ASSOCIATION OF act CIVILIAN TECHNICIANS

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WE KEPT THE FAITH!

Duty • Dignity • Dedication

ASSOCIATION OF CIVILIAN TECHNICIANS

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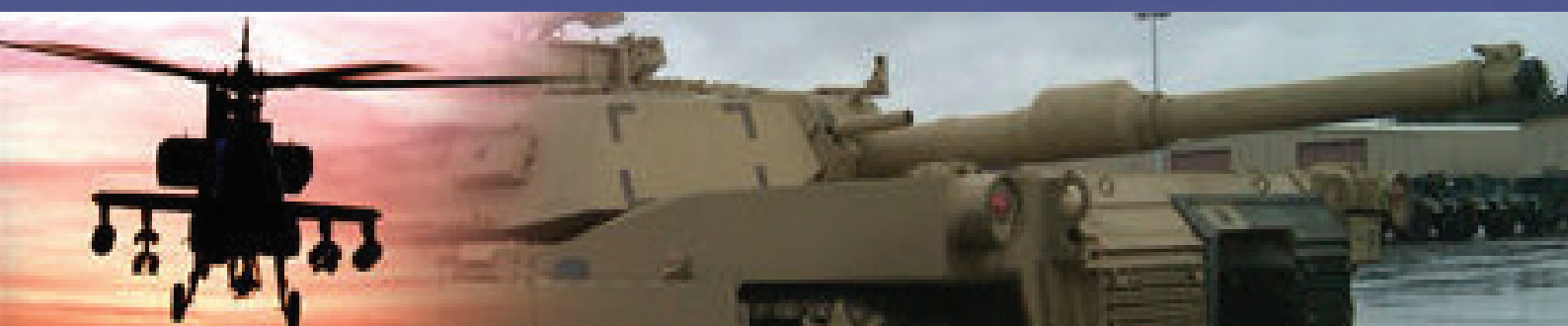

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We Kept the Faith.....

As another year comes to a close and I reflect back, a couple words come to mind. One is "thankful". Thankful that we're here to see this year end, thankful for our Field Reps who work so hard for us each and every day, thankful for an awesome Executive board that pulled together to move ACT forward again, thankful for Terry and Deanna's love for ACT which allows them to stay dedicated to the organization. Most of all, I'm thankful for each and every member of this great organization because you believe our fight can make a difference in the lives of all our technicians which is why you are here.

The next word that comes to mind is "hope". I'm filled with such hope for the future of ACT. With all the obstacles that have been put before us, I see us growing and getting stronger. We are constantly listening to YOU our members and you will see evidence of that in your legislative packets this year. I have hope and I believe that our voices will be heard and we WILL make a difference. There is an old Caribbean saying "One, one full up basket". This means one step at a time and eventually we will get what we want. That's my hope for ACT.

As we look forward to another year, let us be kind to one another. Take a little time to reach out because we never know what one is going through and how much joy just a phone call can bring. For our deployed brothers and sisters, for our members and/or family members who are sick, keep them in your thoughts and prayers.

I want to wish all of you and your families a very Merry Christmas and a prosperous New Year.

We Kept the Faith and prevailed through another year!

Felicia Neale
ACT National President

2023 ACT NATIONAL RALLY TRAINING AGENDA FOR FEB. 7–12

TUESDAY, FEBRUARY 7, 2023
ALL DAY REGISTRATION

ACT DELAGATES TRAVEL TO EMBASSY SUITES ALEXANDRIA OLD TOWN,VA, 22314

WEDNESDAY FEBRUARY 8, 2023

8:00 AM

Opening Remarks, Introductions, registration, and break into groups for training day.

Group 1 VIRGINA BALLROOM	TRAIN WITH REGIONAL REPS
Group 2 TBD	TRAIN WITH REGIONAL REPS
Group 3 TBD	TRAIN WITH REGIONAL REPS

12:00 ALL ATRIUM LUNCH BUFFETT

1:15 PM ATRIUM STAIRCASE REGIONS' PHOTO SHOOT

1:30 PM

Group 1 VIRGINA BALLROOM	TRAIN WITH REGIONAL REPS
Group 2 TBD	TRAIN WITH REGIONAL REPS
Group 3 TBD	TRAIN WITH REGIONAL REPS

THRUSDAY FEBRUARY 9, 2023

8:00 AM

Opening Remarks, Introductions, registration, break into groups for training day.

Group 1 VIRGINA BALLROOM	TRAIN WITH REGIONAL REPS
Group 2 TBD	TRAIN WITH REGIONAL REPS
Group 3 TBD	TRAIN WITH REGIONAL REPS

12:00 ALL ATRIUM LUNCH BUFFETT

1:30 PM

Group 1 VIRGINA BALLROOM	TRAIN WITH REGIONAL REPS
Group 2 TBD	TRAIN WITH REGIONAL REPS
Group 3 TBD	TRAIN WITH REGIONAL REPS

2023 ACT NATIONAL RALLY TRAINING AGENDA FOR FEB. 7–12

FRIDAY FEBRUARY 8, 2023

8:00 AM

Opening Remarks, Introductions, registration, break into groups for training day.

Group 1 VIRGINA BALLROOM	TRAIN WITH REGIONAL REPS
Group 2 TBD	TRAIN WITH REGIONAL REPS
Group 3 TBD	TRAIN WITH REGIONAL REPS

12:00 ALL ATRIUM LUNCH BUFFETT

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1:30 PM

Group 1 VIRGINA BALLROOM	TRAIN WITH REGIONAL REPS
Group 2 TBD	TRAIN WITH REGIONAL REPS
Group 3 TBD	TRAIN WITH REGIONAL REPS

ACT BANQUET SOCIAL DINNER

6:00 PM FRIDAY, FEBRUARY 10, 2023

2023 ACT BUSINESS MEETING

SATURDAY, FEBRUARY 11, 2023

8:00 AM – 12:00 - ALL VIRGINIA BALL ROOM
12:01 - ALL ATRIUM LUNCH BUFFETT
1:00 5M – 5:00 - ALL VIRGINIA BALL ROOM

SUNDAY FEBRUARY 12, 2023

ALL DAY
DELEGATES RUTURN HOME

Propose Amendment to 32 U.S.C. §709 to Make National Guard Technician Military Membership Voluntary After 20 Years

ACT National President Felicia Neale

Dual status National Guard technicians employed under the Technicians Act, 32 U.S.C. §709, are required to maintain National Guard military membership as a condition of their technician civilian employment. Like other Department of Defense (DoD) employees, technicians maintain equipment and perform other support functions to ensure military unit readiness. Unlike other DoD employees, however, technicians automatically lose their civilian employment if for any reason they are separated from the military—even if the separation was not due to any fault of their own.

