

THE TECHNICIAN

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DUTY ● DIGNITY ● DEDICATION



SUPREME COURT SIDES
WITH FEDERAL TECHNICIANS

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UNITED STATES SENATE COMMITTEE ON
ARMED SERVICES

Fiscal Year 2024

**NATIONAL DEFENSE
AUTHORIZATION ACT**

Executive Summary

U.S. Senator Jack Reed, Chairman

U.S. Senator Roger F. Wicker, Ranking Member

June 2023



www.armed-services.senate.gov/imo/media/doc/fy2024_ndaa_executive_summary.pdf

ACT FIGHTS REACTIONARY PROPOSAL FOR “MODERNIZATION” OF THE TECHNICIANS ACT

DANIEL SCHEMBER

On May 18, the Supreme Court, by a 7-2 vote, handed the Ohio National Guard a stinging defeat. Now the backlash has begun.

The Ohio Guard had sought to defeat technicians’ collective bargaining rights indirectly by claiming that, though the rights exist, the Federal Labor Relations Authority lacks jurisdiction over the Guards to enforce them. The Court rejected this strange “rights but no remedy” contention.

In the wake of this rebuke, however, a reactionary legislative proposal to defeat technicians’ collective bargaining rights—both indirectly, through FLRA jurisdictional limitation, and directly, through substantive elimination—has emerged. This proposal seeks to eliminate the existence and enforcement of technicians’ collective bargaining rights by reviving and inflating an old bogus doctrine that the Court of Appeals for the D.C. Circuit rejected nineteen years ago—the idea that there are “military aspects of technician employment” excluded from the collective bargaining law by the statute that prohibits negotiation of terms or conditions of military service. The proposal, likely originating with the National Guard Bureau, asserts that nearly all aspects of technician employment are military aspects, and therefore outside the scope of the collective bargaining law. In Orwellian language, the proposal asserts that its resurrection and expansion of an old court-buried doctrine is a “Modernization” of the law.

ACT FIGHTS REACTIONARY PROPOSAL FOR “MODERNIZATION” OF THE TECHNICIANS ACT CONT..

DANIEL SCHEMBER

Not content just to eviscerate collective bargaining, the proposal also guts rights, created by Congress just a few years ago, to independent review of civilian employment actions by the Merit Systems Protection Board, Equal Employment Opportunity Commission, and arbitrators. It does this by the same bogus mechanism—declaring that civilian employment actions are “related to” military service, because nearly all aspects of technician employment are military, and that for this reason, they are outside the jurisdiction of the MSPB, the EEOC, and arbitrators.

ACT has presented to Congress an Assessment of this proposal that exposes its anti-labor and anti-employee provisions. The Assessment, reprinted below, also refutes other ill-advised aspects of the mis-named “Modernization” proposal.



FLRA REGIONAL DIRECTOR REJECTS IAFF EFFORT TO SEVER NEW HAMPSHIRE GUARD FIREFIGHTERS FROM ACT'S STATEWIDE BARGAINING UNIT

Travis Perry

On November 16, 2022, a Regional Director of the Federal Labor Relations Authority dismissed a petition by the International Association of Firefighters (IAFF) that seeks to sever New Hampshire National Guard firefighters from ACT's statewide Army and Air Guard bargaining unit.

IAFF's petition claims that the firefighters, converted from state to federal National Guard employment in November 2021, should be entitled—based solely on the conversion, and despite their automatic inclusion in ACT's statewide Army and Air Guard bargaining unit—to vote whether they desire to be represented by ACT. The IAFF petition also claims that ACT has not accurately represented the firefighters and that for this reason they should be severed from the ACT bargaining unit and allowed to elect IAFF as their representative.



The Regional Director's decision rejected both arguments. The Director held that automatic inclusion of the firefighters in ACT's bargaining unit does not warrant a vote by the firefighters on whether they should have a separate unit, because FLRA precedents strongly disfavor unit fragmentation, which diminishes both union power and efficiency in labor-management relations.

FLRA REGIONAL DIRECTOR REJECTS IAFF EFFORT TO SEVER NEW HAMPSHIRE GUARD FIREFIGHTERS FROM ACT'S STATEWIDE BARGAINING UNIT CONT..

ACT, moreover, has not failed properly to represent the firefighters, the Director said, because ACT has not failed to address any firefighter grievance of which ACT was aware; and ACT has taken proper steps to negotiate amendments to the collective bargaining agreement (CBA) to address the unique employment conditions of firefighters.

In the FLRA proceedings, ACT showed that it timely had demanded negotiation of a new CBA during the prescribed window period, which did not open until late summer 2022. ACT also showed that it had proposed a negotiation ground rules agreement that focuses on the unique employment conditions of firefighters. These steps by ACT proved that ACT has been accurately representing the firefighters, refuting IAFF's contrary claim.

In addition, ACT presented evidence that it has pressed the agency for reconsideration of its overbroad exclusions of firefighters from the bargaining unit. Determining which firefighters are in the bargaining unit is the most important initial task because it identifies the employees whom ACT should consult in preparing firefighter CBA proposals. Under the unique statutory provision that applies only to firefighters and nurses, even employees who perform supervisory functions are eligible for bargaining unit membership if their performance of those duties does not require most of their time.

IAFF has until January 15 to appeal the RD's decision to the full FLRA.

ARBITRATOR AWARDS

RETROACTIVE PAYMENT OF RETENTION INCENTIVE

Daniel Schember

The Army Aviation Support Facility Aircraft Mechanic held a Federal Aviation Administration Airframe and Powerplant Mechanic's License; and, with that License, in that position, he was receiving a retention incentive payment.

The Aircraft Mechanic was promoted to Quality Assurance Specialist. His retention incentive as an Aircraft Mechanic ceased. Without an incentive payment, his pay as a QA Specialist was less than the pay he had received as an Aircraft Mechanic. Congratulations. You are promoted and your pay is reduced.

Months later, the agency approved a retention incentive payment to the new QA Specialist, but the agency refused to pay it retroactive to the date of his appointment. ACT grieved this refusal. The agency denied the grievance and ACT invoked arbitration.

There was one other QA Specialist at the AASF. He had been appointed six months before the new QA Specialist, and he was receiving a retention incentive payment. What was the reason why he was entitled to the incentive payment? Did the same reason apply to the new QA Specialist?

ACT told the Arbitrator, "We need discovery." An arbitrator can require parties to provide each other relevant information—discovery. ACT asked for the documents showing the reason for the approval of the first QA Specialist's retention incentive. The agency provided the documents.

ARBITRATOR AWARDS

RETROACTIVE PAYMENT OF RETENTION INCENTIVE CONT..

Among them was an Adjutant General memorandum issued four years earlier approving retention incentive payments for all AASF Aircraft Mechanics and QA Specialists holding FAA A&P Licenses.

The agency, nonetheless, said it would be unlawful to pay a retention incentive before it was approved and improper to “backdate” the approval.

In response, ACT pointed to the memo and said that the retention incentive had been approved—four years before. ACT said payment of the previously approved QA Specialist retention incentive should have started on the effective date of the Aircraft Mechanic’s promotion to the QA Specialist position, not some arbitrary date months later when the agency got around to filling out the paperwork. The paperwork, whenever it was prepared, should have made payment of the incentive retroactive to the date of appointment.

The agency, however, insisted that “approval” of an incentive means approval of the form bearing the employee’s name. And, said the agency, the form cannot be “backdated.”

The arbitrator ruled for ACT. The arbitrator said that the incentive payment must be retroactive to the date of appointment—the date on which the employee became entitled to the payment—and that failure to pay it as of that date was an unwarranted personnel action entitling the employee to backpay under the Back Pay Act.

