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TECHNICIAN PERSONNEL REGULATION (TPR) 715

CHAPTER 7A

Labor Management Relations

VOLUNTARY AND NON-DISCIPLINARY ACTIONS

This technician personnel regulation establishes responsibilities, policies and procedures for all voluntary and non-disciplinary actions in the National Guard Technician Program. Section 10, Public Law 90-486 requires issuance of regulations to prescribe the policies and responsibilities in Technician Personnel Programs. This regulation meets those requirements and provides The Adjutants General (TAG) regulatory guidance for the administration of the National Guard Technician Program at the state level.

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Section I Voluntary Action

7A-1. Resignation

a. Resignation is a voluntary termination of employment. A technician can resign at any time; advance notice is not required. Management may ask for a reasonable period of notice to allow for a replacement or work adjustment but may not set an earlier or later date than the date selected by the technician.

b. A technician who plans to resign should complete a SF 52 or submit the resignation in writing, signed and dated, with an effective date and reasons for resigning. When the resignation is made orally management should try to obtain written confirmation of the resignation from the technician. If this is not possible, the person to whom the resignation request is addressed should prepare a memorandum for the record to document the request including reasons given by the technician, the date, and names of any witnesses. Relevant documents are attached to the SF 52 used to process the resignation. Technicians should be encouraged to give specific reasons for resigning since these reasons are used to determine future employment eligibility and entitlement to various benefits including unemployment compensation. They also provide management with helpful information in accessing employment trends.

c. Management cannot demand a technician's resignation. However, when a technician is faced with an adverse action, management should refer the individual to the HRO for advice on options, including resignation. The technician should also be advised the effective date of the resignation, such as prior to or after the adverse action is proposed, dictates whether remarks about the adverse action can be placed on the resignation SF 50. A technician who resigns rather than face the adverse action process forfeits adverse action appeal rights. To make a well-informed decision, a technician should be referred to the HRO for advice on options, rights and benefits information.

d. A technician may request to withdraw a resignation before it becomes effective. Requests to withdraw must be in writing; verbal requests must be followed up in writing within five workdays. Within the Department of Defense there are generally two circumstances where management may deny withdrawal. These are:

- (1) When the technician's position has been or is scheduled to be abolished; or
- (2) When a commitment of the position to be vacated has been obligated to someone else (e.g. an individual is selected for the projected vacancy through the merit placement process and has given notice to his/her current employer). If a technician's request to withdraw a resignation before it becomes effective is denied, management must provide a written explanation of its decision and advise the technician of the right to request an appellate review or administrative hearing (see TPR 752 for a description of both appeal processes). Management has the burden of establishing the validity of its reasons for denying withdrawal (5 CFR Subpart B part 715.202).

e. A technician who has resigned and then alleges the resignation was involuntary must be advised by the HRO of the right to appeal. The technician can request an appellate review, administrative hearing (see TPR 752 for a description of both appeal processes), or a grievance under the terms of an applicable collective bargaining agreement. The timely selection of one forum precludes processing an appeal/grievance in the other forum. The burden is upon the technician to prove by a preponderance of the evidence¹ the involuntary nature of the action.²

f. When a request for a voluntary resignation in lieu of an adverse action is withdrawn, the adverse action under TPR 752 that prompted the resignation will be resumed. All time periods under TPR 752 that were stayed or delayed because of the resignation will be resumed at the point the voluntary resignation is withdrawn.

7A-2. Change to a Lower Grade

a. A technician can request a voluntary change to a lower grade at any time. Such requests are normally made for personal reasons and are usually in the technician's own best interest. A request for a voluntary change to lower grade must be in writing with all facts and circumstances surrounding the action documented. A voluntary change

¹ Considering the record as a whole, the evidence is more convincing to The State Adjutant General than the opposing evidence.

² Case law holds that free choice is undermined to the extent that employees experience duress, time pressure, or mental incompetence at the time of their decision. Several decisions hold that a resignation is deemed involuntary if free choice is compromised (obtained by deception, coercion, duress, time pressure or intimidation). Note however that a choice between two adverse events is not generally held to be coercion, duress or intimidation.

to lower grade at the request of the technician does not carry a right to pay retention under 5 U.S.C. 5363(a)(3). See TPR 500 for guidance on grade and pay retention.

b. Management cannot demand a technician request a change to lower grade. However, when a technician is faced with an adverse action, management may advise the individual of the option to voluntarily request a change to a lower grade. To make a well-informed decision, a technician should be referred to the HRO for rights and benefits information.

