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

OCT 31 2008

MEMORANDUM FOR THE ADJUTANT GENERAL, ARKANSAS NATIONAL GUARD, HRO (ATTN: LTC SCOTT R. BRINKER), P.O. BOX 17, CAMP ROBINSON, NORTH LITTLE ROCK, AR 72199-9600

SUBJECT: Agreement Between The Adjutant General, State of Arkansas National Guard and the Association of Civilian Technicians, Razorback Chapter 117 (LAIRS No. 080090)

The subject agreement, executed on October 3, 2008, has been reviewed pursuant to 5 U.S.C. § 7114(c). As agreed to by the parties in Article 32, Section 2 c, the agreement will go into effect minus the following non-negotiable provisions:

a. Article 8, Employer—Union Cooperation, Section 6. *"Employees will normally be allowed two (2) hours administrative leave for the purpose of donating blood."*

This provision requires management to grant an employee two hours of administrative leave after donating blood. This provision requires management to grant excused absences to employees donating blood without regard to management's need to have the employee perform work. Consequently, this provision is non-negotiable because it directly interferes with management's right to assign work under 5 U.S.C. § 7106(a)(2)(B). See, for example, NFFE, Local 1655 and U.S. Dept. of Defense, NGB, Alexandria, VA, 49 FLRA 874 (1994) (Provision 4). Suggested revision: change "will normally" to "may."

b. Article 12, Discipline and Adverse Actions, Section 1. *"The procedures described in TPR 752 and this article will be followed."*

This provision requires that management, in taking disciplinary and adverse actions, must follow the "procedures" provided in the cited TPR. Because these procedures are not specifically described, they could include the table of penalties also provided in this TPR. Where, as here, a provision directly incorporates the terms of a regulation into a contract, it has the effect of establishing an independent contractual requirement substantively limiting an agency's discretion to exercise the management right described in the regulation. Because this provision so limits management's ability to discipline, it directly interferes with

the right to discipline and is non-negotiable. See, for example, National Association of Government Employees, Local R1-144 and U.S. Navy, Naval Underwater Systems Center, Newport, Rhode Island, 38 FLRA 456 (1990), [remanded as to other matters (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, National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), aff'd sub nom. NTEU v FLRA, 691 F.2d 553 (D.C. Cir. 1982) (relating to the identification of performance elements and the determination of performance standards). Suggested revision: the parties could remedy this problem by inserting the following wording in the NOTE to the Preamble after the first two sentences relating to the assignment of duties to particular management officials or individuals:

> "It is also agreed with regard to any rules and/or regulations referenced or incorporated into the agreement (for example, any Arkansas National Guard Regulations or, for example, the Arkansas TPR 752, relating to discipline), management retains the right to act in accordance with 5 U.S.C. § 7106."

c. Article 12, Discipline and Adverse Actions, Section 1. *"Disciplinary actions against all employees must be based on just cause, be consistent with applicable laws and regulations, and be fair and equitable."*

This provision requires management to exercise its right to discipline in a "fair and equitable" manner. Therefore, this provision would require management to take disciplinary action on a "fair and equitable" basis. In finding that a provision directly interfered with the agency's right to discipline or assign work, the Authority has found terms such as "equitable" or "equitably" to have varying substantive and limiting effects on the particular management right they modify. Thus, the Authority has concluded that terms such as "equitable" or "equitably," when used in proposals or provisions that govern the exercise of a management right, constitute substantive restrictions on the exercise of that right and directly interfere with the right they purport to govern. See, for example, NTEU and U.S. Dept. of the Treasury, Customs Service, Washington, DC, 46 FLRA 696 (1992) (Provisions 25, 26, and 27). Suggested revision: the parties could remedy this problem by deleting "and be fair and equitable" from the provision.

d. Article 12, Discipline and Adverse Actions, Section 2. *"If the employee accepts representation, no further questioning will take place until the representative is present."*

