

American Federation of Government Employees, AFL-
CIO

AFGE FIREFIGHTERS COUNCIL

Serving Federal Firefighters through Knowledge and Strength



**TERMS, TEMP, INTERMITTANTS, VOLUNTEERS,
MILITARY, CROSS-STAFFING**

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March 14, 2011

Maritime Institute
Linthicum, Maryland

TERMS, TEMP, INTERMITTANTS, VOLUNTEERS, MILITARY, CROSS-STAFFING

In this session we are going to talk about types of appointments or assignments you can make to obtain needed staffing.

Yes – you can obtain staffing by obtaining employees under term, temporary or by using part-time employees on intermittent schedules. You can use volunteers. You can cross-staff apparatus and you can use military personnel.

But – ONLY UNDER EXTREMELY LIMITED AND SPECIAL CIRCUMSTANCES and it is important to know what those circumstances are because, quite frankly, they will not help you very much.

Not only are there pertinent statutory and regulatory provisions, but under certain circumstances you could be assuming risks you don't want to assume. In any event, if you wrongfully staff by use the wrong type of employee under the wrong type of appointment, you will be challenged for the wrong you have committed. RULE NO. 1 – THOU SHALL NOT DISOBEY

Let's talk about Terms, Temps, Part-timers on Intermittent schedules and Volunteers first because there are regulatory provisions governing those types of appointments.

TERM APPOINTMENTS:

The Regulatory Provisions pertaining to term appointments are found at 5 CFR §316.301

The time limits for use of term appointees is basically one-year but you can reappoint the employee year by year for a total appointment period of up to 4 years.

The specific purposes for which you can obtain staff under a term appointment are --

(a) the job is not permanent--

(b) the work to be performed is a single project

(c) there is an extraordinary workload

(d) there is a scheduled abolishment of the job, function, installation, etc.

(e) the function will be contracted out

(f) there is uncertainty of future funding

(g) there is a need to keep permanent positions for employees displaced by on-going reorganization.

HOW DO TERM APPOINTMENTS FIT FOR FIRE DEPARTMENT STAFFING

(a) Fire and emergency services involve a permanent job – it will not end -- the service will continue to be provided so term appointments are not appropriate.

(b) F&ES jobs are not a single project – they are of permanent duration – to have the capability to respond – to carry out the F&ES mission for that installation or location for all time. Again, F&ES positions Don't fit under the category of a single project.

(c) F&ES jobs are not the type that are subject to an extraordinary workload for any period of time. Yes, you can get more calls one month than the next but that is just the normal course of things—not, e.g. contrasted with DoD's having to sort out the retirement mess. No term appointees for this reason.

(d) F&ES jobs are not normally scheduled for abolishment, nor is the function but – installations sometimes close – BRAC has happened within DoD and in the VA, they haven't really closed many campuses but they have changed the function dramatically and simply walked from providing F&ES.

Definitely under BRAC and like situations, this could be a reason to obtain staffing under term appointments.

(e) Firefighting functions are prohibited by law from being contracted out 10 USC 2465 - not prohibited under VA but even here, it is interesting, they have not contracted much, they have simply walked away from providing the function. But at any rate, at least for DoD, this doesn't provide authority to hire under term appointments.

(f) uncertainty of funding – well although that sounds good it means a function which is separately funded – e.g. the end of a specific program and that is not firefighting

(g) with respect to the last valid reason for hiring employees under a term appointment -- need to keep permanent positions for employees displaced by on-going reorganization.—this occurs when the facility/installation is undergoing a major reorganization and there will be a number of employees displaced (RIF'ed) who will need to fill available positions. But, in the case of F&ES positions, it is highly unlikely that those displaced employees would have the basic qualifications for an F&ES position – so it is unlikely that you would need to keep F&ES positions open. And hence, it is unlikely that this would ever be a valid reason for hiring term employees. Also, the language of this part is specific in that it takes about “employees who are displaced due to a major reorganization –

so this provision could not be used when you need to keep a position vacant for someone on military leave or an employee who otherwise has return rights.

In sum, there is very little reason to ever hire a firefighter under a term appointment—the most likely time that this would be appropriate is at an installation that is scheduled to close so that the permanent firefighters begin to seek other permanent jobs. As they leave, you may have insufficient remaining firefighters to meet minimum staffing requirements. In that case, you could hire employees under term appointments.

TEMPORARY EMPLOYEES

The authority for employees hired under this type of appointment is found at 5 CFR 316.401. This is even more limiting than term appointments. But, essentially, the permissible reasons for hiring under a temp appointment is much the same as a term appointment in that --

(1) the position is not expected to last more than a year

(2) and there is a need to be met caused by abolishment, reorganization or contracting out of the function, anticipated RIF or completion of specified project

So, unless an installation or facility were within one year of anticipated closure, it would be inappropriate to hire a temp employee.