c. A technician may withdraw a voluntary request for a change to lower grade before it becomes effective. Requests to withdraw must be in writing (signed and dated); verbal requests must be followed up in writing within five workdays. There are two circumstances where management may deny withdrawal. Both are explained in paragraph 7A-1d. If a technician's request is denied, management must provide a written explanation of its decision and advise the technician of the right to an appellate review, administrative hearing (see TPR 752 for a description of both appeal processes), or a grievance under the terms of an applicable CBA. Management has the burden of establishing the validity of its reasons for denying the withdrawal.

d. A technician who alleges the change to lower grade was not voluntary will have his/her allegations processed in accordance with the procedures established in paragraph 7A-1e.

e. When a request for a voluntary change to lower grade in lieu of an adverse action is withdrawn, the adverse action under TPR 752 will be resumed. All time periods that were stayed or delayed because of the request for change to lower grade will be resumed at the point the request for a voluntary downgrade is withdrawn.

7A-3. Optional Retirement

a. Application for optional retirement is a voluntary expression of a technician's desire to retire. The effective date is specified in the retirement application (SF 2801) provided the eligibility requirements are satisfied on that date.

b. Management cannot demand a technician retire. When a technician is faced with an adverse action, however, management may advise the individual of the option to retire. To make a well-informed decision, a technician should be referred to the HRO for rights and benefits information.

c. A technician may request to withdraw an application for retirement before it becomes effective. Requests to withdraw must be in writing; verbal requests must be followed up in writing within five work days. Within the Department of Defense there are two circumstances under which management may deny the request to withdraw. These two circumstances are explained in paragraph 7A-1d. If a technician's withdrawal request is denied, management must provide written explanation of its decision and advise the technician of the right to an appellate review, an administrative hearing (see TPR 752 for a description of both appeal processes), or a grievance under the terms of an applicable Collective Bargaining Agreement. Management has the burden of establishing the validity of its reasons for denying the withdrawal.

d. A technician who has retired and then alleges the action was involuntary will have the allegations processed in accordance with the procedures established in paragraph 7A-1e.

e. When a request for a voluntary retirement is withdrawn that is made in lieu of an adverse action, the adverse action under TPR 752 that prompted the retirement will be resumed. All time periods that were stayed or delayed will be resumed at the time the request for voluntary retirement is withdrawn.

7A-4. Abandonment of Position

a. A technician can be removed for abandonment of position if he/she fails to report for work within a reasonable time (usually 10 calendar days). Management must attempt to ascertain the technician's intentions and document those attempts. If no intent to return can be established, the HRO processes the removal action and forwards the written notice by certified mail to the technician's last known home address. The removal is effective the last day the technician was at work or the last day of approved leave, whichever is later.

b. Abandonment of position is a voluntary termination from technician employment and as such will not require the 30-day notification established by 32 U.S.C. 709(f)(5).³

c. A technician who requests to return to duty after an abandonment of position will be advised by the HRO of the right to appeal as outlined in paragraph 7A-1e. The burden is on management to prove the technician abandoned the position.

d. A technician who challenges an abandonment of position determination may be charged with the offense(s) of AWOL under the provisions of TPR 752.

Section II Non-Disciplinary Action⁴

7A-5. Loss of Military Membership

a. Federal law requires civilian personnel employed pursuant to 32 U.S.C. 709 (a) to maintain membership in the National Guard as a condition of continued employment and requires prompt termination from the current position upon loss of membership in the Army or Air National Guard.⁵ The one exception to the requirement for prompt termination upon loss of military membership is in pending disability retirement claims. Under these circumstances, a technician who has lost military membership may be retained until the OPM's adjudication is received.

b. A technician must be notified in writing of his/her termination at least 30 calendar days before the termination date⁶ (unless serving under a temporary appointment, serving a trial or probationary period, or has voluntarily ceased to be a member of the National Guard). Termination from technician employment will coincide with separation from the National Guard since waiting until the military separation date to issue the notice would not be in keeping with the intent of Congress. The following rules apply when computing the 30-day notice:

- (1) Day means calendar day;
- (2) Calendar day is the 24-hour period between 12 midnight and 12 midnight;
- (3) The 30-day period begins the day after the notification is given directly to the technician or, if mailed, five days after the date mailed as shown on the certified mail return receipt;
- (4) The last day of the 30-day period may not be a non-work day and
- (5) There is no prohibition against effecting this action during the period 15 December through 3 January.

c. A technician has the option of waiving the 30-day notice requirement (waivers must be in writing). Preparation and issuance of the notice is an HRO responsibility.

