the Materiel Management department, the Vehicle Management and Logistics Management department, and the Electrical Shop. In these work units, separate units of Title 5 and Title 32 employees would result in the recognition of different collective bargaining agents and application of different collective bargaining agreements for employees who work in close proximity, for the same supervisor and in the same work unit.

Because the transferred Title 5 MING employees unit do not have significant employment concerns or personnel issues that are different or unique from those of other Michigan ANG employees, a stand-alone unit of Title 5 MING employees is not appropriate. *FISC*, 52 FLRA at 960. As such, petition in case CH-RP-19-0006 filed by AFGE seeking a determination that MING is a successor employer of a stand-alone bargaining unit of Title 5 employees is hereby dismissed.

C. Under the circumstances of this case, rather than accrete the AFGE bargaining unit employees into ACT's bargaining unit, a self-determination election should be held.

MING's petition in case CH-RP-18-0035 sought a determination that the AFGE bargaining unit employees transferred from the Air Force to MING were accreted into ACT's statewide bargaining unit. However, MING appears to have dropped this argument as accretion was not raised or sought as an outcome in its post-hearing brief. ACT has also not sought a finding of accretion. To the extent it is still considered raised in this matter, accretion occurs when a group of employees are added to an existing bargaining unit without an election following a change in agency operations or organization. *U.S. Dep't of the Navy, Naval Air*

Warfare Command, Aircraft Division, Patuxent River, Md., 56 FLRA 1005, 1006 (2000). In order to find an accretion, the transferred employees must be "functionally and administratively integrated into the gaining organization's pre-existing units, such that adding the transferred employees to the units would be appropriate under section 7112(a)." *FISC,* 52 FLRA at 963.

However, "because accretion precludes employee self-determination, the accretion doctrine is narrowly applied." *U.S. Dep't of the Interior, Bureau of Reclamation, Pacific Nw. Region, Grand Coulee Power Office, Wash.*, 62 FLRA 522, 524 (2008). Furthermore, the Authority has agreed with the Board's view that "accretion is much more difficult to establish where the employees sought to be accreted are represented by a rival union." *Defense Logistics Agency, Defense Supply Ctr. Columbus, Columbus, Ohio*, 53 FLRA 1114, 1124-25 (1998):

> This rule is intended to guard against the possibility of "an employer favoring one union over the other in violation of the employer's duty of neutrality." Lammert, 578 F.2d at 1226. Further, it supports the principle that the accretion doctrine is generally narrowly applied, because it precludes employee self determination. Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, SEIU v. NLRB, 9 F.3d 218, 223 (2d. Cir. 1993). This basic reluctance to short-circuit employee self-determination is enhanced where the employees have, in fact, already exercised their right of self-determination and chosen a representative different from the representative seeking to accrete them.

Under these circumstances in the private sector, where two groups of employees "have been historically represented by different unions, a question concerning representation arises, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning overall representation." *Martin Marietta Chemicals*, 270 NLRB 821, 822 (1984).

In my view, under the circumstances of this case, it is inappropriate to accrete the approximately 290 Title 5 employees who have been represented by AFGE for decades into ACT's bargaining unit. Accordingly, the petitions filed in cases CH-RP-18-0032, CH-RP-18-0034 and CH-RP-18-0035, to the extent they seek accretion in this matter, respectively, are hereby dismissed. Furthermore, because I have found that the appropriate bargaining unit following the reorganization in this case is a statewide bargaining unit of employees assigned to the Michigan ANG and because neither Union represents a sufficiently predominate number of employees in that unit,[22] I will direct an election in this matter. Given that a statewide bargaining unit of employees assigned to the Michigan ANG includes those employees who converted from Title 32 to Title 5, it is unnecessary to make any further findings regarding the status of those employees.

[22] ACT represents approximately 439 employees, or about 60% of the new statewide bargaining unit. *See Dep't of the Army, U.S. Army Aviation Missile Command (AMCOM), Redstone Arsenal, Ala.*, 56 FLRA 126, 131 (2000).

V. Direction of Election and Order

The Region will conduct a secret ballot election among the employees in the following appropriate unit:

INCLUDED:	All nonprofessional employees assigned to the Michigan Air National Guard
EXCLUDED:	Professional employees, management officials, supervisors, and employees described in 5 USC §7112(b)(2), (3), (4), (6), and (7).

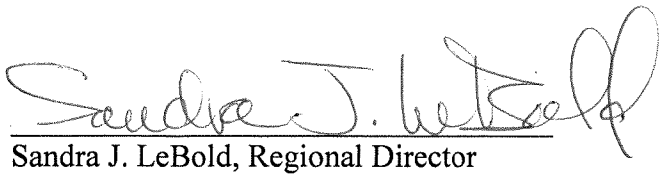
The eligible employees will vote on whether they wish to be represented for the purpose of collective bargaining by the Association of Civilian Technicians (ACT), the American Federation of Government Employees (AFGE), or neither.

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or on furlough. Ineligible to vote are those employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. The date, time, method, and place of election will be specified in the Notice of Election that the Regional Office will issue subsequent to this decision.

VI. Right to File an Application for Review

Under Section 7105(f) of the Statute and Section 2422.31(a) of the Authority's Rules and Regulations (5 C.F.R. § 2420 et seq.), a party may seek review of this Decision by filing an application for review with the Authority within sixty (60) days after the date of this Decision. The contents of an application for review and the Authority's grounds for review are set forth in Section 2422.31(b) and (c) of the Regulations. The filing and service requirements for an application for review are addressed in Section 2429 of the Authority's Regulations.

An application for review must be filed by July 29, 2019 and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 200, 1400 K Street NW, Washington, DC 20424–0001. An application for review may also be filed electronically through the Agency's website. *See* 5 C.F.R. § 2429.24(f). To file electronically, go to www.flra.gov, click on "File a Case" under the "Case Types" tab and follow the detailed instructions.



Sandra J. LeBold, Regional Director
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Dated: May 30, 2019

CERTIFICATE OF SERVICE

I certify that a copy of the Decision and Order in Case Nos. CH-RP-18-0032, CH-RP-18-0034, CH-RP-18-0035 and CH-RP-19-0006 was sent by first-class mail to the following individuals:

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Ylanda Wilson, Legal Assistant

Dated: May 30, 2019