INTERMITTENT

– actually this is not a type of appointment but rather a schedule worked by either a part-time or full-time employee –

The authority for intermittent scheduling is found at 5 CFR §340.403 and even less likely to be of any use in the fire service. It provides:

“340.403 - Intermittent employment. Its use is “when the nature of the work is sporadic and unpredictable so that a tour of duty cannot be regularly scheduled in advance.”

It is often used in areas where you get a lot of snow – hire part-time, on-call employees and put them on intermittent schedules for snow removal – since you can’t predict when it will snow, and then you cannot predict a tour of duty. I cannot conceive of a situation where intermittent’s would be used in a fire department.

VOLUNTEERS --

How about volunteers –

In general, the federal government is strictly prohibited from using volunteers. This stems from the long-held belief that if you perform services, then you should be compensated.

This appears somewhat at odds with this Administration’s “A Call to Service” – The President is asking all Americans and especially federal employees “to come together to help lay a new foundation for growth. The initiatives aims to both expand the impact of existing organizations by engaging new volunteers in their work while encouraging volunteers to develop their own “do-it-yourself projects.”

And, September 11 has been designated as a National Day of Service and Remembrance. Federal employees are asked to volunteer with non-profit organizations, faith-based groups, government agencies (interesting—don’t see how they can do this), businesses and individuals to reignite the spirit of unity and service that inspired Americans in the days after the September 11, 2001 tragedy.”

Well here is what OPM has to say about this – it has issued Guidance on Work and Granting Time off to Permit federal employees to Participate in Volunteer Activities. In essence here’s what it says – use AWS, credit hours, annual leave, comp time, Admin Leave, Leave without pay, job sharing, etc.

In reality, once again federal employees are being asked to volunteer but at their own expense – why do other companies give time off to employees to

volunteer but not the federal government? And in any event, this does not help you with your staffing issues.

The general limitation on using volunteers in the federal service is found in the Anti-Deficiency Act – 31 USC §1342. How many of you know what that statute is:

It's the one that says – you cannot expend funds that have not been appropriated and/or you can only spend appropriated funds for the purpose for which they were appropriated.

With respect to the use of Volunteers – the language of 31 USC §1342 is particularly illustrative because it does provide certain circumstances for which you could use volunteers. It provides:

You “...may not accept voluntary services...except for emergencies involving the safety of human life or the protection of property”

Now I know someone is going to think that they will solve their staffing problems by simply having a cadre of volunteers. Well that won't work. You can only use those volunteers in an extreme emergency – you could not have them report and then wait for calls. So forget about volunteers.

There are a few exceptions to the prohibition against using volunteers and in each and every case; the exception is predicated upon statutory provisions. For

example, you can use student volunteers, volunteers can be used as personal assistants for handicapped employees including the blind and deaf, and volunteers can be used under the Take Pride in America Act to perform certain conservation acts and even in title 10 there is a provision to use volunteers to carry out activities of the Corps of Engineers. But in each case, there is a specific statutory exception permitting the use of volunteers.

And in each case, the statutory language is key. That language not only provides the purpose for the use of the volunteers but it always specifically provides that the volunteers are to be considered federal employees for purposes of the Federal Tort Claims Act and for purposes of the Federal Workers' Compensation provisions.

This accompanying language is necessary to protect both the volunteer and the government from liability. And, it is one of the reasons why AFGE counseled firefighters to consider carefully if they voluntarily went to NY after 9/11 to help. They would not be covered if they were injured even if their department permitted them to take leave for this purpose.

The situation was slightly improved in the Katrina aftermath – there, OPM issued guidance to agencies on what to do if they had employees they could send to New Orleans and if those employees wanted to volunteer for that mission. It

suggested, in a nutshell, that the employees be placed on TDY—that way they would be paid and would be covered by the Federal Workers Compensation Program and the Federal Tort Claims Act would apply.

Well enough said about volunteers. Suffice to say, this is not a way in which you can solve your staffing problems.

FILLING SHORTAGES WITH MILITARY PERSONNEL

Many of you are at installations that staff their fire departments with both civilian and with military personnel. And, there are those instances where staffing shortages occur on the civilian side. In that case, some think that this problem can be solved by using military personnel – after all, if you are in the military you are in essence “on duty” 24/7 so you can be directed to perform duty at any time. However, that is not the case.

But, this issue is more difficult to understand. There are no statutory provisions similar to those pertaining to the use of term, temps and intermittants. There is nothing that says THOU SHALL NOT PUT A MEMBER OF THE ARMED SERVICES IN A POSITION NORMALLY ENCUMBERED BY A CIVILIAN. Rather, you have to dig a little harder to understand why the use of military personnel is problematic.

