DEPARTMENT OF DEFENSE
CIVILIAN PERSONNEL MANAGEMENT SERVICE
1400 KEY BOULEVARD
ARLINGTON, VA 22209-5144

AUG 0 5 2009

MEMORANDUM FOR THE ADJUTANT GENERAL, ARKANSAS
ATTN: LT COL BRINKER, LABOR RELATIONS
SPECIALIST, HUMAN RESOURCES OFFICE
BOX 17, BUILDING 7300, CAMP ROBINSON
NORTH LITTLE ROCK, ARKANSAS 72199-9600

SUBJECT: Agreement Between the Adjutant General of Arkansas (188th Fighter Wing) and River Valley Chapter 131, Association of Civilian Technicians

The subject agreement, executed on July 10, 2009, has been reviewed pursuant to 5 U.S.C. § 7114(c). Although the parties bargained in good faith to reach an agreement, sections of the contract do not conform to law, rule, or regulation. Because of this, the contract is disapproved. Specifically:

a. Several provisions within the agreement provide for actions to be accomplished in accordance with agency regulations (e.g. Technician Personnel Regulations [TPRs], Arkansas supplements, etc.). For example, **ARTICLE 15** – PERFORMANCE APPRAISAL SYSTEM (Page 39) holds that performance management will be accomplished in accordance with both TPR 430 and the Arkansas Supplement to that regulation, and **ARTICLE 20** – DISCIPLINARY AND ADVERSE ACTIONS (Page 46), holds that disciplinary and adverse actions will be taken in accordance with TPR 752. Such regulations establish substantive limits upon the exercise of the authorities set forth in 5 USC §7106. Such provisions incorporate directly into the agreement regulations that involve the assignment of specific duties to specific individuals, and also include separate instances regarding the assignment of work, and the rights to reduce in pay or grade, remove or take other adverse action. For example, TPR 430 encompasses the determination of the number of performance rating levels, the identification of critical elements, the establishment of performance standards, and determinations of actions to be taken based on substandard performance. Determination of the number of performance rating levels, the identification of critical elements and establishment of performance standards are encompassed in the right to assign work, and the determinations of actions to be taken based on substandard performance are substantive decisions regarding directing and assigning employees and taking adverse actions against employees. Where, as here, a provision directly incorporating the terms of a regulation into the contract would have the effect of establishing an independent contractual requirement substantively limiting an agency's discretion to exercise its management rights,

the provision directly interferes with those rights. See, for example 38 FLRA 456 National Association of Government Employees, Local R1-144 and U.S. Navy, Naval Underwater Systems Center, Newport, Rhode Island (1990) remanded as to other proposals (see 43 FLRA 47) Proposal 5 (regarding the determination of the number of rating levels), Proposal 6 (regarding the establishment of an independent contractual requirement) and Proposal 13 (regarding actions based upon substandard performance). See also 3 FLRA 769 National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt (1980) aff'd sub nom. NTEU v FLRA 691 F.2d 553 (D.C. Cir. 1982) regarding the identification of performance elements and the determination of performance standards. Similarly, TPR 752 includes a table of penalties, and the Authority has found that inclusion of such tables in a collective bargaining agreement would directly interfere with the 5 USC §7106 (a)(2)(A) right of the agency to take disciplinary action. See, for example 30 FLRA 706 New York State Nurses Association and Veterans Administration, Bronx Medical Center (1987) Proposal 11.

To correct violations resulting from the references to regulations that place substantive limitations on the exercise of authorities under 5 USC §7106, the parties could either eliminate all such references. Alternatively, the parties could amend the second paragraph of the **PREAMBLE** to the agreement with language similar to the following:

> "Whenever language in this Agreement or in any regulation referenced in this agreement refers to specific duties or responsibilities of specific employees or management officials, it is intended only to provide a guide as to how a situation may be handled. It is agreed that management retains the sole discretion to assign work and to determine who will perform the function discussed. It is also agreed with regard to any rules and/or regulations referenced or incorporated into the agreement that management retains the right to act in accordance with 5 USC§ 7106."

b. **ARTICLE 3 C** – EMPLOYEE RIGHTS (Page 11), Section 8. WORKING CONDITIONS. The first sentence of this provision states:

> *"No Employee will be required to perform duties which are illegal, immoral or a genuine threat to life or health."*

The underlined portion of the provision is inconsistent with the 5 USC §7106 (a)(2)(B) right of the agency to assign work, as it does not limit such situations to those where the technician develops a reasonable belief that performance of the duty poses an imminent risk of death or serious bodily harm coupled with a

reasonable belief that there is insufficient time to seek effective redress through normal hazard reporting and abatement procedures. 29 FLRA 3 American Federation of Government Employees, AFL-CIO, Local 1458 and U.S. Department of Justice, Office of the U.S. Attorney, Southern District of Florida (1987), Provision 1.

