ASSOCIATION OF CIVILIAN TECHNICIANS

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Technical and Clarifying Amendments Regarding Employment of National Guard Technicians

Correct 5 U.S.C. § 2105(a)(1)(F) Unless Current 32 U.S.C. § 709(c) is Deleted

In § 2105(a)(1)(F), "section 709(c) of title 32" should be changed to "section 709(d) of title 32"—unless current § 709(c) is deleted, resulting in redesignation of current § 709(d) as § 709(c).

Section 2105(a)(1)(F) of Title 5 was enacted as part of the 1968 National Guard Technicians Act, P.L. 90-486. The purpose of § 2105(a)(1)(F) was to include National Guard technicians employed under 32 U.S.C. § 709 in the definition of "employee" stated in 5 U.S.C. § 2105(a).

Section 2105(a)(1)(F) accomplished this by including in the § 2105(a) definition "an individual who is—(1) appointed in the civil service by . . . (F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32." Section 709(c) of Title 32, also part of the 1968 Technicians Act, said, "The Secretary concerned shall designate the adjutants general . . . to employ . . . the technicians authorized by this section.

Public Law 106-165 amended 32 U.S.C. § 709 to create a new subsection (c). Original subsection (c) was redesignated subsection (d). Congress, however, overlooked the need to reflect this redesignation in 5 U.S.C. § 2105(a)(1)(F), by changing "section 709(c)" to "section 709(d)".

In *Ohio Adjutant General's Department v. Federal Labor Relations Authority*, ___ U.S. ___, 143 S.Ct. 1194 (2023) (*Ohio National Guard*) the Supreme Court recognized that the reference to "section 709(c)" in 5 U.S.C. § 2105(a)(1)(F) was a mistake and that the reference should be to "section 709(d)":

> Adjutants general appoint dual-status technicians as civilian employees in the federal civil service. See 5 U.S.C. § 2105(a)(1)(F) (providing that the term "'employee,'" for purposes of Title 5, ordinarily includes "an individual . . . appointed in the[federal] civil service by . . . an adjutant general designated by the Secretary [of the Army or of the Air Force] under section *709[(d)]* of title 32"). [Emphasis added.]

143 S.Ct. at 1199. The mistake recognized by the Supreme Court should be corrected now—unless, as noted above and discussed below, current § 709(c) is deleted and current § 709(d) is redesignated § 709(c), which would make amendment of § 2105(a)(1)(F) unnecessary.

32 U.S.C. § 709(a); Add Regulatory Authority of the Secretary of Defense

Section 709(a) currently begins, "Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be,". This language should be amended to say, "Under regulations prescribed by the Secretary of Defense and either the Secretary of the Army or the Secretary of the Air Force, as the case may be,".

The authority of the Secretary of Defense to regulate technician employment is implicit and has been recognized; but express statement of this authority is appropriate.

Delete 32 U.S.C. § 709(b) Introductory Phrase; Delete All of § 709(c); Redesignate Subsequent Subsections; Change Cross Reference in Current Subsection (g)

Because all of the non-dual status technicians authorized by § 709(c) have been converted to Title 5 employees, § 709(c) should be deleted; the § 709(b) introductory phrase, "Except as authorized in subsection (c)," should be deleted; all subsections subsequent to (c) should be redesignated accordingly; and the reference to "subsection (f)" in current (g)(1) should be changed to "subsection (e)".

32 U.S.C. § 709(d); Add Authority to Convert Technicians Non-Competitively to Title 5 Employees by Converting their Technician Positions to Title 5 Positions

In § 1053 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 and § 1084 of the NDAA for FY 2017, Congress authorized conversion of technician positions to Title 5 non-technician positions, with non-competitive placement of the incumbents of the converted technician positions in the new Title 5 positions. Congress also required conversion of a certain percentage of technician positions by a specified date.

This conversion authority has not expired or been repealed and is included in the United States Code as 10 U.S.C. § 10216 note. Nonetheless, erroneous belief that this authority no longer exists is widespread. Guard managers have asserted that encumbered technician positions cannot be converted. Instead, technicians must resign, their vacant former positions must be abolished, new Title 5 positions must be created, and the technicians who resigned must apply and compete with other applicants for the Title 5 positions—placing the resigned technicians at risk and causing them to incur a break in service even if they successfully compete for the Title 5 positions.

Congress, by adding the following new sentence to current 32 U.S.C. § 709(d), should clarify that this inefficient, time-consuming, and risk-creating process is not required:

> Technician positions and technicians occupying them may be converted to title 5 non-technician positions and title 5 non-technician employees, respectively, with non-competitive placement of the converted employees in the converted positions.

32 U.S.C. § 709(e), First Sentence; Add Department of Defense Employment

Consistent with the proposed amendment of § 709(a) above, the first sentence of current § 709(e) should be amended to state, "A technician employed under subsection (a) is an employee of the Department of Defense and either the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States."

32 U.S.C. § 709(f)(4); Change the First "Concerns" to "Challenges" and the Second "Concerns" to "Challenges a Determination of"

> Section 709(f)(4) currently states:
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> (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 [emphasis added];

In this provision, "concerns," where it first appears, should be changed to "challenges"; the second "concerns" should be changed to "challenges a determination of".

In enacting current § 709(f)(4), Congress sought to ensure that appeals challenging military actions or determinations of military fitness for duty could not extend above the Adjutant General. In *Dyer v. Dep't of the Air Force*, 971 F.3d 1377 (Fed. Cir. 2020), however, the court misconstrued (f)(4) by interpreting "concerns" overbroadly.

In *Dyer* a National Guard technician appealed his separation from civilian employment to the Merit Systems Protection Board (MSPB), claiming that statutes applicable to this civilian employment decision had not been followed. The civilian employment decision occurred after a military decision had separated Dyer from military membership. The court held that the MSPB lacked jurisdiction over Dyer's appeal of the civilian employment separation because, according to the court, the appeal "concern[ed] fitness for duty in the reserve components" even though the appeal did not challenge, at all, the military decision separating Dyer from military membership.

The proposed amendment overrules the court's erroneous, overbroad interpretation of (f)(4) by clarifying that an appeal to the MSPB is within the Board's jurisdiction unless it "challenges activity occurring while the member is in a military pay status, or challenges a determination of fitness for duty in the reserve components."

32 U.S.C. § 709(g)(2); Amend to Implement Original Intent

This provision was intended by Congress to deny use and accrual of leave under 5 U.S.C. § 6323(a)(1)—which is paid leave from civilian employment for military duty—by technicians who, instead of intending to return to civilian employment after a temporary tour of military duty, choose permanently to convert from civilian employment to Active Guard and Reserve (AGR) membership. The provision, however, has been applied to deny § 6323(a)(1) leave to technicians who perform short, temporary AGR tours or temporary military tours that are not AGR duty at all. To implement the original intent, § 709(g)(2) should be amended, as follows, to apply only to AGR tours that last three years or more:

> (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) for a continuous period of three years or more.