When Congress enacted the Technicians Act in 1968, Senate Report 1446, which explained the Act, expressly stated at page 12 that Guard technicians who properly do their jobs should be retained in the military and employed until they reach age 60, normal retirement age. In recent years, however, the National Guard increasingly has used military Retention Boards to terminate technicians' military membership long before they reach eligibility for retirement under the Federal Employee Retirement System (FERS). These terminations are not for cause or unsatisfactory performance, but merely to make way for younger, less experienced military members. The terminated technicians—most of whom are in their 40s and veterans of overseas deployments—find themselves in mid-career with a family to support, no income, no affordable health insurance, and an uncertain future.

This situation has made recruiting and retaining high quality technicians difficult for the National Guard. Individuals who decide to become technicians initially have a strong incentive, after receiving their taxpayer-paid technician training, to look soon for private sector employment or other federal jobs that do not require Guard membership, so that they can secure desirable positions enabling them to reach normal retirement well before they become vulnerable to sudden Retention Board military separation. The best technicians, those able to secure desirable positions elsewhere, are leaving technician employment early—sooner than the Guards, themselves, would prefer.

Our proposal would make Guard membership voluntary for technicians after 20 years of Guard military service, the point at which they qualify for military retirement benefits at age 60. At that point, individuals could choose to convert to National Guard employment under 10 U.S.C §10508(b). These converted technicians then could finish their civilian careers without the specter of loss of military membership jeopardizing their employment.

Our proposal—which would transform technician employment back to career service, as Congress originally intended—is desirable for several reasons.

First, it would facilitate recruitment and retention of high-quality personnel. Retention of experienced, highly skilled civilian employees in non-dual status positions would enhance military readiness. In the modern era—unlike, for example, during World War II—units activated for overseas military deployments do not take all their equipment and personnel with them. Deployed personnel normally use and maintain equipment that already is at the deployment site; and overseas military units often include technicians from different states.

As a result, there always is a continuing need at home bases for employees who perform the same jobs as those who have been activated for overseas military duty. Having available for home base work experienced former dual status technicians would ensure that this work is in capable hands and would make these experienced employees available to train younger technicians and Traditional Guard members. This would be a win-win for employees and the Guard.

Second, these experienced employees would be available to deploy overseas as civilian employees if the Guard so desired. Although they could not be compelled by law to perform overseas duty, they could be assigned to work overseas; and most of them likely would accept the assignments rather than resign from their employment. Since 9/11, thousands of civilian DoD employees have separated from the military but continued to serve in war zones. Availability of former dual status technicians to work overseas as equipment maintainers would be a force multiplier.

Third, our proposal would enable the Guard to maintain a younger military force without negatively affecting technician federal employment. By allowing technicians to convert voluntarily to non-technician Title 5 employees after 20 years of military service, the Guard would free up senior Guard military positions, thus improving promotion potential for Traditional Guard members and facilitating their retention.

Fourth, Adjutants General would maintain the authority to employ and administer the employees converted to Title 5—including authority to appoint, detail, assign, and discipline them and conduct force reduction actions—as these employees would be employed under 10 U.S.C. § 10508(b), which confers that authority.

Fifth, because our proposal would allow converted technicians to continue their Guard employment only until they reached minimum retirement age and entitlement to an unreduced FERS annuity, our proposal would ensure ample availability of positions for newly-converting technicians; and, even if converted employees were to become too numerous—an unlikely event—force reduction authority would be available, as noted above.

The proposed amendment, stated below, would allow dual-status technicians voluntarily to convert to non-dual status Title 5 National Guard employment under 10 U.S.C. § 10508(b) once they qualify for retired pay for non-regular service under 10 U.S.C. Chapter 1223. The converted technicians could be separated (but not prevented from seeking other federal employment) when they qualify for an unreduced FERS annuity under 5 U.S.C. §8412.

We are requesting that you introduce or support this proposed legislation.

SEC. _. VOLUNTARY CONVERSION OF NATIONAL GUARD MILITARY TECHNICIANS TO TITLE 5 AFTER 20 YEARS.

Section 709(b)(2) of title 32, United States Code, is amended to state—

"(2) Be a member of the National Guard—except that, upon attaining eligibility for retired pay for non-regular service under 10 U.S.C. Chapter 1223, a person employed under subsection (a) shall be entitled to conversion of the person's position to a non-dual status position and to employment in that position under section 10508(b) of title 10, United States Code, until the person is eligible for an unreduced annuity under section 8412 of title 5, United States Code, absent earlier separation on grounds applicable to other section 10508(b) employees."

ASSOCIATION OF CIVILIAN TECHNICIANS

Felicia Neale
National President

OVERVIEW

Currently, under 10 U.S.C. §1076d, federal employees and retirees who are eligible for health insurance coverage under the Federal Employees Health Benefits program (FEHBP) are ineligible for TRICARE Reserve Select (TRS) until 1 January 2030. To our knowledge FEHB eligible federal employees and retirees are the only members or former members of the Selected Reserve that are not eligible for health benefits under TRS.

PROBLEM

Plans and benefits under the FEHBP are substantially more costly for participants when compared with TRICARE Reserve Select (TRS). Although Congress amended §1076d in 2019 to make effected individual(s) eligible in 2030 - that is still 8 years of paying much more out of pocket. The table below compares some of the costs of TRICARE Reserve Select to one of the more popular national fee for service plans under the FEHB (Blue Cross/ Blue Shield Standard).