ARBITRATOR AWARDS

RETROACTIVE PAYMENT OF RETENTION INCENTIVE CONT..

The arbitrator explained to the agency that a form bearing a current date approving a payment retroactive to an earlier date is not a “backdated” form; rather, a backdated form is a deceptive document bearing a date that makes the document appear to have been prepared or approved on a date earlier than the date on which the preparation or approval actually occurred.

Per ACT’s request, the arbitrator has retained jurisdiction to consider an application for award of attorney’s fees, after the award becomes final. As of this writing, the agency still has time to appeal the award by filing an Exception with the Federal Labor Relations Authority.



Folks,

Something popped up last week on ACT National's radar that had the potential to be detrimental to your rights as a federal employee.

As you all know from my previous emails, the unions and FLRA won the Supreme Court case *Ohio v. FLRA*. This kept your labor rights intact. Now, in what appears to be another attack on your rights, we have the Military Technician Modernization Proposal.

Thanks to our contacts in the SASC, we were given a heads-up concerning this piece of legislation proposed by NGB through the DoD. It was/is called the Military Technician Modernization proposal. I have attached a copy of it for you to review. The bottom line on this proposal is that it would essentially take away nearly all your rights as a "military technician" (I prefer dual status technician, but the law says military technician). The proposal would rewrite 32 USC 709 - basically making the TAG all powerful, prioritizing the "military aspects" of a military technician, and stripping nearly all grievance and appeal rights you currently have.

ACT National, including our legislative director, Les Hackett and General Counsel, Dan Schember, quickly coordinated with fellow unions such as AFGE and LIUNA to put up a united front which worked. At this time, our understanding is this awful proposal is dead in the water and will not be implemented in the 2024 NDAA.

I have attached the Military Technician Modernization Proposal, the actual-current 32 USC 709, and Dan's legal assessment of the proposal.

Please read them. We get asked, "what is ACT doing for me?". The answer just a couple of weeks ago could have been "We save your employee rights by providing legal arguments to the Supreme Court". The answer today is we stopped an absolutely awful proposal from becoming LAW - your reality.

Read the proposal and if you did not know before, you now know what NGB actually thinks of you and the law your employment falls under. ACT proposes legislation to expand your rights and quality of life like getting TriCare (ok, so 2030 right now, but we're trying to fix that), expanding your military leave to something more realistic for today's demands, and trying to give you an option to retire militarily at 20 years and still continue your employment. NGB and the TAGs only seek to expand their power and control over you with little regard to your sacrifices as a federal employee. You serve your country in two roles: as a military member and as a civil servant. BOTH are honorable. BOTH require sacrifice of some kind. BOTH deserve recognition and gratitude.

As I said, we believe this proposal has been halted, but I will not stop anyone from contacting their congressmen and expressing their outrage of this blatant attempt to strip you of your rights.

Hopefully, we can get back to advocating for our legislation now with the HASC and SASC, rather than shutting down dumpster fires like this proposal. When I get any updates from the Board or Legislative Director Les Hackett, I will share them with you.

KEEP THE FAITH,

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1 SEC. ____ . MILITARY TECHNICIAN MODERNIZATION

2 (a) IN GENERAL .—Section 709 of title 32, United States Code, is amended to read as
3 follows:

4 “§709. Military Technicians (dual status): employment, use, status

5 “(a) Under regulations prescribed in accordance with section 10503(9) of title 10, persons
6 may be appointed, employed, administered, detailed, assigned, and disciplined by the adjutants
7 general as military technicians (dual status) in—

8 “(1) the organizing, administering, instructing, or training of Army National
9 Guard or Air National Guard units or personnel to meet Federal readiness standards set
10 by the Secretary of the Army or the Secretary of the Air Force;

11 “(2) the maintenance and repair of supplies issued to the National Guard or the
12 armed forces; and

13 “(3) the performance of the following additional duties to the extent that the
14 performance of those duties does not interfere with the performance of the duties
15 described by paragraphs (1) and (2):

16 “(A) Support of any operation or mission undertaken by the technician’s
17 unit at the request of the President or the Secretary of Defense.

18 “(B) Support of Federal training operations or Federal training missions
19 assigned in whole or in part to the technician’s unit.

20 “(C) Instructing or training in the United States or the Commonwealth of
21 Puerto Rico or possessions of the United States of—

22 “(i) active-duty members of the armed forces;

1 “(ii) members of foreign military forces (under the same
2 authorities and restrictions applicable to active-duty members providing
3 such instruction or training);

4 “(iii) Department of Defense contractor personnel; or

5 “(iv) Department of Defense civilian employees.

6 “(b) A person employed under this section must meet each of the following requirements:

7 “(1) Be a military technician (dual status) as defined in section 10216(a) of title
8 10.

9 “(2) Be a member of the Service component of the National Guard of the State,
10 Commonwealth, Territory, or District in which the person is serving as a military
11 technician (dual status).

12 “(3) Hold the military grade specified by the Chief of the National Guard Bureau
13 for the military technician (dual status) position.

14 “(4) While performing duties as a military technician (dual status) wear the
15 military uniform appropriate for the member’s grade and component of the armed forces,
16 conform to military grooming standards, display proper military customs and courtesies,
17 and refrain from conduct that is prejudicial to the efficiency of the service or military
18 good order and discipline.

19 “(c) A military technician (dual status) employed under this subsection is an employee of
20 the National Guard and an employee of the United States. Notwithstanding paragraphs (2) and
21 (4) of section 101(c) of title 10, any act or omission by a military technician (dual-status)
22 performing duty under this subsection or any member performing duties under sections 502 and
23 503 of this title, including the use of force in defense of Federal property taken pursuant to

1 regulations prescribed by the Chief, National Guard Bureau, shall be considered an act by an
2 employee of the United States Government under section 2671 of title 28.

3 “(d)(1) The military aspects of military technician (dual status) employment and service
4 are paramount over all other aspects of employment.

5 “(2) Notwithstanding any other provision of law, a military technician (dual status) who
6 is involuntarily separated from the National Guard or ceases to hold the military grade specified
7 for that position shall be promptly removed from technician employment by the adjutant general
8 of the jurisdiction concerned. A technician who is involuntarily separated from technician
9 employment under this paragraph, not as a result of misconduct or personal failure to maintain
10 military fitness for duty standards and is certified in writing by the adjutant general as not
11 pending investigation nor awaiting action for misconduct, shall, at the election of the technician
12 concerned, be granted highest priority consideration then available for priority placement under
13 Federal law.

14 “(3) Notwithstanding any other provision of law, a military technician (dual status) who
15 fails to meet the military security standards established for a member of a reserve component
16 may be removed from employment as a technician and concurrently discharged from the
17 National Guard by the adjutant general of the jurisdiction concerned.

18 “(4) A military technician (dual status) may, at any time, be separated from technician
19 employment for cause by the adjutant general of the jurisdiction concerned. For cause includes
20 conduct, committed at any time, that is prejudicial to the efficiency of the service or military
21 good order and discipline.

22 “(5)(A) all personnel actions, discipline, or conditions of employment, including adverse
23 actions pertaining to a military technician (dual status) shall be accomplished by the adjutant

1 general of the jurisdiction concerned in accordance with the authorities and conditions set forth
2 in section 10508(b)(3) of title 10.

3 “(B) A right of appeal by a military technician (dual-status), which may exist with respect
4 to actions, including separations, based upon laws or regulations relating to military membership
5 as a member of the National Guard of the jurisdiction concerned or relating to service as a
6 member of the reserve component of the Army or Air Force, shall not extend beyond the adjutant
7 general concerned.