This provision requires management to terminate an investigatory interview if an employee requests union representation. By requiring management to terminate an investigatory interview when an employee does not have their chosen representative present, this provision essentially provides an employee with a right to remain silent. Because this provision would also unduly delay an investigatory interview, by terminating the interview leaving management with no recourse, it, thereby, insulates an employee from disciplinary action and directly and excessively interferes with management's right to take disciplinary action under 5 U.S.C. § 7106(a)(2)(A). See, U.S. Immigration and Naturalization Service and AFGE, Local 1917, 46 FLRA 1210 (1993) (management need not unduly delay an investigation); see also, AFGE, Local 1812 and U.S. Information Agency, 16 FLRA 308 (1984) (Provision 1). Suggested revision: replace with "If the employee accepts representation, further questioning may take place once the representative is present within a reasonable amount of time.

e. Article 12, Discipline and Adverse Actions, Section 2. *"The parties agree that an employee engaged in an investigatory interview has the right to remain silent, and may refuse to give a written statement until a representative is present, or representation has been declined in accordance with this Section."*

This provision essentially establishes an absolute requirement that management accept an employee's determination that he or she will remain silent and will refuse to provide a written statement until a union representative is present. Thus, this provision requires management to terminate an investigatory interview if an employee requests union representation. By requiring management to terminate an investigatory interview when an employee decides they will remain silent and will not provide a written statement until their chosen representative arrives, this provision essentially provides an employee with a right to remain silent and to make his or her own determination as to whether an investigation will proceed. Because this provision would also unduly delay an investigatory interview, by terminating the interview, without leaving management with any recourse and, thereby, insulating an employee from disciplinary action, it directly and excessively interferes with management's right to take disciplinary action against employees and is non-negotiable under 5 U.S.C. § 7106(a)(2)(A). See, U.S. Immigration and Naturalization Service and AFGE, Local 1917, 46 FLRA 1210 (1993) (management need not unduly delay an investigation); see also, AFGE, Local 1812 and U.S. Information Agency, 16 FLRA 308 (1984) (Provision 1). Suggested revision: delete the phrase "has the right to remain silent" and insert in its place "may remain silent" and insert the phrase "within a reasonable amount of time" immediately after the phrase "until a representative is present."

f. Article 12, Discipline and Adverse Actions, Section 4 a and b. As to Disciplinary Actions (Oral Admonishments and Letters of Reprimand), this provision provides *"[t]he technician may have a labor organization representative if so desired. If the technician requests representation, the supervisor will not proceed until the labor organization representative is present."*

This provision requires management to terminate a disciplinary action (an Oral Admonishment or Letter of Reprimand) until the employee's chosen union representative is present. Thus, this provision requires management to terminate a disciplinary action, without recourse, if an employee requests union representation. Because this provision terminates disciplinary action, without leaving management with any recourse and, thereby, insulates an employee from disciplinary action, it directly and excessively interferes with management's right to take disciplinary action against employees and is non-negotiable under 5 U.S.C. § 7106(a)(2)(A). See, U.S. Immigration and Naturalization Service and AFGE, Local 1917, 46 FLRA 1210 (1993) (management need not unduly delay an investigation); see also, AFGE, Local 1812 and U.S. Information Agency, 16 FLRA 308 (1984) (Provision 1). Suggested revision: delete the second sentence from the provision.

g. Article 12, Discipline and Adverse Actions, Section 5 c. *"Adverse actions will not be initiated by any supervisor without consulting with and obtaining approval of the HRO before issuing proposed adverse action and original decisions."*

This provision provides that supervisors will not initiate adverse actions without consulting with and obtaining the approval of the HRO before issuing a proposed adverse action and original decision. This provision specifically requires approval by the HRO before management initiates an adverse action. Because this provision establishes an absolute prerequisite before management can take an adverse action, this provision directly interferes with management's right to discipline under 5 U.S.C. § 7106(a)(2)(A) and is non-negotiable. See, West Point Elementary School Teachers Association, NEA and The U.S. Military Academy Elementary School, West Point, New York, 29 FLRA 1531 (1987) (Proposal 4). Suggested revision: delete the provision.

h. Article 15, Hours of Work, Section 1 c. *"Changes in work schedules and work hours may be made on an individual basis when necessary to perform the assigned mission of the Employer and will be distributed equitably among eligible and qualified employees to the extent possible."*