³ 32 USC 709(f)(5)...a technician shall be notified in writing of the termination of his employment as a technician and...such notification shall be given at least 30 days before the termination date of such employment (unless the technician is serving under a temporary appointment, is serving a trial or probationary period or has voluntarily ceased to be a member of the National Guard...).

⁴ Non-disciplinary action is an adverse action taken for reason(s) other than to correct an employee's delinquency or misconduct. These actions are normally initiated and decided upon based on actions such as, but not limited to: lack of funds or work; changes to lower grade based on classification; or physical or mental inability to perform the duties of the position.

⁵ 32 U.S.C. 709(b)(1) and (2)...a person employed under subsection (a) must...be a military technician (dual status)...be a member of the National Guard...

32 U.S.C. 709(f)(1)(A)...a person employed under subsection (a) who is a military technician (dual status)...who 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...

The Supreme Court of the United States, in the case of *Tennessee v. Dunlap*, 426 U.S. 312 (1976), found no constitutional or due process defect in this arrangement.

⁶ 32 U.S.C. 709(f)(5) a technician shall be notified in writing of the termination of his employment as a technician and... such notification shall be given at least 30 days before the termination date of such employment (unless serving under a temporary appointment, serving a probationary or trial period, or voluntarily ceases to be a member of the National Guard...).

7A-6. Failure to Meet a Condition of Employment

a. There are many situations that constitute a failure to meet a condition of employment. The following represent the more common ones:

(1) Failure to maintain a compatible military assignment. For example, a technician fails a training course required for military assignment and is militarily reassigned, resulting in an incompatible assignment. Or, because of poor performance in the technician's military assignment, an individual is militarily reassigned, causing an incompatible assignment.⁷ In both examples, management may reassign the technician to a compatible military assignment, or terminate the technician for failure to maintain a compatible military assignment.

(2) Failure to maintain the military appointment requirement for the position. For example, a technician assigned to an "enlisted only" position is appointed as a commissioned officer.⁸

(3) Failure to maintain military rank required for the position.

(4) Failure to maintain flying status.

(5) Failure to maintain a state driver's license.

(6) Failure to maintain current qualifications as an aircrew member.

(7) Failure to meet the physical standards required for an aircrew member.

(8) Revocation of authorization to carry a firearm.

(9) Failure to maintain security clearance.

(10) Failure to remain qualified in the Personnel Reliability Program.

(11) Failure to complete military training.

(12) Physical inability to perform technician duties efficiently and/or safely.⁹ For example, the technician is physically prohibited by his/her physician from climbing, if it is not a temporary condition.

(13) Failure to maintain a compatible military assignment.

(14) Failure to restore to technician status after five years of uniformed service. Refer to Uniformed Services Employment and Reemployment Rights Act (USERRA).

b. If a technician can no longer meet a condition of their employment, management must take appropriate action. If the situation is of a temporary nature, management shall review the portion of the duties the technician will be able to continue performing and if the organization can withstand curtailment of duties for a temporary period of time. Answers to these questions will assist management to assess its options in:

(1) Leaving the technician in his/her position for the time period involved;

(2) Detailing the technician;

(3) Reassigning the technician;

(4) Offering the technician a change to lower grade; or

(5) Terminating the technician.

c. If the inability to meet a requirement of the position is permanent, management must remove the technician from the position either by reassignment, change to lower grade, or termination.

d. Decisions made in each case must be documented with well-founded justification. No decisions should be made without HRO coordination since placement could involve such things as compatibility, qualifications, training, pay, and technician assistance program. Regardless of the alternative selected, the HRO must advise the technician in writing.

e. If management determines a change to lower grade or reassignment is necessary, it must provide the technician with a reasonable amount of time to accept or reject the offer, usually 15 calendar days. The written

⁷ *Martelon v. Temple*, 747 F.2d 1348 (10th Cir. 1984), cert. denied 105 S.Ct. 2675 (1985).

⁸ TPR 300(302.7) permits The Adjutants General to make an exception to this requirement when the military appointment requirement (officer, warrant officer, enlisted) of a technician's position changes.

⁹ The Americans With Disabilities Act (ADA) requires agencies to make "reasonable accommodations" to "qualified individuals with disabilities". An individual is considered to have a "disability" if s/he has a physical or mental impairment that substantially limits one or more major life activity, has a record of such impairment, or is regarded as having such an impairment. It is strongly recommended that applicable EEOC regulations be reviewed before proceeding with this type of action.

notification must inform the technician that should he/she choose not to accept the offer, termination will be effected. See paragraph 7A-5b for rules on computing the 30-day notice.