8 “(C) Notwithstanding any other provision of law, no appeal, complaint, grievance, claim,
9 or action arising under the provisions of sections 2302, 7511, 7512, and 7513 of title 5; section
10 717 of the Civil Rights Act of 1991 (42 U.S.C. 2000e-16); or sections 7116 or 7121 of title 5; or
11 under any other provision of law, shall extend to activity occurring while the member is in a
12 military pay status or to actions, including separations, based upon laws or regulations relating to
13 military membership as a member of the National Guard of the jurisdiction concerned or relating
14 to service as a reserve of the Army or Air Force, or pertaining to actions undertaken under
15 paragraphs (2) or (3).

16 “(D) No appeal, complaint, grievance, claim, or action shall be instituted, filed, or
17 proceed until the adjutant general is first provided written notice by the technician. Such notice
18 shall be provided within 45 calendar days after the action or term of employment giving rise to
19 the appeal, complaint, grievance, or claim. If final written notice of disposition is not provided
20 by the adjutant general to the technician within 90 calendar days after receipt of notice by the
21 technician, the appeal, complaint, grievance, claim, or action may proceed.

22 “(6) A technician shall be notified in writing of the termination of the technician’s
23 employment as a technician and, unless the technician is serving under a temporary appointment,

1 is serving in a trial or probationary period, or has voluntarily ceased to be a member of the
2 National Guard when such membership is a condition of employment, such notification shall be
3 given at least 30 days before the termination date of such employment.

4 “(7) Any administratively imposed civilian hiring controls or restrictions, including
5 personnel ceilings, hiring freezes, administrative furloughs, grade restrictions, or reductions shall
6 not apply to military technicians (dual status) unless such hiring controls are determined by the
7 Chief of the National Guard Bureau to be a direct result of a reduction in military force structure.
8 For the purposes of a furlough due to a lapse in appropriations, technicians shall be treated as
9 uniformed members of the armed forces.

10 “(e) Sections 2108, 3502, 4303, 5102, 7511, and 7512 of title 5; the Age Discrimination in
11 Employment Act of 1967 (29 U.S.C. 621-634); the Rehabilitation Act of 1973 (29 U.S.C. 701-796l);
12 and section 1076d(a)(2) of title 10 do not apply to a person employed under this section. A
13 person employed under this section who is performing Active Guard and Reserve duty (as that
14 term is defined in section 101(d)(6) of title 10) may not use civilian employee leave under
15 sections 6307 or 6323(a)(1) of title 5 during such duty.

16 “(f) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of
17 law, the Chief of the National Guard Bureau shall establish the hours of duties for military
18 technicians (dual status). Notwithstanding sections 5542 and 5543 of title 5 or any other
19 provision of law, technicians shall be granted an amount of compensatory time off from their
20 scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime
21 work, and shall not be entitled to compensation for such work.

22 “(g) The Chief of the National Guard Bureau may not prescribe for purposes of eligibility
23 for Federal recognition under section 301 of this title a qualification applicable to technicians

1 employed under subsection (a) that is not applicable pursuant to that section to the other
2 members of the National Guard in the same grade, branch, position, and type of unit or
3 organization involved.

4 “(h) Notwithstanding the provisions of section 14506, 14507, or 14508 of title 10, the
5 Chief of the National Guard Bureau may, at the request of the adjutant general of the jurisdiction
6 concerned, and with the officer's consent, retain on the reserve active-status list an officer in the
7 grade of major, lieutenant colonel, colonel, or brigadier general who is a reserve officer of the Army
8 or Air Force and who, as a condition of continued employment as a National Guard military
9 technician (dual status) is required to maintain membership in a Selected Reserve unit or
10 organization.

11 “(i) In this section:

12 “(1) The term ‘military pay status’ means a period of military service under titles
13 10 or 32 with respect to which the amount of pay payable to a technician for that service is based
14 on rates of military pay provided for under title 37.

15 “(2) The term ‘fitness for duty in the reserve components’ refers only to military-
16 unique requirements that attend to requirements for military service as a member of the Army
17 National Guard or Air National Guard or as a reserve of the Army or Air Force or service on active
18 duty, that are established by the Secretary of the Army or the Secretary of the Air Force and that
19 pertain to requirements of law or policy relating to military membership as a member of the
20 National Guard of the jurisdiction concerned.

21 “(j) For purposes of any administrative complaint, grievance, claim, or action arising
22 from, or relating to, such a personnel action or condition of employment:

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

5 “(2) The National Guard of the jurisdiction concerned shall defend any
6 administrative appeal, complaint, grievance, claim, or action, and shall promptly
7 implement all aspects of any final administrative or judicial order, judgment, or decision
8 that does not involve or concern any military aspect of the performance of technician
9 duties under this section.

10 “(3) In any civil action or proceeding brought in any court arising from an action
11 under this section, the United States shall be the sole defendant or respondent.

12 “(4) The Attorney General of the United States shall defend the United States in
13 actions arising under this section.

14 “(5) Any settlement, judgment, or costs arising from an action described in
15 paragraph (1), (2), or (3) shall be paid from appropriated funds allocated to the
16 National Guard of the jurisdiction concerned.”.

17 (b) CLERICAL AMENDMENT.—The item relating to section 709 in the table of sections for
18 chapter 7 of title 32, United States Code, is amended to read as follows:

“709. Military Technicians (dual status): employment, use, status.”.

[Please note: The “Changes to Existing Law” section below sets out in red-line format how
the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would extend and enhance authority to conduct the Military Technician program under 32 U.S.C. § 709 informed by lessons learned from National Guard Bureau’s (NGB) and Adjutants General’s implementation of the Dual Status Technician (DST) program. Extension and enhancement of this authority would afford the Chief of the National Guard

Bureau (CNGB) and the Adjutants General of the 54 National Guards from States, territories, the Commonwealth of Puerto Rico, and the District of Columbia clarity and authorization in implementing the DST program.

The amendment and modification of 32 U.S.C. § 709 would further define that a function of NGB is to establish policies and programs for the employment and use of National Guard technicians under section 32 U.S.C. § 709 as specified in 10 U.S.C. § 10503 and 10508 and the NGB Charter. While Adjutants General currently have the full spectrum of employment authorities regarding DST personnel, including appointing, employing, administering, detailing, assigning, and disciplining, the updated version of the Technician Act would clarify and harmonize CNGB's role and authorities consistent with later in time statutes like 10 U.S.C. § 10503 and 10508 and the NGB Charter. Further, the proposal would provide authority for DST personnel to support any DoD or Presidential requested operation undertaken by the DST's unit or Federal training and operations undertaken by a DST's unit.

Additionally, the amendment further defines that any act or mission by a DST, including use of force in defense of Federal property, shall be considered an act by an employee of the United States to ensure Federal Tort or other claims applications apply to these matters.

Historically, there has been confusion in the courts and in administrative actions, appeals, or claims regarding the jurisdiction over the military aspect of DST employment. This amendment clarifies the jurisdiction of the courts and administrative agencies is limited to the nonmilitary aspects of DST employment. The amendment further establishes the military aspects of DST employment shall be paramount over all other aspects of DST employment. The amendment updates the statute to remove outdated references to Non-Dual Status Technicians, thus allowing the statute to focus on DSTs and the requirements of their military mission. The civilian aspects of technician employment focus solely on pay, benefits, and Federal Tort Claims Act coverage.

The proposal also establishes a difference in involuntary separation, not because of misconduct, wherein DSTs shall be granted highest priority consideration for available priority placement. This resolves the issue of the availability of priority placement for involuntary, non-disciplinary separation actions.

The amendment defines the discipline authority reserved to the Adjutant General or those actions which may be brought as an administrative action or claim.