This provision provides that changes in work schedules and hours will be distributed among the remaining "eligible" work force on an "equitable" basis. Because such work hours and schedules constitute the assignment of work, this provision would require management to assign such work on an equitable basis. In finding that a provision directly interfered with the agency's right to assign work, the Authority has found terms such as "equitable" or "equitably" to have varying substantive and limiting effects on the particular management right they modify. Thus, the Authority has concluded that terms such as "equitable" or "equitably," when used in proposals or provisions that govern the exercise of a management right, constitute substantive restrictions on the exercise of that right and directly interfere with the right they purport to govern. In addition, the provision provides that this work will be distributed among "eligible" employees without defining what this term is intended to mean or how it is to be applied. However, it would appear that, in the context of this provision, the term "eligible" employees is intended to prevent management from assigning work to employees with previously approved leave or who are otherwise in a non-duty status. Therefore, this provision is non-negotiable because it directly interferes and limits management's right to assign work under 5 U.S.C. § 7106(a)(2)(B). See, NTEU and U.S. Dept. of the Treasury, Customs Service, Washington, DC, 46 FLRA 696 (1992) (Provisions 25, 26, and 27).

i. Article 15, Hours of Work, Section 3. *"Employees will be given one fifteen (15) minute break period for each four (4) hour period of continuous work."*

This provision requires management to provide a duty free break of fifteen minutes to employees after every four hours of work. Because this provision establishes a substantive limitation on management's right to assign work it is non-negotiable under 5 U.S.C. § 7106(a)(2)(B). See, AFGE, Local 1760 and U.S. Dept. of Health and Human Services, SSA, Office of Hearings and Appeals, 46 FLRA 1285 (1993). Suggested revision: change "will" to "may."

j. Article 16, Compensatory Time, Section 1. *"Compensatory time work assignments will be distributed as equitably as possible among qualified employees."*

This provision provides that compensatory time work assignments will be distributed "as equitably as possible" among the work force. This provision would essentially require management to assign such work equitably. In finding that a provision directly interfered with the agency's right to assign work, the Authority has found terms such as "equitable" or "equitably" to have varying substantive and limiting effects on the particular management right they modify. Thus, the

Authority has concluded that terms such as "equitable" or "equitably," when used in proposals or provisions that govern the exercise of a management right, constitute substantive restrictions on the exercise of that right and directly interfere with the right they purport to govern. This provision is non-negotiable because it directly interferes with management's right to assign work under 5 U.S.C. § 7106(a)(2)(B). See, NTEU and U.S. Dept. of the Treasury, Customs Service, Washington, DC, 46 FLRA 696 (1992) (Provisions 25, 26, and 27).

k. Article 16, Compensatory Time, Section 2. *"When the requirement to work compensatory time no longer exists for an employee that has been notified, the Employer will provide the employee with a minimum of two (2) hours work, if desired by the employee."*

This provision requires management to provide an employee with two hours of work, if desired by the employee, when the work the employee was called back to perform has been completed. Because this provision requires the employee rather than management to determine if the employee's services are needed to accomplish the mission of the agency, this provision directly interferes with management's right to assign work under 5 U.S.C. § 7106(a)(2)(B). See, AFGE, Local 53 and U.S. Dept. of the Navy, Navy Material Transportation Office, Norfolk, VA, 42 FLRA 938 (1991).

l. Article 16, Compensatory Time, Section 3. *"Employees who perform compensatory time work as an extension of the normal workday will be allowed a fifteen (15) minute rest period in keeping with that described in Article 15."*

This provision requires management to provide a duty free break of fifteen minutes to employees if management extends their normal workday. Because this provision establishes a substantive limitation on management's right to assign work it is non-negotiable under 5 U.S.C. § 7106(a)(2)(B). See, AFGE, Local 1760 and U.S. Dept. of Health and Human Services, SSA, Office of Hearings and Appeals, 46 FLRA 1285 (1993). Suggested revision: change "will" to "may."

m. Article 17, Holidays, Section 4. *"The Employer will equitably distribute holiday work among eligible and qualified employees."*

