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PERSPECTIVE

High court finds dual-status contractors subject to labor relations protections

By Jonathan D. Andrews

A recent Supreme Court decision has recognized the right of workers who provide both civilian and military services for the government to organize and benefit from union membership. In the case of *The Ohio Adjutant General's Department v. Federal Labor Relations Authority*, decided May 18, seven justices ruled that legal protections afforded federal workers extended to such hybrid employees. (No. 21–1454, 598 U. S. ____ (2023))

The opinion, written by Justice Clarence Thomas, lays out the legal basis for a labor-management relationship that had been in place for more than four decades before being truncated by the petitioners. In a strongly worded dissent, Justice Samuel Alito, joined by Justice Neil Gorsuch, asserts that because the petitioners are not actually federal agencies, the Federal Labor Relations Authority (FLRA) has no jurisdiction to enter remedial orders against them.

When Congress enacted the Federal Service Labor-Management Relations Statute (FSLMRS) in 1978, it created a framework for labor-management relations in federal agencies. Employees of such agencies were given the right to "form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal," and to engage in collective bargaining. (Section 7102)

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The FLRA, with members appointed by the President with the advice and consent of the Senate, was given responsibility for determining the units subject to these rights: "The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved." (Section 7112)

The FLRA was charged with investigating allegations of unfair labor practices. If it determined that an agency or a union had engaged in an unfair labor practice, it could require that entity "to cease and desist from violations of [the Statute] and require it to take any remedial action it considers appropriate." (Section 7105(g) (3))

Among the agencies covered by the law was the Department of Defense, which presumably included state-based National Guard units. Although the units were not technically federal agencies, the Ohio National Guard was a party to a series of collective bargaining agreements (CBAs) with the American Federation of Government Employees, Local 3970, AFL–CIO (the Union) dating back to 1971.

The Ohio National Guard agreements covered a class of workers known as "dual-status" technicians. These workers performed both civilian and military roles for the Guard, and the Guard recognized the Union as their exclusive representative.

The most recent of the CBAs between the Ohio National Guard and the Union was signed in 2011 and expired in 2014. The parties had already begun negotiating a new agreement when, in March 2016, they signed a memorandum of understanding under which the Ohio Adjutant General would ad-

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here to certain practices contained in the expired CBA.

Later that year, however, the Adjutant General reversed itself, asserting that it was not bound by the expired CBA. It further stated that it did not consider itself bound by the FSLMRS with respect to dual-status technicians.

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The Guard petitioned for review by the U. S. Court of Appeals for the Sixth Circuit, which denied the petition. (21 F. 4th 401 (2021).) The Sixth Circuit held that the Guard was an agency subject to the FSLMRS with respect to employing dual-status technicians and that the technicians were federal civilian employees with collective-bargaining rights under the statute.

On appeal to the Supreme Court, the case required the justices to decide whether the FLRA had jurisdiction over the dispute. According to the court, the FSLMRS only granted the FLRA with jurisdiction over labor organizations and federal agencies, and "petitioners insist that they are neither." The court concluded, however, "that petitioners act as a federal 'agency' when they hire and supervise dual-status technicians serving in their civilian role."

In reaching its conclusion, the justices observed that the Department of Defense was included in the FSLMRS definition of "agency," and it focused on the 1971 case of *Mississippi National Guard, 172d Military Airlift Group (Thompson Field)*, (Asst. Sec. Labor/Management Reports (A/SLMR) No. 20), in which the Assistant Secretary of Labor, operating under an executive order analogous to the FLRA, rejected arguments "virtually identical" to those asserted by the National Guard in the present case.

In concluding that dual-status technicians were employees of the federal government subject to the executive order, the justices noted that the Assistant Secretary in *Thompson Field* relied on definitions of "employee" and "agency" under the relevant executive order that "were materially identical to those that Congress ultimately adopted in the FSLMRS."

In his dissent, Justice Alito dismissed the majority's reliance on *Thompson Field*. He writes that "a single administrative decision by an Assistant Secretary that does not even address the particular argument petitioners raise in this case offers no reason to resist the conclusion that the Ohio Adjutant General's Department is plainly not a federal agency." Concluding that the Ohio National Guard and other petitioners were not "agencies" within the meaning of Section 7105(g)(3), the dissent found no basis for remedial jurisdiction by the FLRA.