Health Plans	Premiums 2022	Deductibles	Co-Pays	Catastrophic Caps (annual)
	Self/ Family	Self/ Family	Inpatient Surgery	Self/ Family
TRICARE Reserve Select	$46.70/$229.99	$168.00/ $336.00	$26.00	$1,120.00
FEHB/ Blue Cross Standard	$276.19/$680.57	$350.00/ $700.00	15% of allowed fees	$12,000 (PPO)

FEHB IS MUCH MORE COSTLY THAN TRICARE RESERVE SELECT

As the table indicates there is a substantial cost difference between TRICARE and Blue Cross/ Blue Shield. By excluding FEHB eligible Guard and Reserve members from the option of enrolment in TRS until Jan 2030, Congress is costing these members and their families thousands of dollars each year in extra medical costs. They may as well be drilling for free!! In the example above just the extra premium costs will cost these families an extra $43,000 and that doesn't include future increases between 2022 and 2030. The annual deductibles are basically doubled and the out of pocket limits are almost 12 times of what TRS eligible members are paying. If the FEHB were even close to providing the same health care coverage at a similar cost as TRS, this would not be such a pressing issue. But as you can see by the table above this is not the case.

It seems particularly unfair that Guard and Reserve members who happen to qualify for the FEHBP are denied access to TRICARE Reserve Select while their counterparts working for state and local governments, or the private sector are fully eligible for TRICARE benefits.

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These Guard and Reserve members provide the same dedicated military service as their contemporaries who are not federal employees or otherwise eligible for the FEHBP. All they are asking for are the same benefits. The bill language below does just that.

A BILL

To amend title 10, United States Code, to remove the prohibition on eligibility for TRICARE Reserve Select of members of the reserve components of the Armed Forces who are eligible to enroll in a health benefits plan under chapter 89 of title 5, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America.

SECTION 1. Short title.

This Act may be cited as the "TRICARE Reserve Select Fairness Act".

SEC. 2. Modification of eligibility for TRICARE Reserve Select of certain members of the Selected Reserve.

Section 1076d(a) of title 10, United States Code, is amended—

(1) in paragraph (1), by striking "(1) Except as provided in paragraph (2), a member" and inserting "A member"; and

(2) by striking paragraph (2).

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LEGISLATION TO INCREASE MILITARY LEAVE

Felicia Neale
National President

5 U.S.C. §6323(a) entitles federal employees to 15 days of paid leave, per fiscal year, for use while absent from work performing military duty. Currently this paid leave is for the military duty authorized under Title 32 and Title 10 statutes.

Congress enacted the military leave statute decades ago. 15 days of military leave is normally used in for periods of National Guard training i.e., two weeks of annual training, 12 weekends per year and occasional extra duty. 15 days of military paid leave in the "past" was adequate to cover the federal employee's absence for military duty.

However, after 9/11 and beginning of the Global War on Terror, operational tempo and training requirements for the National Guard has dramatically increased. The traditional Saturday and Sunday "drill weekend" has morphed into some months being a "Super Drill." Super drills often start on Thursday and end on Sunday. The traditional two-week annual training in many cases has routinely been extended for periods totaling three weeks or four weeks. Additionally, over the past 2 years the National Guard has been activated to assist in an increasing number of natural disasters, riots, and in support of the COVID pandemic. Unfortunately, Congress has not updated the military leave statute to reflect the new reality requiring increased absences from work for military duty.

The requirements for increased National Guard support, moreover, fall disproportionately on the federal employees (Technicians) who are employed by and must be members of the National Guards as a condition of employment. Why? Because Guard Commanders realize that the increased absences from work for Traditional Guard members may cause strain in the employee/employer relationship. or on the employer/Guard relationship.

The Guard wants to ensure that employer support continues. This strain may affect the willingness for Traditional Guard members to reenlist. Commanders, to mitigate that risk of losing traditional Guard members rely on Technicians to perform the extra military duty. Additionally, the Guard needs support of civilian employers. To keep this support Commanders also rely on the Technician Workforce to perform the extra military duty.

The Technicians are proud of the role they play in support of their state and active duty missions but should not have to utilize vacation leave or be in be in a frequent non-pay status to support the new normal extended training periods and missions that must be supported.

To remedy this situation, we are asking you to introduce or support legislation that will increase military leave authorized under 5 U.S.C. §6323(a) from the current rate of 15 days per fiscal year to 30 days per fiscal year and eliminate the current limitation on carrying over from one fiscal year to another. In addition, the amendment would allow military leave to be utilized for State Active Duty (SAD).

Please see proposed amendments to 5 USC §6323(a)(1) below.

Bill Language for Amended 5 U.S.C. § 6323(a)(1)

SEC. ___. AMENDMENTS TO SECTION 6323(a)(1) OF TITLE 5, UNITED STATES CODE.

Section 6323(a)(1) of title 5, United States Code, is amended—

(a) by inserting in the first sentence after "for" "state military service,"
(b) by striking "of 15" and inserting "of 30"; and
(c) by striking "until it totals 15 days at the beginning of a fiscal year"

ASSOCIATION OF CIVILIAN TECHNICIANS
Felicia Neale
National President

Conversion of Air National Guard (ANG) Technicians to Active Guard Reserve (AGR) Members Degrades Readiness; the 2019 Conversion Process Undermines ANG's Credibility and Rationale for Future Conversions

A RAND report shows that conversion of ANG technicians to AGRs degrades readiness. An August 2018 ANG message admits that the 2019 conversion process "undermines" both ANG's "credibility" and its "rationale for future military technician to AGR initiatives."

Conversion of Technicians to AGRs Degrades Readiness

Conversion of ANG technicians to AGRs reduces maintenance productivity by decreasing team experience and stability.

AGRs—because of their right to retire at any age after 20 years of service, such as age 38; and their greater frequency of reassignment—are more like active-duty personnel than technicians. Technicians reach normal retirement only in their late fifties or at age 60 and usually spend their entire careers at the same location.