7A-7. Military Appointment Requirements

Military appointment requirements (officer, warrant officer, enlisted) are specified on position descriptions. A technician who fails to maintain the military appointment requirements must be removed from the technician position. Normally this occurs when an enlisted technician is commissioned into the warrant officer or officer corps. Therefore, military technicians must be advised as early as possible about the effects such a military appointment will have on his/her technician employment. The supervisor is responsible for issuing a written notice informing the military technician that:

- a. Acceptance of an incompatible military appointment will result in termination from technician employment;
- b. Unless selected for a position designated as warrant officer or officer, termination from technician civilian employment will occur upon receipt of temporary Federal recognition (ARNG) or upon graduation from the Academy of Military Science (ANG). Subsequently, the HRO must ensure the 30-day notice requirement established by 32 U.S.C. 709(f)(5) is accomplished. See paragraph 7A-5b for rules on computing the 30-day notice.

7A-8. Termination of General Officers

A military technician promoted to general officer cannot continue in technician employment unless they meet the criteria outlined in TPR 303. Therefore, the HRO must issue a written notice as early as possible to advise the military technician that: (1) promotion to general officer will result in termination from technician employment, and (2) termination will occur not later than 14 days following the date of Federal recognition to any general officer grade that does not meet the criteria outlined in TPR 300. A copy of the Standard Form 50 terminating technician status must be provided to the NGB General Officer Management Office (NGB-GO) before Federal recognition orders can be published. The HRO must ensure the 30-day notice requirement established by 32 U.S.C. 709(f)(5) is accomplished.¹⁰ See paragraph 7A-5b for rules on computing the 30-day notice.

7A-9. Management-Directed Reassignment

a. Management may reassign a technician to another position at the same grade and pay.¹¹ It can also include the movement of a technician from a position with potential for noncompetitive promotion to a position without that potential. There must be a valid reason for a management-directed reassignment. Examples of valid reasons include but are not limited to the following: management needs the technician's expertise / talents elsewhere; action is required to prevent an incompatible assignment or a grade inversion situation; or action is required to eliminate or avoid disruption and conflict where personal disagreements are affecting work relationships.

b. The Human Resources Office is responsible for providing the technician written notification of a management-directed reassignment. As a minimum, this notification will:

- (1) Explain why the management-directed reassignment is taking place (i.e. there must be sufficient detail to establish the action is for legitimate reasons);
- (2) State the effective date for the action;
- (3) Provide the technician with a reasonable amount of time (normally 5 work days) to accept or reject the assignment,
- (4) Provide benefit information applicable to the technician if the technician rejects the offer and termination occurs;

¹⁰ As part of the package to be considered for general officer, a technician must sign a Statement of Understanding acknowledging the termination of their technician status in order to become a general officer. A copy of the Statement of Understanding is provided to the HRO from the personnel offices (ARNG and ANG) at the state HQ eight months prior to any action being taken. This Form may serve as the 30-day written notice under the statute.

¹¹ If the reassignment is a change to a lower graded position but is considered to be in the best interest of the Government and the technician concurs in the action, then the action is processed in accordance with TPR 715. If the technician does not concur with the reassignment to a change to lower grade, then the action must be processed in accordance with either TPR 752 (misconduct), or TPR 430 (performance).

- (5) Explain that if the offer is rejected, the notification letter constitutes a 30-day notice of termination; and
- (6) Inform the technician that there is no appeal of termination under this section.

7A-10. Transfer of Function

The NGB reduction-in-force regulation, TPR 351, establishes procedures for transfer of function, although it is advised to also review the CBA. The HRO is responsible for providing written notification of the transfer. This notice must:

- a. Explain why the transfer of function is occurring;
- b. Provide the effective date for the transfer;
- c. Give the technician a reasonable amount of time (normally 10 calendar days) to accept or reject the transfer;
- d. Explain that if the offer is rejected, the notification memorandum constitutes a 30-day notice of termination; and
- e. Provide benefit information applicable to the technician if termination occurs.

