For Public Release

Association of Civilian Technicians
Position Paper

Section 1053, S.1356, NDAA FY 2016, P.L. 114-92
“Management of Military Technicians”

Summary

Section 1053 reduces costs without sacrificing military readiness.

To achieve the full benefit of the law and to ensure consistent personnel management, the Secretary should convert to Title 5 competitive service positions all dual status technician positions that do not require performance overseas when unit employees are activated to Title 10 military duty.¹

To achieve additional personnel management efficiency, the Secretary immediately should convert all non-dual status technician positions to Title 5 competitive service, non-technician positions. The period of phased-in conversion should be brief, not extended.

Arguments that have been raised for repeal of § 1053 are erroneous or, if true, insufficient or improper.

Provisions of Section 1053

Section 1053(a) requires the Secretary of Defense by January 1, 2017, to “convert not fewer than 20 percent of the” “[m]ilitary technician (dual status) positions identified as general administration, clerical, finance, and office service occupations in the report of the Secretary . . . under section 519 of . . . Public Law 112-81” “to positions filled by individuals who are employed under section 3101 of title 5, United States Code, and are not military technicians.”² Section 1053(a)(2) allows the Secretary to convert positions in other categories. Section 1053(a)(3) states that the Secretary “may fill” a converted position “with the incumbent

¹ An additional benefit of the law is that it affords converted National Guard Technicians Title 5 employment rights, including independent review of suspensions and removals, that all technicians should have. We expect implementation of § 1053 will demonstrate that additional legislation should afford these Title 5 rights to all Guard technicians, including those who remain dual status.

² The “report of the Secretary” is M. Dolfini-Reed, et al., Report on the Termination of Military Technician as a Distinct Personnel Management Category, CNA DRM-2012-U-005399-1Rev (September 2013).
employee without regard to any requirement concerning competition or competitive hiring procedures."

Section 1053(b) prohibits further hiring of non-dual status technicians. It also requires that current non-dual status technician positions vacated by retirement or other separation of the incumbents be converted to Title 5 non-technician positions, if the vacancies are filled.

Value of Section 1053

Section 1053 reduces costs without sacrificing military readiness.

A National Guard or Reserve federal civilian position should be a Title 5 competitive service position with no military membership requirement unless the duties of the position require their performance overseas when unit personnel are activated to Title 10 military duty.³

Unnecessary designation of positions as dual status is costly. The incumbents must be paid not only full-time civilian pay, but also military pay for weekend drills and two weeks of annual military training, as well as paid leave from the civilian job to perform the annual training (or other military service). Dual status employees who become disabled for military service must be separated from their civilian jobs, even if they are fully capable of performing them, and must be paid special civilian disability retirement benefits—resulting in not only loss of the employees’ experience and expertise but also payments for no work. 5 U.S.C. §§ 8337(h), 8456.

³ If the duties of a civilian position must be performed where the unit is located, potentially in a combat zone, readiness requires that the position be dual status, for two reasons. First, though many civilians might be willing to work, perhaps repeatedly, in combat zones, assurance of readiness requires that the unit be able legally to compel deployment, which can be done only if the individual is a military member. Second, allowing the incumbent to stay home while ordering a Traditional Guard or Reserve member to deploy instead would be inefficient. Part-time Traditional members are less experienced than full-time dual status employees. Further, deployment of a Traditional member to do the same work as an employee allowed to stay home would be duplicative, unless the latter were furloughed for the duration of the deployment, which, if long, likely would result in the employee finding another job and resigning, causing the unit permanently to lose the benefit of the employee’s experience and expertise.

Note, however, that these two reasons do not necessarily require that all of a unit’s positions of a particular type be dual status. The whole unit overseas deployments that occurred in World War II have not been ordered in recent years and it would be reasonable to maintain, in light of modern conditions, that such whole unit deployments will not be necessary again. This would mean, for example, that in an Air Guard fighter unit not all of the aircraft maintenance mechanics would need to be dual status. If any overseas deployment would leave at least some of the aircraft at home, mechanics needed to maintain them would not need to be dual status employees. In these circumstances, a policy that would allow older aircraft mechanics to become non-dual status mechanics after many years of dual status service would be consistent with readiness. Further, it would improve it—by retaining experienced, highly skilled employees to perform work efficiently and to train newcomers, and by attracting high quality personnel in the first place, by providing greater assurance of employment until normal retirement age.
For these reasons, positions should be dual status only if this designation is necessary. If the duties of a position do not require performance overseas when unit personnel are activated, the position does not need to be dual status to preserve military readiness.