A 2008 RAND Report noted the "striking difference in productivity" between the current technician-majority ANG maintenance units and active-duty counterparts:

> ANG F-16 units . . . meet the required standards for aircraft maintenance with a workforce that [is] about one-third the size of [an] active-duty counterpart. In fact, the number of flying hours generated per maintainer is more than twice as high in an ANG unit.

RAND Project Air Force, Annual Report (2008) (RAND Report) at 42, 44. The Report explained:

> **Greater Experience and Stability in the ANG Workforce Make Its Aircraft Maintenance Units More Productive Than Their Active-Duty Counterparts**
> . . .
>
> Besides having an average of only seven years of experience, . . . active-component maintainers generally move to a new assignment every three years. Even if they work on the same airframe or perform the same type of repair, there is a certain amount of turbulence each time new teams are formed. On the other hand, ANG teams are relatively stable. *The average full-time technician has over 15 years' experience and has been at one location most of his or her career.*

Id. at 44-45. (Emphasis added.) Converting ANG technicians to AGRs makes ANG maintenance units more like active-duty units. Due to identical retirement rights, the average experience level in an AGR-majority unit sinks toward the seven years typical of active-duty

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units.[1] And, because AGRs may apply for vacant positions nationwide,[2] maintenance teams become less stable, with more frequent turbulence.[3]

Technician-majority ANG maintenance units are three times as productive as their active-duty counterparts—a "striking difference in productivity." RAND Report at 42. Converting technician-majority units into AGR-majority units makes them more like active-duty units, reducing their productivity.

The Conversion Process in Fiscal Year 2019 Undermines ANG's Credibility and its Rationale for Future Conversions

In August 2018 ANG Director Lieutenant General L. Scott Rice and Brigadier General Steven S. Nordhaus wrote messages to the State National Guards announcing conversion of 3,183 technicians to AGR. LTG Rice asserted that the ANG had selected positions for conversion "using 4 guiding principles: [r]eadiness, . . .critical AFSCs, location factors, and special military mission needs," and that conversion of the selected positions "maximizes recruiting, retention, readiness and the overall lethality of our force." BG Nordhaus added, "Our FAMs [Functional Area Managers] methodically placed the resources where they anticipated having the greatest impact on military readiness."

BG Nordhaus said the States had flexibility to change the positions on the ANG conversion list but warned them:

The need to maintain program integrity on the UMD [Unit Manning Document] (i.e., keeping the resources [the positions] in the Program Element [technician or AGR] in which it was programmed) stems from the fact that this military technician to AGR initiative was staffed through AF [Air Force], OSD [Office of the Secretary of Defense], and ultimately Congress, and *allowing resources to flow across Program Elements on the UMD* [that is, changing to technician a position programmed by ANG to be AGR, or vice versa] *undermines not only NGB's [National Guard Bureau's] credibility but our rationale for future military technician to AGR initiatives*. Please keep a strategic

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[1] AGR retirement rights also make AGR-majority units far more costly than technician-majority units. *See*, CNA, Report on the Termination of Military Technician as a Distinct Personnel Management Category (September 2013), Vol. 1, p. 2 (AGR retirement costs 34% higher than technician retirement costs due to earlier AGR retirement age). To replace a technician who provides 40 years of service, two AGRs who retire after 20 years are required. During the second twenty-year period the retired pay of the first AGR must be paid as well as the active duty pay of the second AGR—an enormous increase in cost. Further, the second AGR starts the second twenty-year period as a new, inexperienced Guard member, while the experienced technician continues to work at peak proficiency.

[2] *See, e.g.,* Lieutenant Colonel Beegles, Director Human Resources Office, California National Guard, AGR Realignment PowerPoint document (2018) at slide 4 (announcing nationwide recruitment to fill AGR positions).

[3] *See*, Institute for Defense Analysis, *Analysis of Alternative Mixes of Full-Time Support in the Reserve Components*

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(August 2017) (IDA Report) at v (data support "[a]dvantages of the MT [military technician] program [over AGRs] in position stability and career longevity"; further research needed). *See also* n. 11, *infra*.mindset when considering realignment of these resources as ANG, AF, and OSD leadership expect measurable improvements primarily in terms of your units' C-ratings but also with recruiting and retention of both fulltime and DSG [Drill Status Guard] members. [Emphasis added.][4]

The conversion process in Fiscal Year 2019 did not implement the concepts stated in LTG Rice's and BG Nordhaus's August messages. The States changed 82% of the positions that ANG initially had designated for conversion to AGR.[5] On March 14, 2019, a memorandum by LTG Rice dropped all pretense of rational ANG determination of the positions to be converted:

> My staff provided a list of recommended realignment positions to start the realignment process and provide flexibility. *This realignment process allows the "54" to substitute positions throughout their organization and we have flexibility to move the realignment to other units.* [Emphasis added.][6]

In its June 11, 2019, Report on the National Defense Authorization Act for Fiscal Year 2020, the Senate Armed Services Committee wrote:

> The committee is concerned that the Air National Guard did not properly validate its requirements under its realignment initiative, relying instead on a wish list from the States rather than a rigorous and analytical process to determine what positions should be realigned, could be realigned, and what should remain technician.[7]

The Committee's concern is well-founded. The irrational implementation of the realignment in Fiscal Year 2019 "undermines not only NGB's credibility but [ANG's] rationale for future military technician to AGR initiatives"—just as BG Nordhaus's August message said.

ANG's willingness to allow the realignment to proceed in total disregard of its "guiding principles"—which, purportedly, "methodically placed" technician positions on the ANG conversion list according to "critical AFSCs, location factors, and special military mission needs" to "maximize [] recruiting, retention, readiness and the overall lethality of our force"—

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[4] The C-rating system evaluates "unit manning, equipment, and training" readiness. Senate Committee on Armed Services, 94th Cong., 1st Sess., Hearing on S. 920, Part 3 Manpower (Feb. 24-28 and Mar. 4, 1975) at 1681. "The C-rating legend is as follows: C-1 = fully ready; C-2 = substantially ready; C-3 = marginally ready; C-4 = not ready." *Id*.