The statute establishes the Adjutant General as the "head of Agency" for purposes of administrative actions, appeals, or claims. The amendment also grants Adjutants General 90 days to resolve an appeal, complaint, grievance, or claim. This affords an opportunity to investigate and resolve these DST employment matters by providing additional time for reasoned analysis to avert or resolve these actions. Further, this amendment recognizes amicable settlements are preferable and many essential witnesses may only be available one weekend a month.

The amendment also limits or deconflicts civilian personnel statutes with military membership statutes. Further, the amendment disallows DSTs who are performing Active Guard and Reserve (AGR) duty (as that term is defined in 10 U.S.C. § 101(d)(6)) from using Federal civilian annual military, and sick leave while in AGR duty status. This amendment clarifies ambiguity in the current military technician statute that causes confusion on the ability to use civilian sick leave, and other approved civilian leave statuses while on AGR duty. The prohibition on the use of sick leave for DSTs performing AGR duty is based upon the AGRs military, not civilian, duty status. DSTs are entitled to use military time off procedures when sick or injured while employed as an AGR based on their military status. Using DST civilian sick leave while in AGR status is not appropriate, as the DST is not in a civilian employment status, and is receiving military benefits under their military status as a National Guard military member. Additionally, there has been a propensity for abuse of civilian sick leave, including using before or after holidays to receive full holiday pay.

The amendment provides CNGB authority to establish the duty hours.

Lastly, the proposed amendment would ensure Federal recognition requirements of DST personnel are the same as other National Guard members in the same grade, branch, position and type of unit or organization.

Resource Information: The National Guard used cost savings resulting from this proposal to meet the minimum (floor) end strength for dual status military technicians as requested for the FY 2024 NDAA. The table below reflects the best estimate of savings included in the Fiscal Year (FY) 2024 President’s Budget.

RESOURCE IMPACT (\$MILLIONS)									
Program	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028	Appropriation	Budget Activity	BLI/SAG	Program Element (for all RDT&E programs)
ARNG - CIVILIAN PAY & MILITARY TECHNICIAN PAY	-16	-16	-16	-16	-16	Operation & Maintenance, Army National Guard	01 & 04	Various	Various
ANG - CIVILIAN PAY & MILITARY TECHNICIAN PAY	-12	-12	-12	-12	-12	Operation & Maintenance, Air National Guard	01 & 04	Various	Various

Changes to Existing Law: This proposal would amend Title 32 U.S.C. § 709 as follows:

32 U.S. Code § 709 - ~~Technicians: employment, use, status~~

~~(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in-~~

- ~~(1) the organizing, administering, instructing, or training of the National Guard;~~
- ~~(2) the maintenance and repair of supplies issued to the National Guard or the armed forces; and~~

(3) the performance of the following additional duties to the extent that the performance of those duties does not interfere with the performance of the duties described by paragraphs (1) and (2):

(A) Support of operations or missions undertaken by the technician's unit at the request of the President or the Secretary of Defense.

(B) Support of Federal training operations or Federal training missions assigned in whole or in part to the technician's unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of-

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c)(1) A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2) The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned-

(1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who-

(A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

(B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components;

(5) with respect to an appeal concerning any activity not covered by paragraph (4), the provisions of sections 7511, 7512, and 7513 of title 5, and section 717 of the Civil Rights Act of 1991 1 (42 U.S.C. 2000e-16) shall apply; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

(g)(1) Except as provided in subsection (f), sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(2) In addition to the sections referred to in paragraph (1), section 6323(a)(1) of title 5 also does not apply to a person employed under this section who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10).

(h) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i) The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

(j) In this section:

(1) The term "military pay status" means a period of service where the amount of pay payable to a technician for that service is based on rates of military pay provided for under title 37.

(2) The term "fitness for duty in the reserve components" refers only to military-unique service requirements that attend to military service generally, including service in the reserve components or service on active duty.

§709. Military Technicians (dual status): employment, use, status

(a) Under regulations prescribed in accordance with section 10503(9) of title 10, persons may be appointed, employed, administered, detailed, assigned, and disciplined by the adjutants general as military technicians (dual status) in—

(1) the organizing, administering, instructing, or training of Army National Guard or Air National Guard units or personnel to meet Federal readiness standards set by the Secretary of the Army or the Secretary of the Air Force;

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces; and

(3) the performance of the following additional duties to the extent that the performance of those duties does not interfere with the performance of the duties described by paragraphs (1) and (2):

(A) Support of any operation or mission undertaken by the technician's unit at the request of the President or the Secretary of Defense.

(B) Support of Federal training operations or Federal training missions assigned in whole or in part to the technician's unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of—

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

(b) A person employed under this section must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the Service component of the National Guard of the State, Commonwealth, Territory, or District in which the person is serving as a military technician (dual status).

(3) Hold the military grade specified by the Chief of the National Guard Bureau for the military technician (dual status) position.

(4) While performing duties as a military technician (dual status) wear the military uniform appropriate for the member's grade and component of the armed forces, conform to military grooming standards, display proper military customs and courtesies, and refrain from conduct that is prejudicial to the efficiency of the service or military good order and discipline.

(c) A military technician (dual status) employed under this subsection is an employee of the National Guard and an employee of the United States. Notwithstanding paragraphs (2) and (4) of section 101(c) of title 10, any act or omission by a military technician (dual-status) performing

duty under this subsection or any member performing duties under sections 502 and 503 of this title, including the use of force in defense of Federal property taken pursuant to regulations prescribed by the Chief, National Guard Bureau, shall be considered an act by an employee of the United States Government under section 2671 of title 28.

(d)(1) The military aspects of military technician (dual status) employment and service are paramount over all other aspects of employment.

(2) Notwithstanding any other provision of law, a military technician (dual status) who is involuntarily separated from the National Guard or ceases to hold the military grade specified for that position shall be promptly removed from technician employment by the adjutant general of the jurisdiction concerned. A technician who is involuntarily separated from technician employment under this paragraph, not as a result of misconduct or personal failure to maintain military fitness for duty standards and is certified in writing by the adjutant general as not pending investigation nor awaiting action for misconduct, shall, at the election of the technician concerned, be granted highest priority consideration then available for priority placement under Federal law.

(3) Notwithstanding any other provision of law, a military technician (dual status) who fails to meet the military security standards established for a member of a reserve component may be removed from employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned.

(4) A military technician (dual status) may, at any time, be separated from technician employment for cause by the adjutant general of the jurisdiction concerned. For cause includes conduct, committed at any time, that is prejudicial to the efficiency of the service or military good order and discipline.

(5)(A) all personnel actions, discipline, or conditions of employment, including adverse actions pertaining to a military technician (dual status) shall be accomplished by the adjutant general of the jurisdiction concerned in accordance with the authorities and conditions set forth in section 10508(b)(3) of title 10.

(B) A right of appeal by a military technician (dual-status), which may exist with respect to actions, including separations, based upon laws or regulations relating to military membership as a member of the National Guard of the jurisdiction concerned or relating to service as a member of the reserve component of the Army or Air Force, shall not extend beyond the adjutant general concerned.

(C) Notwithstanding any other provision of law, no appeal, complaint, grievance, claim, or action arising under the provisions of sections 2302, 7511, 7512, and 7513 of title 5; section 717 of the Civil Rights Act of 1991 (42 U.S.C. 2000e-16); or sections 7116 or 7121 of title 5; or under any other provision of law, shall extend to activity occurring while the member is in a military pay status or to actions, including separations, based upon laws or regulations relating to military membership as a member of the National Guard of the jurisdiction concerned or relating to service as a reserve of the Army or Air Force, or pertaining to actions undertaken under paragraphs (2) or (3).

(D) No appeal, complaint, grievance, claim, or action shall be instituted, filed, or proceed until the adjutant general is first provided written notice by the technician. Such notice shall be provided within 45 calendar days after the action or term of employment giving rise to the appeal, complaint, grievance, or claim. If final written notice of disposition is not provided by

the adjutant general to the technician within 90 calendar days after receipt of notice by the technician, the appeal, complaint, grievance, claim, or action may proceed.