DoD has somewhat addressed this issue by issuing various Directives that touch on the subject. For instance, paragraph 3.2.3 of DODD 1100.4 (2/12/2005) states that “Manpower shall be designated as civilian except when military incumbency is required for reasons of law, command and control of crisis situations, combat readiness, or esprit de corps; when unusual working conditions are not conducive to civilian employment, or when military unique knowledge and skills are required for the successful performance of the duties.” And, DODD 1100.9, (9/8/1971), the precursor to DODD 1100.4 and which is now superseded, set the tone by providing that positions that might be designated as military or civilian will be designated as appropriate to one or the other, **but not both**. Reasonable opportunities for career development will be an important factor in these instances.

Suffice to say, in general, DoD’s policy is that positions should be filled by civilians except when military incumbency is considered part of combat readiness or when military knowledge is necessary for the performance of the job – Firefighting certainly does not require military incumbents nor does firefighting require a military background. In fact, firefighting has been considered by DoD to be an “inherently governmental function”; and in 2010, it identified the GS-081 series as a “Mission Critical Occupation”. The provision of F&ES is absolutely

necessary to protect and preserve the property and persons involved in the war-fighting mission.

So, while there are no specific statutory provisions which states that military personnel cannot fill civilian positions, it appears clear that positions must be designated as either military or civilian. Once designated, it would also appear inappropriate to simply fill a civilian position with a member of the Armed Services or to fill a position designated as a military position with a civilian employee. The only way this could be accomplished would be to delete the position through a valid reorganization, from the list of authorized positions and then reestablish it as a military position for valid reasons.

There have been few cases involving the issue of converting civilian positions to military positions. In two arbitration cases where a local challenged the use of military in positions, the decision was unfavorable. However, the facts in each of those cases are different from the typical situation where a fire department is understaffed and military are detailed in or vacant positions are more or less permanently filled with the assignment of military personnel.

In one case at Fort Drum, New York, there was a RIF at the Central Issue Facility (CIF) for a valid reason--budget cuts--and so some civilian positions were eliminated. Military personnel were not assigned to perform the work of the

eliminated positions. Rather, special duty authority was granted which permitted the assignment of military personnel already stationed at the installation to perform some of the duties which had been performed by the RIF'ed civilians. Special duty, however, is purely a temporary assignment. The military personnel who were assigned under the "Special Duty" assignment were subject to immediate recall back to their units. If military firefighters are assigned under "Special Duty" authority, then the termination of their assignment can easily be ascertained. If the end date is not known, then perhaps a challenge would be appropriate. Further, because military personnel on "Special Duty" are subject to immediate recall, it is arguable that they cannot be detailed to a position which requires the ability to respond instantaneously.

In the other case, NAGE Local R5-188 v. Seymour Johnson ARB, 48 FLRA 110, (1993), certain switchboard operators were RIF'ed. Shortly after the RIF, the switchboard operations of the base were consolidated at a single worksite. Some military personnel were used to perform duties at the consolidated site. However, the military personnel performed these duties both before and after the RIF and, the number of military personnel performing the communications functions was not changed, nor was the total number of military personnel

assigned to Seymour Johnson. Thus, the union failed to show that military personnel had replaced civilians or been used to fill civilian positions.

Because management does have the right to assign work, a challenge to back-filling with military personnel is difficult to win. However, when the practice becomes persistent particularly where no civilian vacancies are filled except with military personnel on permanent assignment, the remaining civilian firefighters could challenge this. They would have to show that it was an illegal conversion resulting in a loss of opportunity for career advancement in violation of both DODD Directives and Military Department Regulations. A collateral challenge would be that by filling civilian firefighter positions with military personnel, the Agency is intentionally diminishing the size of the bargaining unit in contravention of the intent of the labor-relations provisions of Title 5.

One other point should be made here and that is what happens when you find on one particular shift that you are short staffing and so you will have to resort to overtime. Here, you might be able to use military personnel but if this is the case, you need to remember that the applicable collective bargaining agreement may well address how overtime will be handled and if you use military personnel to solve your shortage problem, you might be violating the CBA. Further, if a civilian firefighter has been tapped for mandatory overtime and

reports and then you tell him to go home because the shortage will be handled by an enlisted man, then you may be liable for a minimum amount of overtime, (2 hours) – because the employee reported.

CROSS-STAFFING

Never before have I stood before a group of fire and emergency services professionals to discuss cross-staffing and I hope this first attempt does not result in a “Shoot her now scenario”

Let me start by asking a couple of questions?

How many of you have seen the statutory authority for cross-staffing?

How many of you can provide a clear, cogent definition of cross-staffing?

How many of you think that all of us in this room could come to an agreement that we could put into writing as to what is cross-staffing, how it can be achieved, and under what circumstances it can be used?