[5] Adriene R. Dallas, Chief, Labor/Employee Relations Branch, Technician Personnel Division, National Guard Bureau, NCR Teleconference 25 August 2010.

[6] Lieutenant General L. Scott Rice, Director, Air National Guard, Memorandum for the Adjutants General, Subject: Military Technician/Active Guard Reserve (AGR) Realignment (March 14, 2019).

[7] S.Rep. 48, 116th Cong., 1st Sess. National Defense Authorization Act for Fiscal Year 2020 (S. 1790) (Committee on Armed Services June 11, 2019) at 152.

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suggests that ANG is concerned more with the number of conversions than which positions are converted. ANG's principal desire is *numerous* conversions.

The Defense Department's report on the feasibility of converting technicians to AGRs suggests this as well. The report says ANG wants its force mix to be 25,045 AGRs and 8,862 technicians.[8] This is a 10,281 increase of the September 2017 AGRs and a 13,241 decrease of the September 2017 technicians.[9] Yet the report identifies only one career field, pilots, in which retention is a problem and names only four others—Space; Cyber; Intelligence, Surveillance, and Reconnaissance; and Remotely Piloted Aircraft—as among those "ideally suited for conversion."[10] The report offers no reason why these four atypical career fields should be converted; but, even if they should, this does not justify the enormous conversion—including conversion of typical maintenance positions—that the ANG desires. The report states no reason why maintenance positions should be converted. It never addresses the subject.[11]

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[8] Office of the Under Secretary of Defense for Personnel and Readiness, Report to Congress on the Feasibility and Advisability of Converting Military Technician Positions to Personnel Performing Active Guard and Reserve Duty (Transmitted to Congress September 25, 2017) (Feasibility Report) at 21, Table 3.

[9] The decrease in technicians is greater than the increase in AGRs because some of the technicians are converted to Title 5 employees, who are not required to be military members.

[10] Feasibility Report at 6 and 20. Regarding pilots, the report, at 6, states, "MilTech pilots are most affected by the shortfall—only 64 percent of MilTech pilot positions are filled. Many MilTech pilots are believed to have vacated their positions for pilot jobs outside the federal government that offered more pay. By comparison, AGR pilot positions are filled at 87 percent." This statement is misleading. Whether an unfilled pilot position is designated technician or AGR is arbitrary. All of the unfilled positions could be designated AGR positions, resulting in 100% of the technician positions being filled, with the entire shortfall being in the AGR positions. Further, higher private sector pay makes retention of pilots difficult irrespective of whether they are technicians or AGRs. Converting technician pilots to AGRs will not solve the problem, because private sector pay is higher than AGR pay, not just technician pay.

[11] The IDA Report, at v, states that there is no "clearly apparent" "relative readiness benefit" achieved by converting technicians to AGRs and, as noted, also states that data support "[a]dvantages of the MT [military technician] program [over AGRs] in position stability and career longevity." *Id*. The Feasibility Report, at 13, acknowledges this as well: "the turbulence generated by a large scale conversion of dual status MilTechs to AGR over a short period of time would lead to a decline in force experience, capability, and continuity. This decline would be attributable not only to the loss of expertise and continuity inherent in the MilTech force, but also to the likelihood of a significant AGR shortfall."

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FLRA Has Statutory Authority to Issue Orders to National Guards

Dan Schember
ACT General Counsel

In an AFGE case currently pending before the Supreme Court, the Ohio National Guard argues that the Federal Labor Relations Authority (FLRA) has no statutory authority to order the Guard to comply with the collective bargaining law, 5 U.S.C. Chapter 71.

The Ohio Guard, though, admits that its federal employees have Chapter 71 collective bargaining rights and that the Guard, in its role as their designated employer, acts as the representative and agent of the Department of Defense (DoD) for Chapter 71 purposes. The Guard's sole argument is that Chapter 71 empowers the FLRA to issue orders only to an "agency," defined by Chapter 71 as an "Executive agency," and that the Guard is not an Executive agency.

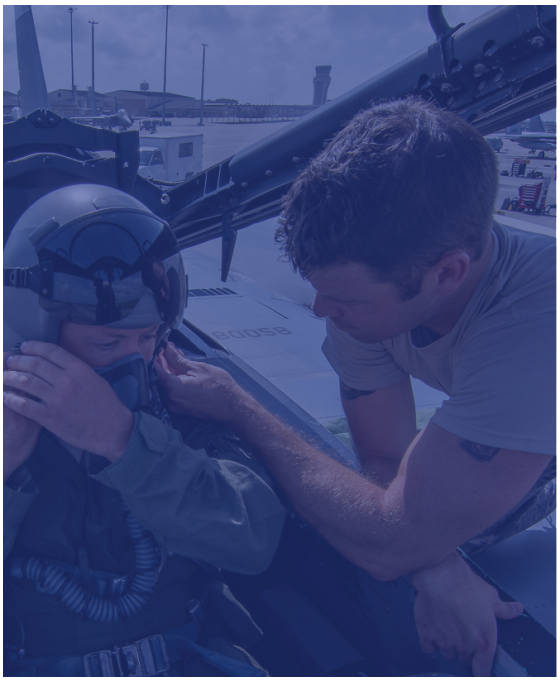
In addition to the text of the collective bargaining law, the Ohio Guard relies on the *Singleton* case, in which the U.S. Court of Appeals for the Federal Circuit held that the Merit Systems Protection Board lacks statutory authority to issue orders to an Adjutant General or a National Guard, because neither is a federal employee or federal agency. The Guard argues that *Singleton* is correct and that the Fifth Circuit decision in the *Lipscomb* case—which held that the FLRA has authority to order a National Guard to comply with Chapter 71 because, in employing technicians, the Guard acts as a federal agency—is incorrect.