As Section 9 of ARTICLE 11 – SAFETY AND HEALTH already contains permissible language to the same effect as that disapproved above, the parties could correct the violation by deleting the comma after the word "illegal"; placing the word "or" between the words "illegal" and "immoral", and deleting the remainder of the sentence.

c. ARTICLE 8 – HOURS OF WORK (Page 25), Section 6. OVERTIME AND COMPENSATORY TIME. The final sentence of this provision states:

> *"Overtime will be assigned on a rotational basis to ensure equity, fairness, and equal distribution of work."*

This sentence is inconsistent with the 5 USC §7106 (a)(2)(B) right of the agency to assign work as it does not require that personnel be qualified for assignment to an overtime duty. See 33 FLRA 711 International Association of Machinists and Aerospace Workers and Department of the Treasury, Bureau of Engraving and Printing (1988) Proposal 8. Additionally, the Authority has found that the inclusion of terms similar to "fair" and "equitable" regarding the exercise of a management right constitute a substantive limit on the exercise of that right. See 46 FLRA 696 NTEU and U.S. Department of the Treasury, Customs Service, Washington, D.C. (1992).

The parties could correct this violation by inserting the words "among equally qualified personnel" immediately following the word "basis" in the sentence, and deleting the remainder of the sentence.

d. ARTICLE 11 – SAFETY AND HEALTH (Page 35), Section 10. The first sentence of this section states:

> *"It is understood that no employee shall be required to perform work in an area that is determined to be unsafe or unhealthy unless such unsafe or unhealthy condition can be alleviated through the use of appropriate safety equipment."*

This provision is inconsistent with the 5 USC §7106 (a)(2)(B) right of the agency to assign work, as it does not limit such situations to those where the technician develops a reasonable belief that performance of the duty poses an imminent risk of death or serious bodily harm coupled with a reasonable belief that there is insufficient time to seek effective redress through normal hazard reporting and abatement procedures. 29 FLRA 3 American Federation of Government Employees, AFL-CIO, Local 1458 and U.S. Department of Justice, Office of the U.S. Attorney, Southern District of Florida (1987), Provision 1.

As Section 9 of **ARTICLE 11** – SAFETY AND HEALTH already contains permissible language to the same effect as that disapproved above, the parties could correct the violation by deleting the first sentence of Section 10.

e. **ARTICLE 20** – DISCIPLINARY AND ADVERSE ACTIONS (Page 46), Section 2. PRELIMINARY INVESTIGATION. Subsection a. states:

> *"Prior to taking disciplinary action or proposing adverse actions, the appropriate Management official shall undertake preliminary investigations and discussions with the employee and, if requested, his/her representative. If the employee desires such representation, it shall be granted before further action occurs. Disciplinary action will be initiated, if at all, as soon as practicable after the incident in question, or after management knows of the incident."*

The underlined sentence by restricting management from taking any further action until the employee's representative is present effectively prevents management from any further investigation, and interferes with the 5 USC §7106(a)(1) right of the agency to determine its internal security practices. 975 F.2d 218 U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE v. FEDERAL LABOR RELATIONS AUTHORITY (1992)

The parties could correct this violation by inserting language similar to the following in place of the underlined sentence:

> "If the employee being examined in connection with an investigation requests representation a reasonable amount of time may be provided for the employee's representative to arrive; however, such time allowed will not delay management's investigation."

Several provisions while not, on their face, inconsistent with law or Government-wide regulation, must be interpreted as set forth below to be, and remain, enforceable:

a. ARTICLE 15 – PERFORMANCE APPRAISAL SYSTEM (Page 39), Section 1 GENERAL. The second sentence of this provision refers to the performance management system as being a three level system; however, in the "NOTE" appended to the section the agreement states that the number of levels has not been negotiated. The second sentence was not disapproved, as the "NOTE" was interpreted to mean that management would not be constrained from implementing revisions that include more or fewer levels, subject to its obligations regarding bargaining over procedures and appropriate arrangements Any interpretation that would restrict management from implementing such changes could not be enforced.

b. ARTICLE 28 – POSITION CLASSIFICATION (Page 56), Section 1. b. The provision refers to the interpretation of the phrase "performs other duties as assigned." The provision was not disapproved, as it was interpreted to mean that accurate position descriptions would be maintained and that management had the authority to assign the duties required to accomplish its work. Any interpretation that would restrict management from assigning work under 5 USC §7106 (a)(2)(B) could not be enforced.

Pursuant to the separate Memorandum executed by the parties on July 10, 2009, all agreement provisions not disapproved in this memorandum may be implemented. The parties may revise the above cited language and resubmit the contract for approval at a later time. The documentation of a revised contract should be forwarded to this office by the most expeditious means as soon as the parties sign and date it. The effective date of the agreement will be the date the additional documentation is approved by this office or a later date specified by the parties.

This action is taken under authority delegated by DoD 1400.25-M, Civilian Personnel Manual, Subchapter 711, Labor Management Relations.

If there are any questions concerning this matter, Mr. Wilson Fisher can be reached on DSN 426-6301 or commercial (703) 696-6301, extension 420.

A copy of this memorandum was served on the union representative by certified mail on this date.

for Darryl Roberts
Deputy Director
Labor and Employee Relations Division

cc:

Jerry Goines
President, River Valley Chapter 131
Association of Civilian Technicians
P.O. Box 10366
Ft. Smith, AR 72917

National Guard Bureau
ATTN: NGB-HRL (Ms. Lynn Crouse)
1411 Jefferson Davis Highway, Suite 9100
Arlington, VA 22202-3231