This provision provides that holiday work assignments will be distributed among "eligible" employees in the work force on an equitable basis. In finding that a provision directly interfered with the agency's right to assign work, the Authority has found terms such as "equitable" or "equitably" to have varying substantive and

limiting effects on the particular management right they modify. Thus, the Authority has concluded that terms such as "equitable" or "equitably," when used in proposals or provisions that govern the exercise of a management right, constitute substantive restrictions on the exercise of that right and directly interfere with the right they purport to govern. In addition, the provision provides that this work will be distributed among "eligible" employees without defining what this term is intended to mean or how it is to be applied. However, it would appear that, in the context of this provision, the term "eligible" employees is intended to prevent management from assigning work to employees with previously approved leave or who are otherwise in a non-duty status. Consequently, this provision is non-negotiable because it directly interferes with management's right to assign work under 5 U.S.C. § 7106(a)(2)(B). See, NTEU and U.S. Dept. of the Treasury, Customs Service, Washington, DC, 46 FLRA 696 (1992).

n. Article 18, Leave, Section 4. *"Sick leave shall be used in accordance with applicable laws and regulations, including but not limited to Federal Employees Family Friendly Leave Act and the Family Medical Leave Act."*

This provision provides for the use of sick leave for the purposes and amounts established under the provisions of the "Family Friendly Leave Act" (FFLA). This provision makes reference to the Family Friendly Leave Act and states that the parties will follow the applicable provisions of this law. However, the FFLA has been codified in 5 C.F.R. § 630.401 and the entitlements to employees have been modified from the original FFLA. Therefore, this provision is contrary to a Government-wide regulation. Under 5 U.S.C. § 7117(a)(1), a negotiated provision cannot be inconsistent with a Government-wide regulation. See, for example, Service and Hospital Employees International Union and Veterans Administration Medical Center, Milwaukee WI, 35 FLRA 521 (1990) (Provision 4). Suggested revision: eliminate the reference to the Family Friendly Leave Act.

o. Article 18, Leave, Section 4. *"No employee shall be required to present a doctor's certificate (certificate defined in Article 1) for any sick leave unless that employee has been placed on leave restriction or the absence is in excess of three days if required by management."*

This provision establishes only two instances in which management can request medical documentation from an employee (employee has been placed on leave restriction or an absence exceeds three days). Therefore, this provision precludes management from seeking medical documentation under circumstances that are not described in this provision. Management has the discretion, under 5 C.F.R. § 630.403(a), to require medical documentation when necessary; specifically, "for an absence for any of the purposes described in § 630.401(a) for an absence in

excess of 3 workdays, or for a lesser period when the agency determines it is necessary." This provision, therefore, is contrary to a Government-wide regulation because it fails to provide for the range of action provided to management under this Government-wide regulation. Under 5 U.S.C. § 7117(a)(1), a negotiated provision cannot be inconsistent with a Government-wide regulation. See, Service and Hospital Employees International Union and Veterans Administration Medical Center, Milwaukee WI, 35 FLRA 521 (1990) (Provision 2). See also, AFGE, Local 1156 and U.S. Department of the Navy, Navy Ships Parts Control Center, Mechanicsburg, PA, 42 FLRA 1157 (1991). Suggested revision: insert an additional provision in this section to read "for a lesser period as determined by management and as provided for under the applicable provisions of 5 C.F.R. § 630.403(a)."

p. Article 19, TDY and Travel, Section 2 a. *"TDY will be assigned on a fair and equitable basis."*

This provision requires management to exercise its right to assign work in the form of TDY "on a fair and equitable basis." Therefore, this provision would require management to assign work on a "fair and equitable" basis. In finding that a provision directly interfered with the agency's right to assign work, the Authority has found terms such as "equitable" or "equitably" to have varying substantive and limiting effects on the particular management right they modify. Thus, the Authority has concluded that terms such as "equitable" or "equitably," when used in proposals or provisions that govern the exercise of a management right, constitute substantive restrictions on the exercise of that right and directly interfere with the right they purport to govern. See, NTEU and U.S. Dept. of the Treasury, Customs Service, Washington, DC, 46 FLRA 696 (1992) (Provisions 25, 26, and 27). Suggested revision: delete this provision.

q. Article 19, TDY and Travel, Section 5. *"Work schedules will be the same as those of the technician when not in a TDY status."*