The Ohio Guard's pursuit of Supreme Court review—from a Sixth Circuit decision that rejected the Guard's position and agreed with *Lipscomb*—had argued that FLRA authority over the Guard was not only unauthorized by statute but also unconstitutional under the Constitution's Militia Clauses. Significantly, the Supreme Court declined to consider the constitutional argument and agreed to decide only the scope of the FLRA's statutory authority.

The Supreme Court's refusal to consider the constitutional question has the following consequence: Game Over.

There is an enormous deficiency in Ohio's argument. Since the Singleton decision Congress has enacted 10 U.S.C. § 10508(b), which expressly provides for employment of National Guard Title 5 employees, including Title 32 technicians who were converted to Title 5, and states that with respect to "any administrative complaint . . . arising from . . . a . . . condition of employment" the National Guard is "considered the employing agency" and "the sole . . . respondent in any administrative action" and "shall promptly implement all aspects of any final administrative order."

In short, Chapter 71 is not the only applicable law. The National Guards also are governed by § 10508(b). The



Ohio Guard's argument in its opening Supreme Court brief ignores § 10508(b).

Now, once § 10508(b) is brought to the Ohio Guard's attention by AFGE's brief—which almost certainly will be the case—Ohio could argue in reply that § 10508(b) empowers the FLRA to issue orders to a National Guard only in cases involving Title 5, not Title 32, Guard employees. This argument, however, encounters insurmountable difficulties.

Under the analysis required by the Supreme Court's decision in the *Fausto* case, which concerned the 1978 law that includes Chapter 71, the Court, in considering federal employment statutes enacted at different points in time, must assess the implications of more recent statutory enactments for court decisions rendered under the earlier legal framework and decide whether a more recent enactment implicitly has repealed any of those decisions—in order for the current legal framework to "make sense."

Here, the implications of § 10508(b) are obvious. In enacting § 10508(b), Congress rejected Singleton and adopted *Lipscomb*. Nothing else makes sense.

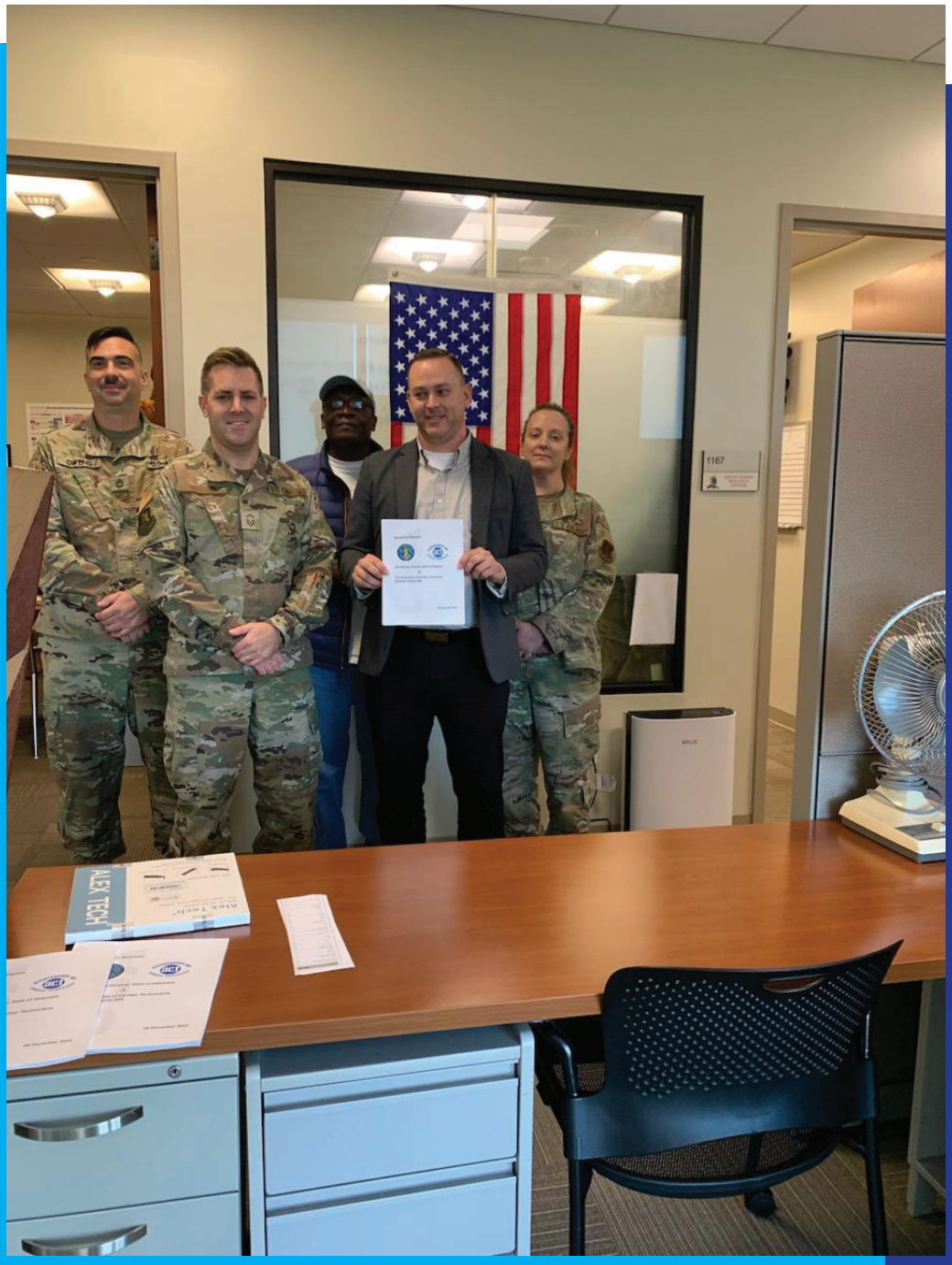
Here, the implications of § 10508(b) are obvious. In enacting § 10508(b), Congress rejected *Singleton* and adopted *Lipscomb*. Nothing else makes sense.

