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Legal Sidebar

Supreme Court Holds That Federal Labor Relations Authority Has Jurisdiction to Regulate State National Guards

July 11, 2023

On May 18, 2023, the Supreme Court decided *Ohio Adjutant General's Department v. Federal Labor Relations Authority*, a case on the Federal Labor Relations Authority's (FLRA's) power to regulate the labor practices of state National Guards. The dispute arose from charges filed with the FLRA against the Ohio Adjutant General's Department and the Ohio National Guard (collectively, the Guard) alleging that the Guard violated the collective bargaining rights of its technicians who have "dual status" as both federal and state employees. The Guard argued that the Federal Service Labor-Management Relations Statute (FSLMRS), which governs labor relations between the federal government and its employees, could not be enforced by the FLRA against the Guard because the Guard is not an executive "agency" subject to the FLRA's regulation. The Supreme Court disagreed, holding that the Guard is under the jurisdiction of the FLRA when it hires and supervises dual-status technicians serving in their civilian role, as the Guard "act[s] as a federal 'agency'" in that context.

This Legal Sidebar discusses the background on the underlying dispute between the Guard and the union representing the technicians, the American Federation of Government Employees, Local 3970 (AFL-CIO). The Sidebar also provides a synopsis of the Guard's challenge to FLRA's authority and a summary of the Court's decision. It concludes with a discussion highlighting considerations for Congress. For general information on the FSLMRS, see *Federal Labor Relations Statutes: An Overview*.

Background

Article I, Section 8, clause 15, of the U.S. Constitution provides that "The Congress shall have Power To ... provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Article I, Section 8, clause 16, provides that "The Congress shall have Power To ... provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." These clauses, known as the Militia Clauses, grant Congress authority over "the Militia," while reserving other authority to the states. Organized militias have existed in some form since before the Founding.

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LSB11005

Congress constituted the state militias as the National Guard with the passage of the National Defense Act of 1916, which brought the militia, which had been an almost purely state institution, under significant regulatory control by the national government.

In contrast to its purely military personnel, the Guard also employs full-time civilian workers, known as "National Guard technicians," who "meet the day-to-day administrative, training, and logistic needs of the Guard." While technicians are employees of the Guard, they are also dual-status federal employees whose employment status is a "hybrid, both of federal and state, and of civilian and military strains." Congress requires the Department of Defense (DOD) to "designate" adjutants general of National Guards "to employ and administer" the technicians in 32 U.S.C. § 709(d). This designation, enacted under the National Guard Technicians Act of 1968, allows the Guard to employ technicians as federal employees.

The FSLMRS, codified at 5 U.S.C. §§ 7101–7135, provides generally for collective bargaining between federal agencies and labor unions and authorizes the FLRA to administer the law. Under 5 U.S.C. § 7105(g)(3), the FLRA "may require an agency or a labor organization to cease and desist from violations" of the statute and "require it to take any remedial action it considers appropriate." Among the violations the FSLMRS prohibits are unfair labor practices (ULPs) such as "interfer[ing] with, restrain[ing], or coerc[ing] any employee in the exercise by the employee of any right under" the Act; refusing to "negotiate in good faith" with a union; or "otherwise fail[ing] or refus[ing] to comply with any provision." The term *agency* is defined in 5 U.S.C. § 7103(a)(3) to mean "an Executive agency" as well as other federal government entities. The statute exempts several agencies from coverage under the Act.

In Ohio, the Guard and the AFL-CIO had a 45-year collective bargaining relationship covering the technicians. As the most recently signed collective bargaining agreement (CBA) was set to expire, the Guard and the AFL-CIO began negotiations for a new agreement. However, in September 2016, the Guard issued a memorandum claiming that it was not bound by the signed CBA and that it questioned the FSLMRS's application to the technicians.

In response to the memorandum and other actions taken by the Guard, the AFL-CIO filed several statutory ULP charges with the FLRA's General Counsel, who is charged with determining whether a complaint should be issued. After an investigation, the FLRA's General Counsel issued two complaints against the Guard, alleging in part that the Guard refused to negotiate in good faith when it told employees it was no longer bound by the FSLMRS and that the Guard interfered with, restrained, and coerced employees in the exercise of their collective bargaining rights under the statute. An administrative law judge (ALJ) conducted a hearing and issued a decision finding that (1) the Guard is an "agency" within the meaning of the FSLMRS, (2) the FLRA had jurisdiction over the Guard, (3) technicians had collective bargaining rights under the statute, and (4) the Guard's actions in repudiating the CBA clearly violated the statute. On June 30, 2020, a three-member FLRA panel issued a divided decision adopting the ALJ's findings, conclusions, and recommended order. The order included several forms of relief, such as requiring the Guard to reimburse the union for lost dues and to disseminate a notice to its employees that the Guard violated the law.

Ohio Adjutant General's Department v. FLRA

The Guard subsequently petitioned the U.S. Court of Appeals for the Sixth Circuit to review the FLRA decision and order. Before the Sixth Circuit, the Guard argued that the FSLMRS does not give the FLRA jurisdiction over the technicians or the Guard and that it is unconstitutional for the FLRA to issue orders to the Guard because Congress's authority in the Militia Clauses extends only to the part of a state National Guard that is employed in active duty in service of the United States.

The Sixth Circuit rejected the Guard's statutory and constitutional arguments. The court held that the Guard is an "executive agency" and the technicians are "federal civilian employees" covered by the statute. The panel looked to legislative history to confirm Congress's efforts to ensure that dual-status

technicians, in their civilian capacity, have collective bargaining rights that members of the uniformed services do not have. The court explained that "every other circuit that has considered this issue has similarly found that state National Guards constitute executive agencies in their capacity as employers and supervisors of technicians." Additionally, the court dismissed the Guard's constitutional arguments that Congress's power in the Militia Clauses applies only to the portion of the Guard in active duty, citing a Fifth Circuit case, *Lipscomb v. FLRA*, that rejected arguments that the Tenth and Eleventh Amendments barred the FLRA from exercising jurisdiction over the Mississippi Guard.

