

LAW REVIEW¹ 24020

March 2024

A National Guard Technician Is a Federal Employee for Most Purposes.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.1.3.3—USERRA applies to National Guard service.

1.8—Relationship between USERRA and other laws/policies.

***Ohio Adjutant General's Department v. Federal Labor Relations Authority*, 143 S.Ct. 1193 (2023).³**

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 45 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the Federal reemployment statute) for 38 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at <mailto:swright@roa.org>.

³ This is a 7-2 decision of the United States Supreme Court, released on 5/18/2023. The Opinion of the Court was written by Justice Clarence Thomas, and he was joined by Chief Justice John Roberts, Justice Sonia Sotomayor, Justice Elena Kagan, Justice Brett Kavanaugh, Justice Amy Coney Barrett, and Justice Ketanji Brown Jackson. Justice Samuel Alito wrote a dissent and was joined by Justice Neil Gorsuch.

Q: I am a Staff Sergeant in the Nebraska Army National Guard and a National Guard technician. That means that during normal work hours Monday through Friday I am a civilian employee of the Adjutant General of Nebraska and during drill weekends and annual training I am a National Guard soldier. During the week, when I am a civilian employee, I wear my Army uniform and observe military courtesies like saluting. If you saw me at work on a weekday afternoon, you probably would not be able to ascertain my “civilian” status just from observing me at work.

I am trying to figure out a basic question: Am I a federal employee? Or am I an employee of the State of Nebraska? What do you think?

Answer, bottom line up front:

You are a federal employee.

Explanation:

In 2022 and 2023, the United States Supreme Court decided two separate cases relating to legal issues arising from the employment of National Guard technicians.⁴ For most purposes, a National Guard technician is a federal employee. Just last year (2023), the Supreme Court held that National Guard technicians are federal employees for purposes of the application of the federal statute that requires federal agencies to bargain collectively with unions that represent federal civilian employees. The Court held:

⁴ See *Babcock v. Kijakazi*, 142 S.Ct. 641 (2022) and *Ohio Adjutant General’s Department v. Federal Labor Relations Authority*, 143 S.Ct. 1193 (2023). We have discussed *Babcock* in Law Review 22035 (June 2022) and *Ohio Adjutant General’s Department* in Law Review 23039 (

This case requires us to determine whether the Federal Labor Relations Authority (FLRA) properly exercised jurisdiction over an unfair labor practices dispute. On one side were the Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's Department (collectively petitioners or the Guard). On the other was the American Federation of Government Employees, Local 3970, AFL-CIO (Union), which represents federal employees known as dual-status technicians who work in both civilian and military roles for the Guard.

The Union petitioned the FLRA to resolve the dispute. But, under the **Federal Service Labor-Management Relations Statute (FSLMRS or Statute)**, the FLRA only has jurisdiction over labor organizations and federal "agencies"—and petitioners insist that they are neither. 5 U. S. C. §7101 *et seq.* We hold, however, that petitioners act as a federal "agency" when they hire and supervise dual-status technicians serving in their civilian role.

Enacted in 1978, the FSLMRS establishes a comprehensive framework governing labor-management relations in federal agencies. It secures the right of "[e]ach employee" "to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal." §7102. And, it further guarantees that "each employee shall be protected in the exercise of such right." *Ibid.* To that end, the FSLMRS provides for collective bargaining between federal agencies and their employees' unions, and it bars each from committing unfair labor practices. See §§7102(2) and 7116(a)-(b). For example, an agency may not "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Statute; "refuse to consult or negotiate in good faith with a labor organization as required by" the Statute; or "otherwise fail or

refuse to comply with any provision of ” the Statute.
§§7116(a)(1),(5),(8).

The Statute creates the FLRA and tasks it with administering this framework, including by investigating and adjudicating labor disputes. §7105(a)(2)(G); see also §§7104 and 7118(a)(1). It provides that the FLRA’s general counsel “shall investigate” a charge against “any agency or labor organization” and, if warranted, may issue a complaint calling for a hearing before the FLRA. §§7118(a)(1)-(2). The FLRA is then responsible for “conduct[ing] hearings and resolv[ing such] complaints.” §7105(a)(2)(G). If the FLRA determines that an agency or a union has engaged in an unfair labor practice, it “may require” the entity “to cease and desist from violations of [the Statute] and require it to take any remedial action it considers appropriate.” §7105(g)(3).