This conclusion, moreover, is embraced by a DoD regulation, DoDI 1205.18 (June 5, 2020), which states that all the National Guard's civilian full time support personnel, defined to include both Title 5 and Title 32 employees, are employed "in accordance with Section 10508(b) of Title 10, U.S.C." This regulation is reasonable, and therefore entitled to the Court's deference, under the *Chevron* decision, because it is consistent with the *Fausto* analysis that "makes sense" of the legal framework.

There is an additional consideration. Under an FLRA decision won by ACT, Title 5 and Title 32 Guard employees are entitled to be in the same bargaining unit. Therefore, an FLRA case claiming the agency has violated the rights of the entire unit, or the union representing the unit, would concern the conditions of employment of both Title 5 and Title 32 employees. Under the express terms of § 10508(b), the FLRA has authority to order the Guard to implement the rights of the Title 5 employees; and, even if as to the Title 32 employees *Singleton* is adopted and *Lipscomb* is rejected, the FLRA, as to the Title 32 employees, could issue an enforcement order to DoD, the Executive agency, if the union merely were to name DoD as a respondent in the case. DoD, in turn, as the federal employer of the Title 32 technicians, 32 U.S.C. § 709(e), then would be obligated, and would have authority, 5 U.S.C. § 302(b), to order the Guard, DoD's agent and representative, to comply with the FLRA order as to the Title 32 employees. Thus, adoption of the Ohio Guard's legal position would have no substantive consequence, and would create only meaningless procedural complexity, which makes no sense.

For all these reasons, the Supreme Court should reject Ohio's statutory argument and affirm the decision of the Sixth Circuit, which agreed with *Lipscomb*. Regarding the statutes, Ohio cannot escape § 10508(b) and its implications. Result: Game Over.

Delaware Chapter Contract Negotiations Finished!



From left to right:
John Owens – new Chapter President, Jared Stone – new Chapter VP, Tom McGill – retired Chapter President, Michael Rogers - DE-HR/LRS, Lt.Col. Maureen Mulrooney – DE Deputy HRO

ASSOCIATION OF CIVILIAN TECHNICIANS

Felicia Neale
National President

Association of Civilian Technicians, Inc.

Proposed Amendment of 10 U.S.C. § 10216(g)

to

Prevent Loss of Civilian Employment
Due Solely to Loss of Military Membership
Under Certain Conditions

12 Jan 2022

Isssue

Under law dual status technicians employed under 32 U.S.C. §709 (1968) & 10 USC §10216 (1996) National Guard technicians are required to maintain membership in Guard or Reserve units as a condition of their civilian employment. Much like other DoD employees these technicians work to maintain equipment and perform other support functions to ensure the readiness of Guard and Reserve units. Unlike other DoD employees, technicians automatically lose their civilian employment if for any reason they are separated from the military—even if the separation was no fault of their own and not for cause.

The problem is that these technicians are finding it more and more difficult to retain their membership in the Guard and Reserve long enough to reach eligibility for retirement under the Federal Employee Retirement System (FERS). The Guard and Reserve separate many members for reasons that are not within the member's control. Once separated, they are thrust into the unenviable position of being in mid-career with a family to support, no income, no affordable health insurance, and an uncertain career outlook. Adding insult to injury, most technicians, due to the dual status requirement, are veterans of overseas deployments.

This destructive practice is contrary to the intent of Congress when it enacted the Technician Act (32 USC §709) (1968). The legislative history of the Act—Senate Report 1446, page 12—expressly states that Guard technicians who properly do their jobs should be employed until they reach age 60, normal retirement age. When the Technician Act was made law in 1968 Guard and Reserve members (including technicians) could be confident in maintaining their membership until they chose to retire voluntarily or at age 60. As the Guard and Reserve have transitioned from a strategic to operational force, that is no longer the case.

A right to reach normal retirement—absent misconduct justifying removal, unsatisfactory job performance, or medical disability warranting disability retirement—is necessary to recruit and retain high quality technician personnel. Vulnerability to arbitrary separation in mid-career impedes recruitment and retention of qualified technicians.

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With respect to those who accept technician employment initially it creates a strong incentive to take their taxpayer-funded training elsewhere, to careers where they have ample assurance of reaching normal retirement age.

Proposed Solution

Dual status technicians who are separated from the military, other than for unacceptable job performance or misconduct of a kind that also warrants removal from civilian employment, should not be separated involuntarily from their civilian positions until they reach entitlement to an unreduced retirement annuity—unless they are separated for unacceptable performance, misconduct, or failure to meet physical fitness or height weight standards, or disability entitling them to civilian employment disability retirement.[1]

Enhancement of Military Readiness

The proposed solution would enhance, not reduce, military readiness. The original concept of dual status employment is that, with some exceptions, technicians should hold identical civilian and military positions so that when the entire unit is activated to full-time overseas military service the unit's capabilities are unchanged. This concept has continued validity today, but with a significant modification.

Since 9/11, state Army or Air National Guards no longer deploy overseas en masse. Since Guard or Reserve units normally deploy on a rotational basis, units activated for overseas military deployments typically do not take all personnel and unit equipment with them. Depending on the type of unit, deployed personnel normally use and maintain equipment that is already at the deployment site. Some equipment always remains at the home base for training non-deployed unit personnel or in case another federal mission or State emergency develops. Non-deployed personnel must be trained and stay-behind equipment must be maintained.

Consequently, there always is a continuing need at the home base for employees who perform the same jobs as those who have been activated for overseas military duty. Having available for home base work experienced former dual status technicians who have lost military membership without fault would ensure that this work is in capable hands and also make these experienced employees available to train younger technicians and Traditional Guard members.

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[1] Technicians militarily separated for medical disabilities that do not qualify them for normal civilian disability retirement under 5 U.S.C. § 8337(a) or § 8451 should have the option of continuing their employment or electing the special disability retirement to which technicians are entitled when medically separated from the military. *See* 5 U.S.C. §§ 8337(h) and 8456. The option to elect either continued employment or special technician retirement is available at this time only to Wounded Warrior technicians whose disabilities are combat related. The option should be available to all technicians irrespective of the cause of their military medical disqualification. To date, very few, if any, Wounded Warriors have elected the option of continuing their federal employment—likely because special technician disability retirement plus private sector employment is more remunerative. Nonetheless, the option of continued federal employment should be offered to those who might prefer it, despite the financial sacrifice.