In May 2022, the Guard petitioned the Supreme Court to reverse the Sixth Circuit decision. In October, the Supreme Court granted the petition on the sole question: "Does the Civil Service Reform Act of 1978, which empowers the FLRA to regulate the labor practices of federal agencies only ... empower it to regulate the labor practices of state militias?" The Supreme Court did not grant certiorari over the Guard's constitutional question regarding Congress's power in the Militia Clauses over National Guards.

At oral arguments before the Court, the Guard appeared to concede one of the two statutory jurisdictional arguments previously made before the Sixth Circuit regarding the FSLMRS's coverage of the technicians. Thus, the Guard focused on the single issue of whether it is an "executive agency" under the FSLMRS, arguing that the statute does not empower the FLRA to issue orders to National Guards and state adjutants general. The Guard emphasized that, under the statute, Congress provided the FLRA authority "to issue orders only to labor organizations, to several specific federal entities [], and to three categories of federal agencies: executive departments, government corporations, and executive-branch agencies that are neither executive departments, government corporations, nor military departments," and "[t]he [Guard] is none of these." Additionally, the Guard argued that principles of federalism, requiring Congress to use exceedingly clear language if it wishes to alter "the usual constitutional balance of federal and state powers" as articulated in *Bond v. United States*, required the Court to resolve any ambiguity in interpreting the statute in its favor.

The government argued that the FSLMRS applies to the Guard, thus requiring it to collectively bargain with the technicians and to comply with the FLRA's orders. In its brief, the government pointed to 32 U.S.C. 709(d) and the designation that provides the Ohio adjutant general authority to supervise technicians in their federal work, arguing that "[t]he relationship between petitioners and dual status technicians who are performing work in their federal civilian roles is therefore solely the result of a federal statute granting petitioners a federal role and federal authority over federal employees" and "like other officials who supervise the Departments' employees, adjutants general must comply with the Act." The government also contended that the statutory text and context of the statute opposed upsetting a half-century-old bargaining arrangement that Congress had accepted and was applicable to all but one state and multiple territories that "have certified bargaining units that include dual status technicians and that more than 32,000 technicians are covered by a collective bargaining agreement."

On May 18, 2023, the Supreme Court held in a 7-2 decision that the Guard falls under the jurisdiction of the FLRA. The majority, in a decision written by Justice Thomas, held that when "petitioners employ and supervise dual-status technicians ... they exercise the authority of the Department of Defense, a covered agency" under the FSLMRS. The Court compared this exercise of authority to DOD components such as the Department of the Army and the Department of the Air Force, which "plainly fall within the Statute's reach." The Court also examined the Technicians Act of 1968, including 32 U.S.C. § 709(d), which, the Court reasoned, "is the sole basis for petitioners' authority to employ technicians performing work in their federal civilian roles, confirming that petitioners act on behalf of—and exercise the authority of—a covered federal agency when they supervise dual-status technicians."

Additionally, the Court highlighted the "evolution of federal agency-employee relations law" and the pre-FSLMRS legal regime, where labor-management relations for federal employees were governed "by a series of Executive Orders." In particular, the Court focused on "the Statute's immediate predecessor, Executive Order No. 11491," which "established the precursor to the current FLRA and listed prohibited

unfair labor practices for both federal agency management and unions." The Court observed that in a 1971 decision interpreting the Executive Order, the adjutant general was understood to be designated as an agent of the Secretaries of the Army and the Air Force in employing and administering dual-status technicians and that this agency relationship created an obligation for the adjutant general to comply with federal law. The Court further observed that when Congress replaced the Executive Order with the FSLMRS, it "explicitly continued many aspects of the pre-FSLMRS regime.... "

In dissent, Justice Alito, joined by Justice Gorsuch, wrote that regardless of whether the Guard "act[s]," exercise[s] the authority of," or "functio[ns] as an agency," the Guard is not "*actually*" a federal agency. Acknowledging that that dual-status technicians are "indeed strange creatures" or "rare birds," the dissent wrote that "a plain reading of the statutory text leads ineluctably to the conclusion" that the Guard is not covered by the FSLMRS and so the FLRA lacks jurisdiction to enter remedial orders against them. Justice Alito reasoned that, "[i]f Congress wants the FLRA to have authority to enter an order against [the Guard], it must give the FLRA that authority."

Considerations for Congress

The Supreme Court's decision in *Ohio Adjutant General's Department* did not reach the constitutional question concerning Congress's power under the Militia Clauses to regulate members of state National Guards who are not employed in the service of the United States. At least two federal appellate courts, however, have rejected arguments that Congress lacks the constitutional authority to regulate dual-status technicians who have not been called into active duty.

A change by Congress to the FLRA's authority regarding National Guard technicians could implicate federal employees beyond Ohio to employees in every state except Mississippi, which according to the government does not have certified bargaining units that include dual-status technicians. In light of the Supreme Court's decision, Congress may seek to clarify the FSLMRS's coverage (e.g., to exclude National Guards and require DOD to conduct collective bargaining negotiations with the technicians directly).

Alternatively, Congress may maintain the status quo but clarify the coverage of National Guards under the FSLMRS. For example, Congress could amend the statute to explicitly include adjutant general's departments and National Guards as covered agencies in 5 U.S.C. § 7103(a)(3). Congress could also provide new incentives or consequences for the National Guards either participating or refusing to participate in collective bargaining.

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