(6) A technician shall be notified in writing of the termination of the technician's employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

(7) Any administratively imposed civilian hiring controls or restrictions, including personnel ceilings, hiring freezes, administrative furloughs, grade restrictions, or reductions shall not apply to military technicians (dual status) unless such hiring controls are determined by the Chief of the National Guard Bureau to be a direct result of a reduction in military force structure. For the purposes of a furlough due to a lapse in appropriations, technicians shall be treated as uniformed members of the armed forces.

(e) Sections 2108, 3502, 4303, 5102, 7511, and 7512 of title 5; the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621-634); the Rehabilitation Act of 1973 (29 U.S.C. 701-796l); and section 1076d(a)(2) of title 10 do not apply to a person employed under this section. A person employed under this section who is performing Active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10) may not use civilian employee leave under sections 6307 or 6323(a)(1) of title 5 during such duty.

(f) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Chief of the National Guard Bureau shall establish the hours of duties for military technicians (dual status). Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(g) The Chief of the National Guard Bureau may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

(h) Notwithstanding the provisions of section 14506, 14507, or 14508 of title 10, the Chief of the National Guard Bureau may, at the request of the adjutant general of the jurisdiction concerned, and with the officer's consent, retain on the reserve active-status list an officer in the grade of major, lieutenant colonel, colonel, or brigadier general who is a reserve officer of the Army or Air Force and who, as a condition of continued employment as a National Guard military technician (dual status) is required to maintain membership in a Selected Reserve unit or organization.

(i) In this section:

(1) The term 'military pay status' means a period of military service under titles 10 or 32 with respect to which the amount of pay payable to a technician for that service is based on rates of military pay provided for under title 37.

(2) The term 'fitness for duty in the reserve components' refers only to military-unique requirements that attend to requirements for military service as a member of the Army National Guard or Air National Guard or as a reserve of the Army or Air Force or service on active duty, that are established by the Secretary of the Army or the Secretary of the Air Force and that pertain to requirements of law or policy relating to military membership as a member of the National Guard of the jurisdiction concerned.

(j) For purposes of any administrative complaint, grievance, claim, or action arising from, or relating to, such a personnel action or condition of employment:

(1) 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.

(2) The National Guard of the jurisdiction concerned shall defend any administrative appeal, complaint, grievance, claim, or action, and shall promptly implement all aspects of any final administrative or judicial order, judgment, or decision that does not involve or concern any military aspect of the performance of technician duties under this section.

(3) In any civil action or proceeding brought in any court arising from an action under this section, the United States shall be the sole defendant or respondent.

(4) The Attorney General of the United States shall defend the United States in actions arising under this section.

(5) Any settlement, judgment, or costs arising from an action described in paragraph (1), (2), or (3) shall be paid from appropriated funds allocated to the National Guard of the jurisdiction concerned.

32 U.S. Code § 709 - Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in—

(1) the organizing, administering, instructing, or training of the National Guard;

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces; and

(3) the performance of the following additional duties to the extent that the performance of those duties does not interfere with the performance of the duties described by paragraphs (1) and (2):

(A) Support of operations or missions undertaken by the technician's unit at the request of the President or the Secretary of Defense.

(B) Support of Federal training operations or Federal training missions assigned in whole or in part to the technician's unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of—

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c)

(1) A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2) The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who—

(A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

(B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components;

(5) with respect to an appeal concerning any activity not covered by paragraph (4), the provisions of sections 7511, 7512, and 7513 of title 5, and section 717 of the Civil Rights Act of 1991 [1] (42 U.S.C. 2000e-16) shall apply; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

(g)

(1) Except as provided in subsection (f), sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(2) In addition to the sections referred to in paragraph (1), section 6323(a)(1) of title 5 also does not apply to a person employed under this section who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10).

(h) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians.

Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i) The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

(j) In this section:

(1) The term “military pay status” means a period of service where the amount of pay payable to a technician for that service is based on rates of military pay provided for under title 37.

(2) The term “tness for duty in the reserve components” refers only to military-unique service requirements that attend to military service generally, including service in the reserve components or service on active duty.

(Aug. 10, 1956, ch. 1041, 70A Stat. 614; Pub. L. 87-224, § 2, Sept. 13, 1961, 75 Stat. 496; Pub. L. 90-486, § 2(1), Aug. 13, 1968, 82 Stat. 755; Pub. L. 92-119, § 2, Aug. 13, 1971, 85 Stat. 340; Pub. L. 96-513, title V, § 515(5)-(7), Dec. 12, 1980, 94 Stat. 2937; Pub. L. 103-

160, div. A, title V, §§ 523(a), 524(c), (d), Nov. 30, 1993, 107 Stat. 1656, 1657; Pub. L. 103-337, div. A, title X, § 1070(b)(2), (d)(5), Oct. 5, 1994, 108 Stat. 2856, 2858; Pub. L. 104-106, div. A, title X, § 1038(a), Feb. 10, 1996, 110 Stat. 432; Pub. L. 105-85, div. A, title V, § 522(c), Nov. 18, 1997, 111 Stat. 1735; Pub. L. 106-65, div. A, title V, § 524, Oct. 5, 1999, 113 Stat. 599; Pub. L. 109-364, div. A, title V, § 525(d), Oct. 17, 2006, 120 Stat. 2195; Pub. L. 114-328, div. A, title V, §§ 512(a), (b), 513, Dec. 23, 2016, 130 Stat. 2112, 2113.)

Association of Civilian Technicians
Assessment
of the
Proposed “Military Technician Modernization” Amendments to 32 U.S.C. § 709
Summary

The proposed “Military Technician Modernization” amendments to 32 U.S.C. § 709:

- (a) eliminate all, or nearly all, of the collective bargaining rights of National Guard technicians;
- (b) curtail these technicians’ individual employment rights;¹
- (c) eliminate express mention of the authority of the Secretaries of the Army and Air Force to issue regulations governing National Guard technician employment.

Elimination of All, or Nearly All, Collective Bargaining Rights

The proposed amendments eliminate rights recently affirmed in *Ohio Adjutant General’s Department v. Federal Labor Relations Authority*, ___ U.S. ___, No. 21-1454 (May 18, 2023) (*Ohio National Guard*). Instead of achieving “modernization,” the amendments eliminate the existence and enforceability of collective bargaining rights by resurrecting, inflating, and codifying a baseless legal doctrine that was buried nineteen years ago in *Ass’n of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA*, 360 F.3d 195 (D.C. Cir. 2004) (*ACT Wichita*).

In *Ohio National Guard*, the State sought to eliminate technicians’ collective bargaining rights indirectly by acknowledging their existence but claiming they could not be enforced against the Guard by the Federal Labor Relations Authority (FLRA). A seven-member Supreme Court majority, however, upheld the FLRA’s jurisdiction over the Guards.

In *ACT Wichita*, the court rejected the idea that there are “military aspects of technician employment” excluded from collective bargaining by 10 U.S.C. § 976, which prohibits bargaining over “terms or conditions of military service.” § 976(c)(2). The court held that § 976 does not apply to aspects of § 709 technician employment because § 976, as the statute expressly states, applies to “a member of the National Guard *who is serving* on full-time National Guard duty or . . . a member of a Reserve component *while performing* inactive-duty training.” § 976(a)(1) (emphasis added).