This provision requires management to schedule a technician's work day in the exact accordance with the technician's regular, non-TDY workday, while the technician is in TDY status. Because this provision would not permit management to assign work to a technician on TDY outside of his or her regular workday, this provision directly interferes with management's right to assign work since it essentially precludes management from assigning any other duties from the job the employee was called in to perform during TDY. See, American Federation of Government Employees, AFL CIO, Council 214 and U.S. Marine Corp, Marine Corps Logistics Base, Non-appropriated Fund, Instrumentality, Albany, Georgia, 29 FLRA 1587 (1987) (Provision 3). Suggested revision: delete this provision.

r. Article 20, Position Description, Section 3. *"It is acknowledged that there are vacancies that exist from time to time that are not or cannot be filled due to management decisions; these duties may be equitably distributed among the remaining work force within the area of concern on a fair and equitable basis."*

This provision requires management to exercise its right to assign work by assigning those duties normally performed by employees assigned to vacant positions to the remaining bargaining unit employees "on a fair and equitable basis." In finding that a provision directly interfered with the agency's right to assign work, the Authority has found terms such as "equitable" or "equitably" to have varying substantive and limiting effects on the particular management right they modify. Thus, the Authority has concluded that terms such as "equitable" or "equitably," when used in proposals or provisions that govern the exercise of a management right, constitute substantive restrictions on the exercise of that right and directly interfere with the right they purport to govern. See, NTEU and U.S. Dept. of the Treasury, Customs Service, Washington, DC, 46 FLRA 696 (1992) (Provisions 25, 26, and 27).

s. Article 23, Merit Placement, Section 13. *"a. The rating panel will consist of not less than three (3) members. If possible, the members will be subject matter specialists in the major section of the position being evaluated. One member will be an individual outside the affected major section. An HRO representative will serve as a non-voting advisor to the rating panel. Rating panel members will be appointed by letter. The union will be provided a copy of the rating letter.*

b. To avoid the appearance of a conflict in interest, the nominating official should not serve as a member of a panel convened for the purpose of rating or ranking candidates for vacancies within his area. Candidates for the vacancy cannot serve on the rating panel."

This provision requires management to exclude various management officials from participating in the selection process and prescribes an absolute number of management officials to serve as panel members. By stating that a particular management official can not be a member of a rating panel or participate in the panel's deliberations concerning the selection process and limiting the number of officials who can serve on the panel, this provision establishes a prohibition on whom management can choose to participate in the selection process and to whom it can assign the work of selecting a candidate for a position. Consequently, this provision directly and excessively interferes with management's rights to assign work and to select and is contrary to 5 U.S.C. § 7106(a)(2)(B) and (C) respectively. See, for example, AFGE, Local 1815 and U.S. Dept. of the Army, U.S. Army Aviation Center, Fort Rucker, 53 FLRA 606 (1997) (Provision 5).

t. Article 25, Performance Appraisals, Section 3. *"If the Technician's performance in any critical element continues to be unacceptable despite efforts by the Supervisor or Manager to improve performance, the Technician and his/her representative will be advised that the Technician must be reassigned, reduced in grade (demoted), or removed from employment."*

This provision requires management to take the actions enumerated if a technician continues his or her unacceptable performance. However, this provision fails to allow management any discretion in this matter. Because this provision eliminates management's discretion in fully assessing an employee's performance and determining the proper course of actions, this provision directly interferes with management's right to direct employees, discipline employees, and assign work under 5 U.S.C. § 7106(a)(2)(A) and (B). See, for example, AFGE, Local 3529 and U.S. Dept. of Defense, Defense Contract Audit Agency, Central Region, Irving, TX, 57 FLRA 172 (2001) (Proposal 8); see also, AFGE, National Council of Locals and VA, 29 FLRA 515 (1987) (Proposal 8, Section 4 C).