You have just showed what the problem is with cross-staffing.

Believe it or not, I did quite a bit of research before deciding I might have enough nerve to stand up here and talk about cross-staffing. But, even after all my research; I cannot unequivocally answer the three questions I just asked you.

The issue of cross-staffing and the questions it raises has been around for a long time and in the federal sector, it has been debated over and over. Perhaps that is why there isn't even a definition of it. For example, years ago, AR 420-90 simply included the statement "Cross-staffing is permitted". It didn't define cross-staffing; it didn't state when it could be used and it didn't state under what circumstances it could be achieved.

So what can I tell you about cross-staffing? My research of this led to a lot of conclusions. First let me point out that most of the literature on cross-staffing was done for non-federal fire departments that commissioned studies on the feasibility, cost-savings, practicality, and so forth of cross-staffing their departments. And having reviewed all of these studies, I came to the conclusion that cross-staffing is certainly not the preferred way of doing business but it may be necessitated in times of financial shortfalls. However, in virtually all of the studies, it was suggested that alternatives to cross-staffing – such as automatic aid, volunteers (an option not available in the federal sector) and on-call contractor provided ambulance transport, etc. should be considered first or at least considered to have in conjunction with the utilization of cross-staffing. So, it is fair to say, that the studies and literature out there indicate that cross-staffing

is not an ideal way to run a department. But, it is one that may be necessary when there is inadequate funding to fully staff every piece of apparatus.

As an attorney, I am of the opinion that the federal sector has a decided advantage over the non-federal sector with respect to deciding whether to use cross-staffing. Does anyone here know why?

Well, the National Technology Transfer and Advancement Act mandates the use of National Consensus Standards and for you, that means NFPA and certainly DODI reflects this. In the non-federal sector, the studies I researched all touched on what impact cross-staffing has with the department's compliance with NFPA 1710. But, those departments are not legally required to comply with 1710. In the federal sector you are. And you must comply with 1500 and other relevant NFPA standards as well.

So, what does this mean to each of you? First of all, if you fail to comply with the dictates of 1500 and 1710 and there is a serious loss of life or even property, you could be found to have been negligent and hence, liable for damages (and I won't represent you).

Now, let's look at what we have and see if some cogent points can be made that would provide you with some guidance on the issue of cross-staffing.

1. What is the minimum staffing based on? Here too, there is some debate. Some say it is predicated on the number of on-duty staff needed to respond to a single incident. Others state that is the number needed to respond to a single fire incident. I tend to support the second premise for the reason that 1710 states that there must be four firefighters on duty at all times. If you use the incident definition, why then didn't 1710 use the figure 2 – to staff an ambulance or 15-for a CBRNS team response. No, it used four and that translates into a fire response. If you accept this, then we can move onto the second point.

2. What is the basis for determining the location of your stations? It is, of course, response time. If this is the case, then if you cross-staff from one station to another, wouldn't you also risk being unable to respond within the permissible time limits? For example, if you had a truck and an ambulance at one station and a truck at another station, with 4 firefighters at each station, what happens if the ambulance is out with 2 firefighters and you get a call –you don't have the 4 needed to respond and then the question becomes, could two firefighters from the other station respond within the permissible time? It's risky. This then leads to the conclusion that if you are going to cross-staff, then it must be done where apparatus is co-located.

3. What do you need in order to cross-staff at each station? Again, if what you must maintain at all times is the ability to respond within the permissible time frame, to a single fire incident, then you would need at least a truck and two other pieces of apparatus.

4. What exceptions to this might there be. An obvious exception would be when you have available automatic aid – not mutual aid – or will come if we can – but we will come in response to a call.

Now before you shoot me, let me say that these are my conclusions based on existing statutory requirements and available literature. I am well aware that there is not full agreement on my conclusions but, as an attorney, I suggest you think very carefully before you make a decision that could result in your being liable for damages in a negligence suit.

So, here is the summation of my presentation on what you can do if you have staffing shortfalls –

1. Term employees – probably can't use unless you are under BRAC or face another similar situation.

2. Term employees – probably can't use unless again you are slated for closure or parts of your installation is slated for closure within a year.

3. Intermittent scheduling – won't work in the fire department

4. Volunteers – forget it unless there is a major disaster of some sort

5. Military personnel – maybe for short periods of needs not foreseeable

but not to in general, fill positions

6. Cross-staffing – but perhaps only when the total apparatus is more than 3 and it is co-located.

Not much help is it – so

Stay tuned until Thursday for the Session on Legislation – what each of us must do is tell our story to our Congressional Reps – staffing is mandated, you can't do this job without the staff, F&ES is an inherently governmental function, it is a mission critical occupation and there must be earmarked funding to provide the legally mandated minimum staff.