7A-11. Furlough for 30 Days or Less (22 Workdays)

a. Management has the inherent authority to furlough any or all of its technicians if there are legitimate reasons. Situations under which a furlough can be used include lack of work, lack of funds, or unforeseeable circumstances such as breakdown in equipment, natural disasters, sabotage, or sudden emergencies requiring immediate curtailment of activities.

b. Collective bargaining obligations and negotiated agreement provisions on furlough procedures must be honored. If exceptions to negotiated procedures are required by management's authority to act in an emergency, labor organizations should be informed in advance of the nature and extent of the emergency.

c. The HRO is responsible for preparing and issuing written furlough notices. Such notices may be addressed to groups of technicians, but a copy must be provided to each technician or forwarded to the technician's address of record a minimum of 24-hours before the effective date of the furlough. Such notices will include: (1) the reason for the furlough; (2) the estimated length of the furlough (a furlough period can be for 30 consecutive calendar days or 22 nonconsecutive workdays; e.g., 1 day per week for 22 weeks); and (3) a statement the technician has the right to have the furlough action reviewed by TAG.

d. A technician who requests review of the furlough action submits his/her objections to the HRO. TAG takes whatever action he/she deems appropriate to thoroughly review the technician's objections along with management's need for the furlough. A final decision is then issued by TAG summarizing the objections and the method of review and concluding with the reasons for the final decision. (Management is responsible for establishing the appropriateness of the furlough.) The decision must also advise the technician there is no further administrative appeal to TAG's final decision. (NOTE: Furloughs in excess of 30 calendar days (22 workdays) must be processed in accordance with TPR 300(351).)

7A-12. Decrease in the Hours of Duty for a Part-time Technician

a. Part-time employment is covered in TPR 300. Before management can decrease the specific number of hours a part-time technician has been employed to work on his/her prearranged scheduled tour of duty, the technician must be provided written notification of the decrease. As a minimum, the notification must be given to the technician in advance of the pay period in which the change occurs. The notice must include the reason for the decrease and a right to have the action reviewed by TAG. The notification memorandum must be cleared by the HRO before issuance.

b. A technician who requests review of the decrease in hours submits his/her objections to TAG. TAG takes whatever action he/she deems appropriate to thoroughly review the technician's objections along with management's rationale for the decrease. A final decision is then issued by TAG summarizing the objections and the method of review and concluding with the reasons for the final decision. (Management is responsible for establishing the appropriateness of the decrease). The technician must also be advised there is no further administrative appeal to TAG's final decision.

7A-13. Enforced Leave

a. Management has the right to require a technician to leave the worksite when it is determined that: the technician is not ready, willing, and able to perform assigned duties; and/or the technician's continued presence is highly undesirable or presents an immediate threat to Government property or the well being of the technician, coworkers, or the public. The following three examples illustrate this management right.

(1) A technician reports to work without required safety equipment. At that point the technician is not ready and able to perform assigned duties. A supervisor can place the technician on annual leave, compensatory time-off, or LWOP until he/she reports to work with the required safety equipment.

(2) A technician appears for work in what the supervisor reasonably determines to be an unsafe state due to illness, alcohol abuse, medication, controlled substance abuse, or other causes. Attempts to have the technician explain the conditions are unsuccessful. The supervisor determines that the technician's continued presence creates an immediate threat to Government property, the technician, and/or fellow co-workers. The supervisor affords the technician an option of being taken home or to a family physician or having a family member called. If he/she refuses to choose or is unable to choose, the supervisor selects the best alternative. When the technician reports to work the next day, the supervisor advises him/her that unless there is a reasonable explanation, the leave status for the non-duty time will be LWOP. If there is a reasonable explanation (for example, reaction to new medication that can be supported by a doctor's statement), the supervisor can give the technician the option of using annual leave, compensatory time-off, or sick leave. The technician is then advised no further action will be taken or the incident is still being appraised and disciplinary or adverse action could result.

(3) A technician is in a rage, disrupting the entire shop (throwing objects and cursing). Attempts to calm the technician are rebuked. The supervisor determines the technician's continued presence would be highly undesirable. The technician is advised he/she is being placed in a LWOP status and to immediately leave the worksite and return when calmed down. The technician regains composure and reports to work the next day. The supervisor advises the technician that unless there is a reasonable explanation, the LWOP status from the previous day will not be changed. If the explanation alters the supervisor's position on the LWOP (for example, technician first learned of a family member's serious illness), the technician can be offered the option of taking appropriate leave. The technician is advised no further action will be taken or the incident is still being appraised and disciplinary or adverse action could result.

b. Enforced leave may not be continued once management determines the technician is ready, willing, and able to perform assigned duties or the immediate emergency is resolved.