The provisions of the subject agreement identified below are approved with the following mandatory understandings:

a. Article 16, Compensatory Time, Section 6. *"Employees called in to work outside and unconnected with their basic workweek, shall be furnished with a minimum of two (2) hours work. In addition, any employee called in to work under the provisions of this section may be promptly released upon completion of the work that he/she was called upon to perform."*

To the extent that the parties intend to implement this provision in a manner that is consistent with the applicable provisions of 5 C.F.R. § 550.112(h)(in terms of compensatory time) and that preserves management's right to assign work under 5 U.S.C. § 7106(a)(2)(B) when there is work that needs to be accomplished, this provision is approved.

b. Article 18, Leave, Section 2. *"Previously approved leave will not be canceled by the Employer except for reasons of such magnitude that the employee absence would impair the mission of the Arkansas Air National Guard at Little Rock AFB."*

This provision describes how management should treat previously approved leave and provides that such leave should be cancelled only for valid work related reasons. This wording is acceptable provided it is understood that the parties intend, in implementing this provision, to preserve management's right to assign work under 5 U.S.C. § 7106(a)(2)(B) and that management solely determines

whether there is work to be performed and whether there is a mission related or workload need that justifies the cancellation of an employee's previously approved leave.

c. Article 19, TDY and Travel, Section 7 b. *"When practical, travel will normally be arranged within the employee's scheduled hours of work."*

This provision provides that TDY travel should be scheduled "when practical" during an employee's regular hours of work. This provision is approved with the understanding that it is the intent of the parties, in implementing this language, to preserve management's right to assign work under 5 U.S.C. § 7106(a)(2)(B) in determining whether the scheduling of such travel is during or outside of the employee's regular workday is necessary to accomplish the mission.

d. Article 23, Merit Placement, Section 8 a, b, c. *"The areas of consideration for each specific position vacancy announcement will be in the following manner and sequence: [the provision then outlines and defines various areas of consideration]."*

The wording of this provision is approved with the understanding that it is informative and it is the intent of the parties, in implementing this language, to preserve management's right to select under 5 U.S.C. § 7106(a)(2)(C) and to determine whether it needs to go outside the enumerated areas of consideration to secure a qualified candidate from any appropriate source.

e. Article 23, Merit Placement, Section 14. *"The crediting plan is established in the Arkansas National Guard Merit Placement Plan and provides a system for rating and ranking applicants. [the provision then describes various facets of the plan including elements of the evaluation panels and a description of various KSAs related to specific levels of experience, and finally, in subsection b, a description of levels of training and education to be considered in evaluating candidates for positions]."*

To the extent that the parties intend to implement this informative provision in a manner that preserves management's right to select from any appropriate source under 5 U.S.C. § 7106(a)(2)(C) and to adjust the basic structure of the merit placement plan along with the structural elements associated with evaluation panels, including the ability to adjust the number of KSAs and the description of the training and education used to evaluate candidates, this provision is approved.

f. Article 25, Performance Appraisals, Section 1. *"All Technicians will be rated with the HRO Form 430 using the three tiered system of unacceptable, fully acceptable, and exceeds fully acceptable."*

To the extent that the parties intend that this provision will be informative and not prescriptive and to implement this provision in a manner that preserves management's rights to direct employees and assign work under 5 U.S.C. § 7106(a)(2)(A) and (B) by changing the number of performance levels used to evaluate employee performance during the term of the subject agreement (i.e., management can readily change the three performance tiers), this provision is approved.

The approval of this three year agreement, minus the disapproved provisions, does not constitute a waiver of or exception to any existing law, rule regulation or published policy.

This action is taken under authority delegated by DoD 1400.25-M, Civilian Personnel Manual, Subchapter 711, Labor-Management Relations. Please annotate the agreement to indicate: Approved, minus the disapproved provisions, by the Department of Defense on OCT 3 1 2008.

Copies of the approved agreement, excluding those provisions disapproved, should be forwarded as follows:

a. One copy mailed to the Defense Civilian Personnel Management Service (DCPMS), Field Advisory Services, Labor and Employee Relations Division, 1400 Key Boulevard, Suite B-200, Arlington, Virginia 22209-5144- and one copy emailed to labor.relations@cpms.osd.mil. Also, please provide one copy of a completed OPM Form 913-B (attached) either by mail or email.

b. One copy mailed to the National Guard Bureau, ATTN: NGB-HRL, 1411 Jefferson Davis Highway, Suite 9100, Arlington, VA 22202-3231.

A copy of this memorandum was served on the union by certified mail on OCT 3 1 2008.

If there are any questions concerning the agreement, Mr. Lee Alner can be reached on DSN 426-6301 or commercial (703) 696-6301, extension 407.

Darryl Roberts
Deputy Director
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cc:

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5 CFR 2424 is days to respond