The phrase, “military aspects of technician employment” is old, invented language not used in the United States Code. The proposed amendments, in § 709(d)(1), not only insert this phrase into 32 U.S.C. § 709, but also append to it “and service,” thus implying technician

¹ The proposed amendments include only one change favorable to technicians. Proposed § 709(e) eliminates applicability to technicians of the 10 U.S.C. § 1076d(a)(2) prohibition against receipt of TRICARE health insurance benefits, thus making technicians eligible for TRICARE under § 1076d(a)(1).

employment is also “military . . . service”—a concept rejected by the Supreme Court in *Babcock v. Kijakazi*, 595 U. S. ____ (2022). Proposed § 709(d)(1) goes on to state that “[t]he military aspects of military technician (dual status) employment and service are paramount over all other aspects of employment.”

The “Section-by-Section Analysis” accompanying the proposed amendments states that “the jurisdiction of the courts and administrative agencies is limited to the nonmilitary aspects of DST [dual status technician] employment” and asserts that nearly *every* aspect of technician employment is a military aspect because, “The civilian aspects of technician employment focus *solely* on pay, benefits, and Federal Tort Claims Act coverage.” (Emphasis added.)

Thus, proposed § 709(d)(1) legislatively overrules both *ACT Wichita* and *Ohio National Guard*. If technicians have any remaining collective bargaining rights at all, they apply and are enforceable only in the realms of pay, benefits, and FTCA coverage—because all other aspects of technician employment are military, and “the jurisdiction of . . . administrative agencies,” such as the FLRA, “is limited to the nonmilitary aspects of DST employment.”

Section 709(d)(1) is not appropriate. Wholesale elimination of collective bargaining rights—by resurrecting and expanding a baseless doctrine discredited nearly two decades ago—is not “modernization.”

Curtailed of Individual Employment Rights

Elimination of Retention of Disabled Technicians Pending Disability Retirement

Under longstanding policy previously recognized by a now-superseded Technician Program Regulation (TPR 715), technicians separated militarily due to disability could be retained in their civilian employment positions—if able to work, despite medical disqualification for military membership—pending determination by the Office of Personnel Management (OPM) of their entitlement to civilian employment retirement, based on their military disability. Claims in arbitration cases maintain that, despite the dropping of the TPR provision from the current regulation, this retention is negotiable and that the retirement statutes administered by OPM authorize it.

Proposed § 709(d)(2), however, eliminates the possibility of retention by requiring prompt removal “[n]otwithstanding any other provision of law.” Proposed § 709(d)(2) thus deprives disabled technicians of employment and income while they wait, for many months, for OPM to decide their retirement eligibility.

Restriction of Priority Placement Rights

Proposed § 709(d)(2) also deprives technicians separated from their employment due to loss of military membership—“not as a result of misconduct or personal failure to maintain military fitness for duty standards”—of their existing rights to priority placement in another position, unless and until they are “certified in writing by the adjutant general as not pending investigation nor awaiting action for misconduct.” Because proposed § 709(d)(2) applies

“[n]otwithstanding any other provision of law,” an employee entitled to certification has no remedy if, for any reason or no reason, the certification is delayed or never issued. Also, an employee innocent of wrongdoing, but under “investigation,” is disentitled to certification so long as the investigation is pending; and the employee has no remedy if the investigation lasts for years or becomes dormant but is never formally closed.

Elimination of Rights in Security Clearance Cases

Proposed § 709(d)(3) authorizes adjutants general, “[n]otwithstanding any other provision of law,” to remove technicians from civilian employment for failure to meet military security standards. This denies technicians procedural rights under Department of Defense regulations and precludes any remedy if the security violation allegation is invalid.

Expansion of Cause for Separation

Proposed § 709(d)(4) states that “conduct . . . prejudicial to . . . military good order and discipline” is “cause” for separation from civilian employment. The Section-by-Section Analysis neither explains why the current “cause” standard is insufficient nor states how any insufficiency would be cured by expansion of “cause” to include a military standard. It appears from proposed § 709(d)(5), moreover, that the purpose of the § 709(d)(4) expansion of “cause” is to deny opportunity for appeal of all or most discipline beyond the adjutant general.

Restriction of Appeals Above the Adjutant General

Currently, § 709 allows appeals of civilian employment actions, including discipline and actions alleged to be discriminatory, to the Merit Systems Protection Board (MSPB); the Equal Employment Opportunity Commission (EEOC); or, when the negotiated grievance procedure is invoked, an independent arbitrator. § 709(f)(4) and (5). Appeal “beyond the adjutant general” is precluded only “when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components.”

Proposed § 709(d)(5), however, precludes appeal beyond the adjutant general if the action appealed was “based upon laws or regulations *relating to* military membership . . . or *relating to* service as a member of the reserve component of the Army or Air Force.” Proposed § 709(d)(5)(B) and (C). (Emphasis added.) Thus, under proposed § 709(d)(5) any civilian employment discipline under proposed § 709(d)(4) for “conduct . . . prejudicial to . . . military good order and discipline”—and all discipline likely can be so portrayed—cannot be appealed beyond the adjutant general.

Also, any discriminatory action “based upon laws or regulations . . . relating to service as a member of the National Guard”—and nearly everything done under proposed § 709 at least “relat[es] to” military service because nearly everything is a “military aspect” of technician employment—cannot be appealed to the EEOC.

The proposed amendments eviscerate the current rights to appeal civilian employment actions to the MSPB, the EEOC, or an independent arbitrator. This destruction of rights is not “modernization.”²

Elimination of Military Appeals of Military Matters

Proposed § 709(d)(5) not only restricts civilian employment appeals, but also prohibits technicians from appealing military actions either to the National Guard Bureau, to the extent current regulations allow, or to the Board for Correction of Military Records under 10 U.S.C. § 1552. For technicians, unlike other Guard members, “no appeal, complaint, grievance, claim, or action . . . under any . . . provision of law[] shall extend to activity occurring . . . in a military pay status.” Proposed § 709(d)(5)(C).

Short Deadline for Notification of Claims; Preclusion if Deadline Not Met

Under proposed § 709(d)(5)(D), an “appeal, complaint, grievance, claim, or action” is barred unless notice is provided to the adjutant general “within 45 calendar days after the action or term of employment giving rise to” it. This bar applies even if the claimant had no knowledge of “the action or term of employment” until after the 45-day period.

Defeat of Appeals by Adjutant General Delay

Under proposed § 709(d)(5)(D), the adjutant general, upon receipt of notice, required by that provision, of an “appeal, complaint, grievance, claim, or action,” may prohibit filing of the appeal or other action for up to 90 days. During this delay, short statutory filing deadlines, such as those for appeals to the MSPB or EEOC, will expire, precluding the appeals or actions. Proposed § 709(d)(5)(D) states that, after the 90 days, “the appeal, complaint, grievance, claim, or action may proceed,” insofar as § 709(d)(5)(D) is concerned; but § 709(d)(5)(D) does not extend the deadlines stated in other statutes; and those other statutes likely will govern whether an appeal or other action is timely.

Elimination of Other Statutory Rights

Current § 709(g)(1) states that “sections 2108, 3502, 7511, and 7512 of title 5 do not apply to” technicians “[e]xcept as provided in subsection (f).” Proposed § 709(e) changes this to state that these provisions do not apply to technicians at all. This creates uncertainty with respect to MSPB appeals (to the extent any remain), because current § 709(f)(5) creates entitlement to these appeals by applying §§ 7511 and 7512, as well as 7513, to technicians. Proposed § 709(e) eliminates the applicability to technicians of §§ 7511 and 7512, but not § 7513. This creates uncertainty, because § 7513 is linked to §§ 7511 and 7512. The Section-by-Section Analysis

² With respect to the few administrative appeals or other actions that are still available, proposed § 709(j) reprints large portions of statutory text now stated in 10 U.S.C. § 10508(b)(3) regarding jurisdiction over the National Guards. It would be more appropriate simply to amend § 10508(b)(3), itself, to clarify that the § 10508(b)(3) provisions apply to employment of § 709 technicians, as well as to National Guard employment of Title 5 employees.

contains no explanation of the impact of eliminating the applicability to technicians of §§ 7511 and 7512.