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Additional benefit and flexibility would be afforded by the fact that, although these non-military members could not be compelled by law to perform overseas duty, they could be assigned to work overseas as civilians, if management so desired, and most of them likely would accept the assignments rather than resign from their employment. Case in point: since 9/11, thousands of civilian DoD employees have separated from the military but continued to serve in war zones. Depending on the type of mission, adding civilians employed as equipment maintainers to a deployment could be a force multiplier.

By transforming technician employment back to career employment, as Congress originally intended, ability to recruit and retain the highest quality personnel would be enhanced and greater numbers of more experienced personnel would be available for home base employment, while an ample number of military members—and experienced, willing civilian employees, should management choose them—would be available for overseas deployments.

The attached amendment would require the Secretary of Defense to convert dual status technicians who are separated from the Guard—involuntarily and not for unacceptable performance, misconduct, or failure to meet physical fitness or height weight standards—to Title 5 National Guard employees until they are eligible for early FERS retirement under 5 U.S.C. § 8414(c). The technicians would be required to apply for conversion and would be disqualified if disability prevented them from performing the duties required for the civilian position. Like all federal employees, they would continue to be subject to removal for unacceptable performance or misconduct. The concept of this legislation is quite simple. The Guard retains these experienced employees (like jet engine mechanics) long enough for them to qualify for retirement under §8414(c) and then, once the incumbents have retired, the positions can revert to dual status. This amendment also preserves the original intent of the current §10216(g) by allowing technicians separated for combat related disabilities to be retained.

This amendment would be a win-win for employees and the National Guard. The Guard technician program again would provide career employment—an expectation that, normally, employment will continue at least until eligibility for early retirement benefits is attained. The Guard would enjoy a cadre of experienced employees and, when they reach early retirement age, be able to convert their positions back to dual status.

Current Language §10216(g):

The Technician Act of 1969 created the Title 32 USC §709(c) Federal Civilian Employee (T32) workforce. This workforce was comprised of two groups of employees. One group required as a condition of employment to maintain military membership in their states National Guard. These employees are referred to as Dual Status (DS) employees. The other group had no requirement for military membership. These employees were referred to as Non-Dual Status (NDS) employees.

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The 2017 NDAA authorized the National Guard to convert all NDS positions to Title 5 Federal Employee Positions and 12.6% of the DS Title 32 workforce. None of the converted positions required military membership.

However, §709(c) still contains the term NDS technician. Additionally, 10 USC 10216(g) states that *"if a military technician (dual status) loses such dual status as the result of a combat-related disability (as defined in section 1413a of this title), the person may be retained as a **non-dual status technician**"*. Confusion exists as to whether §10216(g) as written authorizes affected dual status technicians to be converted to a Title 5 position upon loss of military membership.

Amending §10216(g) to reflect the proper term would clarify that technicians with combat related separations may be converted to T5. We are advocating that when Congress amends §10216(g) the amendment will include language authorizing conversion of T32 technicians to T5 positions for other than "just "combat-related military separations. This amendment would reflect the original intent of Congress when it enacted §709(c). The intent was to protect T32 technicians who lost their technician positions due to *"a military promotion or other elimination factors "*.

We respectfully request the language (page 5) be added to the NDAA for FY 2023.

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Requested Amendment to 10 U.S.C. § 10216(g)

SEC. _____. RETENTION OF MILITARY TECHNICIANS WHO LOSE DUAL STATUS.

Section 10216 of title 10, United States Code, is amended by striking subsection (g) and inserting—

"(g) Retention of Military Technicians Who Lose Dual Status.—(1) Notwithstanding subsection (d) of this section or subsections (a) (3) and (b) of section 10218 of this title, if a military technician (dual status) loses such dual status as the result of involuntary separation from the Selected Reserve, except for misconduct, unsatisfactory performance or failure to meet physical fitness or height weight standards, the Secretary shall convert that person's position in accordance with section 2102(a) of title 5 to a position under section 3101 or section 5342(a)(2) of that title, as the case may be, and retain the person as a non-dual status employee so long as—

(A) the person requests retention;

(B) the person is able to perform the non-dual status duties of the position; and

(C) the person, while a non-dual status employee, is not disqualified from performing the non-dual status duties of the position because of performance, medical, or other reasons.

(2) For purposes of section 8414(c) of Title 5, and section 115(d) of Title 10 the service of a person so retained is service as a military reserve technician and as a military technician and the person shall be removed not later than 30 days after becoming eligible for an unreduced annuity under that section."

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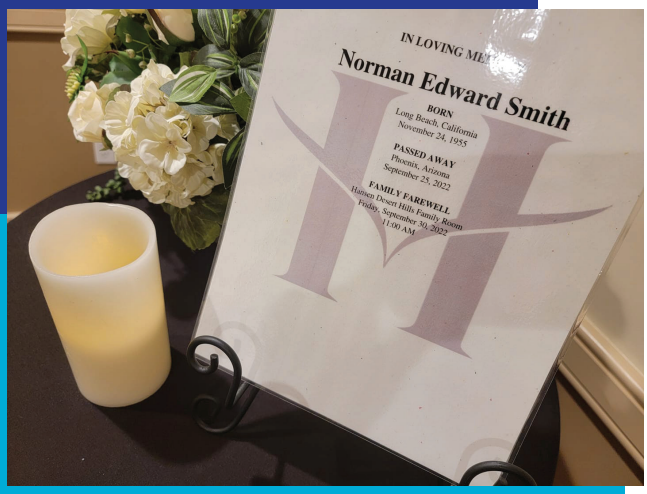
Norm Smith was an employee with ACT, served on the Executive Board as National Secretary as well as a lifetime member of ACT for many years. Our thoughts and prayers are with his family.



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