In accordance with this principle, § 1053 does not impair readiness, because the percentage of dual status positions that the law requires to be converted to Title 5 non-technician positions is less than the number of positions that should be converted. For many years Congress has imposed an arbitrarily low cap on non-dual status employment in Guard and Reserve units. 10 U.S.C. § 10217. Due to the cap, many positions have been designated dual status though their duties need not be performed overseas when unit personnel are activated.

Section 1053 expressly designates for conversion “general administration, clerical, finance, and office service occupations.” The Secretary’s 2013 report found “that 21 percent of all DS MilTech positions are general administration, clerical, and office services occupations.” Table 9 of the Secretary’s report identifies several other categories of dual status technician positions that are likely to include jobs that do not require deployment—for example, “Accounting and Budget,” “Human Resources Management,” “Unknown,” “Business and Industry,” “Education,” “Miscellaneous Occupations” (listed twice as two different categories), “Information and Art,” and “Legal and Kindred.” Thus, the legally required conversions are fewer than the conversions that should occur, and that can occur without impairing military readiness.

**The Secretary Should Maximize and Expedite Conversions to Achieve Full Cost Savings and Avoid Inconsistent Personnel Management**

**All Positions that Do Not Need to be Dual Status Should Be Converted, Not Just the Minimum Number Required by the Law**

To maximize cost savings and avoid inconsistent personnel management, the Secretary should convert all positions that do not need to be dual status, not just the minimum percentage required by the law. An arbitrary number of positions should not be converted while other employees in either identical positions or positions equally suitable for conversion continue to be dual status employees.

Such inconsistent personnel management likely would cause irrational workforce turbulence and inefficiency—as employees in otherwise identical positions seek placement in

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4 Also, even if some positions of a particular type need to be dual status, this does not mean that all positions of that type need to be dual status—to the extent that World War II style full unit deployments, including all unit equipment, are no longer occurring and are unlikely to occur in the future. See footnote 2.
the particular subset that has Title 5 status; or employees seek not the positions for which they are best suited, but those for which they are suited well enough and that also have Title 5 status. Incongruity of this kind likely would have a corrosive effect on employee morale. This is to be expected where employees who by all rational considerations are similarly situated are nonetheless treated inconsistently in a significant way. To avoid these consequences, all positions appropriate for conversion should be converted, not just the statutory minimum.\(^5\)

**Conversion of Non-Dual Status Positions Should Be Expedited**

To avoid additional inconsistency in personnel management, the Secretary should expedite the conversion of all non-dual status technician positions to Title 5 competitive service positions. Under § 1053(b)’s “phased-in” conversion of non-dual status technician positions, a non-dual status technician who is twenty-five years old and hired in December 2016 could remain a non-dual status technician until retirement more than forty years later. A situation in which some employees continue for decades to be non-dual status technicians, while newly-hired employees in identical jobs working next to them are given non-technician Title 5 status, would create turbulence, inefficiency and corrosion of morale similar to that described above.

As Title 5 non-technician positions become available, some non-dual status technicians are likely to seek them because they have that Title 5 status, not because they are the positions in which the employees might best serve the agency. On the other hand, to the extent some hiring managers are opposed to and wish to slow the conversion, they have an incentive not to hire non-dual status technicians who apply for new vacancies, even if they are best qualified, so that the technicians remain technicians and do not create new non-technician vacancies by leaving their current positions. These irrational circumstances should be avoided.\(^6\)

**Arguments for Repeal of § 1053 are Invalid**

We have heard the following arguments for repeal of § 1053. First, it creates a serious readiness issue by requiring that at least 20% of dual status technicians be converted to Title 5 civilian employees. Second, it drives up costs because for every converted position the military

\(^5\) To avoid other inefficiency, the Secretary should use the authority granted by 1053(a)(3) to require that incumbents in positions to be converted be appointed non-competitively to the converted positions without break in service. The conversion should not be an occasion for turbulence and instability in the workforce. There should be no “jockeying” for converted positions.