Proposed § 709(e) also eliminates the applicability to technicians of 5 U.S.C. § 4303, concerning actions for unacceptable performance. It eliminates the applicability of § 5102, thereby eliminating the applicability of all 5 U.S.C. Chapter 51 provisions on classification of positions. Proposed § 709(e) states that the statutory prohibitions against discrimination on the basis of age or disability are inapplicable to technicians. The Section-by-Section Analysis does not explain why the applicability of all these statutes to technicians should be eliminated.

Proposed § 709(e) prohibits technicians from using 5 U.S.C. § 6307 sick leave when performing Active Guard and Reserve duty, for 180 days or more—though not when performing other temporary military duty. Use of civilian employment sick leave during any type of temporary military duty should not be prohibited. Illness or injury during this duty is an appropriate circumstance for receipt of both military and civilian compensation. Alleged abuse of sick leave by individuals who are not sick or injured should be addressed by appropriate disciplinary action, not elimination of sick leave rights.

Elimination of Express Statement of Service Secretaries' Regulatory Authority

Currently, § 709(a) provides that employment of technicians is “[u]nder regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be.” Proposed § 709(a) changes this to say that employment of technicians is “[u]nder regulations prescribed in accordance with section 10503(9) of title 10,” which states that the duties of the National Guard Bureau must include, “Establishing policies and programs for the employment and use of National Guard technicians under section 709 of title 32.”

The apparent intent of this proposed change to § 709(a) is to eliminate the regulatory authority of the Secretaries and vest exclusive regulatory authority in the National Guard Bureau; but this change does not accomplish this goal. Under both current and proposed § 709, technicians are employees of the United States. Under 10 U.S.C. § 10501, the National Guard Bureau is a “joint activity of the Department of Defense” and “the channel of communications on all matters pertaining to the National Guard . . . between (1) the Department of the Army and Department of the Air Force, and (2) the several States.” These circumstances give the Departments of Defense, Army, and Air Force inherent authority to issue regulations governing National Guard technician employment. Current § 709 does not expressly confer regulatory authority on the Department of Defense, yet that authority has been recognized to be implicit and Department of Defense regulations applicable to Guard technicians have been enforced without any objection to their legitimacy by National Guards or the National Guard Bureau.

The proposed elimination of express mention of the regulatory authority of the Secretaries is not appropriate, as it could mislead Guard administrators to believe that this authority does not exist, potentially resulting in confusion and needless controversy.

THE MORE YOU KNOW



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

CPM 2023-11
June 26, 2023

Employee Services

Memorandum for Human Resource Directors

From: Veronica E. Hinton
Associate Director
Employee Services

Subject: **27 Pay Periods in Leave Year 2023**

For most employees, the 2023 leave year began on January 1, 2023, and will end on January 13, 2024. For these employees, leave year 2023 will have 27 pay periods for leave accrual purposes. A leave year begins on the first day of the first full biweekly pay period in a calendar year and ends on the day immediately before the first day of the first full biweekly pay period in the following calendar year. See our [Leave Year Beginning and Ending Dates](#) fact sheet. (In some agencies the first pay period in calendar year 2023 may have begun on January 8, 2023. At those agencies, the leave year has 26 pay periods and the guidance in this memo does not apply.)

Accrual of Annual Leave

Under 5 U.S.C. 6303, employees accrue annual leave for each full biweekly pay period they are employed within the leave year. This means that most Federal employees will accrue an additional 4, 6, or 8 hours of annual leave in the 2023 leave year based on each individual employee's annual leave accrual rate. As provided by statute, employees with 3 years but less than 15 years of service accrue 10 hours of annual leave in the last full biweekly pay period of the year. (See our [Annual Leave \(General Information\)](#) fact sheet for more information.)

Employees Must Use Annual Leave to Avoid Forfeiture

Although affected employees will earn an additional pay period's worth of leave during the course of the 2023 leave year, the maximum carryover ceiling on annual leave still remains in effect (e.g., for most employees 240 hours, 360 hours (overseas), 720 hours (Senior Executive Service (SES) and senior level (SL) and scientific and professional (ST) employees). As a result, agencies should advise affected employees that they will accrue an additional 4, 6, or 8 hours of annual leave in the 2023 leave year and that they must use any annual leave above the maximum leave ceiling ("use or lose") before the final day of the leave year (January 13, 2024, for most employees). Any accrued annual leave in excess of the maximum allowed by law will be forfeited if not used by the final

day of the leave year. As provided in statute, an agency may restore annual leave that was forfeited due to an exigency of the public business or sickness of the employee only if the annual leave is scheduled in writing before the start of the third biweekly pay period prior to the end of the leave year (i.e., by December 2, 2023). (See our [Restoration of Annual Leave](#) fact sheet for more information.)

26 Pay Dates for Most Employees in 2023

Although most employees will have 27 leave pay periods, most employees will still have 26 *pay days* in calendar year 2023. Leave accrual is affected by the number of *pay periods*, not the number of pay days, in a calendar year. This means that any regular payments or payroll deductions that are made each pay day will also remain at 26 in 2023. Questions from agency headquarters human resources and headquarters payroll offices concerning the effect of calendar years with 27 pay days on pay and pay limitations may be directed to pay-leave-policy@opm.gov.

Additional Information for Human Resources Offices

For further information on the dates and number of pay periods in a leave year, agency human resources offices should contact their payroll providers. If there are further questions, the appropriate headquarters-level agency human resources office may contact Pay and Leave at OPM at pay-leave-policy@opm.gov. Component-level human resources offices must contact their agency headquarters office. Because agency payroll systems differ from agency to agency, employees must contact their servicing human resources office or payroll provider.

cc:Chief Human Capital Officers (CHCOs), and Deputy CHCOs

THE MORE YOU KNOW

Thursday, June 8, 2023
CPM 2023-09



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

MEMORANDUM FOR:
CHIEF HUMAN CAPITAL OFFICERS
From:
Kiran A. Ahuja, Director, U.S. Office of Personnel Management
Subject:
Dangerous Air Quality Conditions Due to Canadian Wildfires

As much of the country experiences dangerous air quality conditions from the ongoing Canadian wildfires, the U.S. Office of Personnel Management (OPM) is reminding Federal agencies to be proactive in protecting the health and wellbeing of our Federal workforce. In particular, we strongly encourage agencies to take all available steps to help protect those employees with high-risk medical conditions when dangerous air quality conditions are present. Employees are strongly encouraged to monitor their local air quality index levels through the AirNow website.

OPM would also like to remind agencies of the various workplace flexibilities that may be used to reduce health risks associated with dangerous air quality levels. Agencies are encouraged to permit employees, particularly those with high-risk medical conditions, to telework from home on a day when air quality conditions are dangerous. Additionally, if permitted by agency policy, an employee working a flexible work schedule may choose to adjust arrival and departure times to avoid commuting during hours when the air quality may be worse. Employees may also request the use of annual leave, earned compensatory time off, or credit hours on a day when the air quality is threatening to an employee's health and welfare. The following links provide additional information on available workplace flexibilities:

Any decision to change the operating status of a Federal office or facility due to dangerous air quality conditions should be made consistent with the operating status announcements and guidance found in OPM's Governmentwide Dismissal and Closure Procedures. This includes the proper application of weather and safety leave, unscheduled telework, and unscheduled leave for employees. Please note that OPM issues operating status announcements that apply only to those employees working in Executive agencies with offices located inside the "Washington Capital Beltway" (i.e. the Washington, DC area). Employees working in Federal agency offices located outside of the Washington Capital Beltway must follow operating status announcements issued by their agency. The current Washington, DC area operating status can be found on OPM's website or by downloading the OPM Alert Mobile App.