This case concerns the Statute’s application to a unique category of federal civil-service employees: dual-status technicians working for the State National Guards. These “rare bird[s]” occupy both civilian and military roles. *Babcock v. Kijakazi*, 595 U. S. ___, ___, 142 S. Ct. 641, 211 L. Ed. 2d 424 (2022) (slip op., at 2). They serve as “civilian employee[s]” engaged in “organizing, administering, instructing,” “training,” or “maintenance and repair of supplies” to assist the National Guard. 10 U. S. C. §10216(a)(1)(C); see 32 U. S. C. §§709(a)(1)-(2); *Babcock*, 595 U. S., at ___, 142 S. Ct. 641, 211 L. Ed. 2d 424 (slip op., at 2). Yet, they must “as a condition of that employment . . . maintain membership in the [National Guard]” and wear a uniform while working. 10 U. S. C. §10216(a)(1)(B); see 32 U. S. C. §§709(b)(2)-(4). Except when participating as National Guard members in part-time drills, training, or active-duty deployment, see 32 U. S. C. §§502(a) and 709(g)(2), dual-status technicians work full time in a civilian capacity and receive federal civil-service pay. See *Babcock*, 595 U.

S., at ____ - ____, 142 S. Ct. 641, 211 L. Ed. 2d 424 (slip op., at 2-3); see also 5 U. S. C. §2101.

Importantly, under the Technicians Act of 1968, each dual-status technician is considered “an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States.” 32 U. S. C. §709(e). *While it is state adjutants general who “employ and administer” dual-status technicians working for their respective State National Guard units, they can only do so pursuant to an express “designat[ion]” of authority by the Secretary of the Army or the Secretary of the Air Force. §709(d); see also Dept. of the Army, S. Resor, Delegation of Authority Under the National Guard Technicians Act of 1968 (General Order 85, Dec. 31, 1968) (General Order 85) (current order designating the relevant authority).*⁵

Q: A National Guard judge advocate told me that the Uniformed Services Employment and Reemployment Rights Act (USERRA) defines National Guard technicians as state employees and that makes me a state employee, not a federal employee, at least for purposes of USERRA. What do you say about that?

A: In the first place, USERRA does not say that National Guard technicians are State employees. Here is the entire text of the USERRA provision: “In the case of a National Guard technician employed under section 709 of title 32 [of the United States Code], the term ‘employer’ means the adjutant general of the State in which the technician is employed.”⁶

The adjutant general is a State official. In most States, the adjutant general is appointed by the Governor with the advice and consent of

⁵ *Ohio Adjutant General’s Department*, 143 S.Ct. at 1196-97 (emphasis supplied).

⁶ 38 U.S.C. § 4303(4)(B).

one or both houses of the State legislature. In previous articles, I have written that National Guard technicians are State employees for USERRA purposes, citing section 4303(4)(B) of USERRA.

I have reconsidered what I have written previously, based on *Ohio Adjutant General's Department v. Federal Labor Relations Authority*, the 2023 Supreme Court decision. Yes, the Adjutant General is a State official, but that does not mean that the National Guard technicians are State employees. As Justice Thomas explained in his majority opinion, the Adjutant General of a specific State has been delegated the authority to hire and supervise the technicians by the Secretary of the Army (in the case of Army National Guard technicians) or the Secretary of the Air Force (in the case of Air National Guard technicians).

The employer of the National Guard technicians is the Adjutant General of the State in which they serve, but the technicians are federal employees, not State employees.⁷

Please join or support ROA.

This article is one of 2,100-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve

⁷ In its USERRA regulations, which were promulgated in 2005, the Department of Labor (DOL) has stated: “A National Guard civilian technician is considered a State employee for USERRA purposes, although he or she is considered a Federal employee for most other purposes.” 20 C.F.R. § 1002.306. I believe that DOL should reconsider this statement when it updates its USERRA regulations because this statement is inconsistent with *Ohio Adjutant General's Department*. Many of the sections in the USERRA regulations need to be corrected because of statutory amendments since 2005. See Law Review 21033 (May 2021).

32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).⁸

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

⁸ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight⁹ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at <https://www.roa.org/page/memberoptions>. If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002¹⁰

⁹ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁰ You can also contribute on-line at www.roa.org.