\(^6\) Under § 1053(b), non-dual status technicians may resign, causing their vacated positions to become non-technician Title 5 positions, then apply for and compete to be rehired in the converted position—with good chance of success, as they likely would be found to be best qualified. The Secretary should achieve this result directly, without the inefficient hiatus between resignation and rehiring. The Secretary should issue a regulation providing that any non-dual status technician who desires to resign from technician employment and immediately be rehired non-competitively without break in service to the Title 5 competitive service position that will replace the technician position has a right to do so.
will need to recruit a new military member and these new members will have to be paid enlistment and re-enlistment incentives that dual status technicians do not have to be paid. Third, Title 5 employees in National Guard units will not be answerable to the Adjutants General and the Governors, and this will cause administrative problems. Fourth, Title 5 employees in Guard units will not be available for state emergencies. Fifth, Title 5 employees will be subject to civilian force reductions that are not linked to military reductions.

None of these arguments is a valid reason to repeal § 1053.

First, § 1053 does not require conversion of more dual status technician positions than should be converted. To the contrary, the legal requirement is conservative; the Secretary actually should convert more positions than the 20 percent required by the law. The Secretary’s 2013 report found that 21% of dual status technicians are employed in general administration, clerical and office service occupations. Many others are employed in “Accounting and Budget,” “Human Resources Management,” “Unknown,” “Business and Industry,” “Education,” “Miscellaneous Occupations” (listed twice as two different categories), “Information and Art,” and “Legal and Kindred.” There is no reason to believe, and critics have provided no evidence, that the law’s 20 percent requirement cannot be met by converting only positions that do not require overseas deployment. In fact, the Secretary’s report indicates the opposite is true.

Second, because the duties of the converted dual status positions do not need to be performed overseas—and therefore do not need to be performed by anyone in military status—there will be no need to recruit new military members to perform these duties. Thus, there will be no new enlistment or re-enlistment bonuses to pay. The full-time Title 5 non-technician employees will perform the duties of these positions at all times. Because these employees will not need to be military members, military costs will be reduced, not increased.

Third, National Guard technicians are not answerable to state Governors now. Rather, they are federal employees of the United States Department of Defense. 32 U.S.C. § 709(e). The Secretary must designate Adjutants General as the employers of Guard technicians, 32 U.S.C. § 709(d); but in employing technicians Adjutants General act as federal officials. Lipscomb v. FLRA, 333 F.3d 611 (5th Cir. 2003). They must comply with the regulations of the Secretary, 32 U.S.C. § 709(a)—any conflicting orders from state Governors notwithstanding. While the § 709(d) legal mandate would not apply with respect to the Title 5 employees in converted Guard positions, this is not a sufficient reason to repeal § 1053. There is no reason to believe the Secretary would not choose to designate the Adjutants General to employ, or at least operationally direct, these employees, thereby providing Adjutants General fully sufficient administrative authority. The Secretary’s general statutory authority over Department employees, as well as the authority implied by § 1053 itself, provides ample legal authority for this designation.
Fourth, while it is true that Title 5 employees employed in Guard units under § 1053 would not be required to be available for state emergencies—because they would not be required to be state Guard members—this is not a proper reason to repeal § 1053. The non-dual status technicians currently employed by Guard units also are not available for state emergencies. Like current non-dual status technician positions, the dual status positions to be converted under § 1053 are only those that do not need to be part of the federal military unit when the unit is activated to Title 10 status. If it is not necessary to include a position in the federal military unit, it is not proper to argue that the position nonetheless should be part of the state military unit. The Secretary should not be required to retain in the military finance clerks who do not need to deploy overseas, just so these finance clerks can be kept in the state military and ordered to fill sandbags during floods. There is no principled basis for such a requirement. If for a particular flood more than the reduced number of dual status technicians need to be ordered to state military duty, Traditional Guard members, who are not reduced by § 1053, can be activated. Necessity for overseas deployment, not occasional need for sandbagging or other common emergency work, should determine the composition of a military unit.

Fifth, while it is also true that non-technician Title 5 employees of Guard and Reserve units would lose the legal protection from civilian force reduction provided by 10 U.S.C. § 10216, this is not a sufficient reason to repeal § 1053. In implementing future civilian force reductions not linked to military force reductions, Congress and the Department properly can be expected to tailor the reductions to ensure the same preservation of military readiness that § 10216 currently provides. This, of course, should be done; and there is no reason to believe it will not be.

Conclusion

Section 1053 saves money without reducing military readiness. To maximize both savings and personnel management efficiency, the Secretary should fully and expeditiously implement this law.