Finally, OPM wants to make the Federal community aware of the resources available from various Federal health authorities that provide information and advice on the best ways to cope with dangerous air quality conditions to protect ourselves and our families. The following links to official Federal Government information may be helpful:

- The Environmental Protection Agency's (EPA) AirNow Fire and Smoke Map which gives the public information on fire locations, smoke plumes, near real-time air quality and actions to take to protect your health all in one place.
 - The EPA's AirNow app, available for free on the Apple App Store and Google Play Store, can be used to check the AirNow Fire and Smoke Map by tapping the Smoke icon in the app.
 - EPA's AirNow guidance on ways to reduce exposure when smoke is in the air.
- The Centers for Disease Control and Prevention guidance on air quality and wildfire smoke.
- The Department of Health and Human Service's Office of Climate Change and Health Equity guidance on the current wildfire outlook.

Additional Information

For additional information, agency headquarters-level human resources offices may contact OPM at pay-leave-policy@opm.gov. Component-level human resources offices must contact their agency headquarters for assistance. Employees must contact their agency human resources office for further information on this memorandum.

cc: Deputy Chief Human Capital Officers and Human Resources Directors

THE MORE YOU KNOW



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

CPM 2023-10

June 12, 2023

Memorandum for Heads of Executive Departments and Agencies

From: Kiran A. Ahuja
Director

Subject: Emergency Leave Transfer for Federal Employees Adversely Affected by
Typhoon Mawar 2023

In the event of a major disaster or emergency as declared by the President that results in severe adverse effects for a substantial number of Federal employees, the U.S. Office of Personnel Management (OPM), in consultation with the Office of Management and Budget (OMB), may establish an emergency leave transfer program (ELTP). After coordinating with Federal agencies to assess the impact on employees in the declared disaster areas, OPM, in consultation with OMB, has determined that an ELTP program is warranted for Typhoon Mawar 2023.

An ELTP permits employees in the executive and judicial branches, or agency leave banks established under 5 U.S.C. 6363, to donate unused annual leave for transfer to employees of the same or other agencies (or the judicial branch) who are adversely affected by a major disaster or emergency, either directly or through adversely affected family members, and who need additional time off from work without having to use their own paid leave. Employees who are adversely affected and seek to become emergency leave recipients must apply in writing to their agencies. An employee who is unable to do so on their own may apply through a personal representative (5 CFR 630.1105). The ELTP will be in place to assist approved leave recipients as the need for donated annual leave becomes known.

Agencies with employees adversely affected by Typhoon Mawar 2023 are in the best position to determine whether, and how much, donated annual leave is needed by their employees and which of their employees have been adversely affected by the disaster within the meaning of OPM regulations. They are also in the best position to quickly facilitate the transfer of donated annual leave within their agencies. Therefore, OPM is authorizing agency and department heads (or their designees) to do the following:

- (1) Determine which employees are affected and whether, and how much, donated annual leave they need;
- (2) Determine the period of time for which donated annual leave may be accepted for distribution to approved leave recipients;

(3) As appropriate, approve leave donors and/or leave recipients in their agencies;

(4) Facilitate the distribution of donated annual leave from approved leave donors or (with the concurrence of an agency leave bank board) from an agency leave bank to approved leave recipients within their agencies; and

(5) Educate adversely affected employees that, dependent on agency policy, they may request advanced annual or sick leave, as appropriate (even if they have available annual and sick leave) or leave without pay, so that they are not forced to use accrued leave before donated annual leave becomes available. This is necessary since donated annual leave may not be retroactively substituted for accrued annual or sick leave used because of the disaster or emergency; it may only be substituted retroactively for any period of leave without pay or advanced annual or sick leave used because of the disaster or emergency.

Agencies are responsible for administering the ELTP for their own affected employees. Therefore, employees who wish to donate annual leave must contact their own agencies, not OPM, to determine if there are any affected employees in their agency and how to donate annual leave to them.

Agencies should contact OPM for assistance in receiving additional donated annual leave from other agencies only if they do not receive sufficient amounts of donated annual leave to meet the needs of emergency leave recipients within the agency. Based on the demand for donated leave, OPM will solicit and coordinate the transfer of donated annual leave among Federal agencies. OPM will notify each agency of the cumulative amount of donated annual leave that will be credited to it for transfer to its approved emergency leave recipients. The agency will determine the amount of donated annual leave to be transferred to each emergency leave recipient.

Guidance

- [Emergency Leave Transfer Program regulations, 5 CFR Part 630, Subpart K](#)
- [Emergency Leave Transfer Program Fact Sheet](#)
- [Guidance on Multiple Emergency Leave Transfer Programs](#), CPM 2017-16, November 2, 2017
- [The Supplementary Information to the final 2008 Emergency Leave Transfer Program Regulations](#) provides helpful background information

Guam Typhoon Mawar 2023

- [DR-4715-GU](#)
- Incident Period: May 22, 2023, and continuing
- Declaration Date: May 25, 2023
- Designated Areas: Territory of Guam

- [Map of affected area](#)

Guam Typhoon Mawar 2023

- [EM-3594-GU](#)
- Incident Period: May 22, 2023, and continuing
- Declaration Date: May 22, 2023
- Designated Areas: Territory of Guam
- [Map of affected area](#)

Commonwealth of the Northern Mariana Islands Typhoon Mawar 2023

- [DR-4716-MP](#)
- Incident Period: May 22, 2023, and continuing
- Declaration Date: Jun 2, 2023
- Designated Areas: Rota
- [Map of affected area](#)

Commonwealth of the Northern Mariana Islands Typhoon Mawar 2023

- [EM-3593-MP](#)
- Incident Period: May 22, 2023, and continuing
- Declaration Date: May 22, 2023
- Designated Areas: Northern Islands, Rota, Saipan, Tinian
- [Map of affected area](#)

Additional Information

Agency headquarters-level human resources offices may contact Pay and Leave at OPM at pay-leave-policy@opm.gov. Because the emergency leave transfer program will be administered by the agencies, employees should contact their servicing agency human resources office for further information on the emergency leave transfer program.

cc: Chief Human Capital Officers (CHCOs), Deputy CHCOs, and Human Resources Directors

Upcoming Virtual Training

Introduction to the FLRA and the ULP Process, Official
Time Tuesday, August 8, 2023 1:00 pm - 4:00 pm EST
<https://www.flra.gov/resources-training/training/introduction-flra-and-ulp-process-official-time-4>

7116(a)(1) and (b)(1) Statements, 7116(a)(2) and (4) discrimination, The
Flagrant Misconduct Standard, The Union's Duty of Fair Representation
Tuesday, August 15, 2023 1:00 pm - 4:00 pm EST
<https://www.flra.gov/resources-training/training/7116a1-and-b1-statements-7116a2-and-4-discrimination-flagrant-4>

Bargaining under the Statute, Scope of Bargaining, Duty to Bargain, Term,
Mid-Term, and Change Bargaining, Good faith/Bad faith Bargaining,
Defenses to the Duty to Bargain, Remedies Training
Tuesday, August 22, 2023 - 12:00pm
<https://www.flra.gov/resources-training/training/bargaining-under-statute-scope-bargaining-duty-bargain-term-mid-term-4>

Meetings under the Statute, Investigatory Examinations, Formal
Discussions, Bypasses
Tuesday, August 29, 2023 1:00 pm - 4:00 pm EST
<https://www.flra.gov/resources-training/training/meetings-under-statute-investigatory-examinations-formal-discussions-5>



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