



THE ATTORNEY GENERAL
OF TEXAS

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ATTORNEY GENERAL

AUSTIN, TEXAS 78711

November 4, 1970

Major General Ross Ayers
AGC, Texas ARNG
The Adjutant General

Opinion No. M-719

Re: Must the Adjutant General of Texas Comply with Fed. Ex. Order No. 11491 and DoD No. 1426.1, although to do so apparently would conflict with Art. 5154c, V.C.S.

Dear General Ayers:

You have requested a legal opinion of this office with reference to the following questions:

"Question No. 1. Is the Adjutant General of Texas required to comply with Federal Executive Order No. 11491 and Department of Defense Directive No. 1426.1 which substantially require that the policies contained therein shall govern officers and agencies of the Executive Branch of Government in all dealings with employee organizations representing such employees?

"Question No. 2. May the Adjutant General of Texas, or anyone acting for him, recognize a labor organization of Federal employees who are National Guard technicians?

"Question No. 3. Is the Adjutant General of Texas, or anyone acting for him, required to enter into a collective bargaining contract with a labor organization of Federal employees who are National Guard technicians respecting their wages, hours or conditions of employment?

Federal Executive Order No. 11491 in Section I(a) reads as follows:

"Section 1. Policy. (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority. The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization."

Department of Defense Directive No. 1426.1 in Sections I and III A issued March 26, 1970, reads as follows:

"I. Purpose. This Directive established policies and procedures applicable to labor-management relations within the Department of Defense in order to promote effective, equitable, and uniform implementation within the Department of the policies, rights, and responsibilities prescribed in Executive Order 11491 (Enclosure 1).

III. Applicability. A. Except as provided in subsection B of this section the provisions of this Directive and Executive Order 11491 are applicable to all components of the Department of Defense (Military Departments, Defense Agencies and the office of the Secretary of Defense), hereinafter referred to as "DoD components," including nonappropriated fund activities under their cognizance. With respect to matters covered by this Directive only, the Chief of the National Guard Bureau and the Chiefs of the Army and Air Force Exchange Service and the Army and Air Force Motion Picture Service may make those decisions and take those actions which are the responsibility of the head of a DoD component, providing such authority is expressly delegated by both the Secretary of the Army and Secretary of the Air Force on or after the date of issuance of this Directive. When such authority has been delegated, this phrase "DoD component" appearing in this Directive shall be understood as applying to the National Guard Bureau, the Army and Air Force Motion Picture Service as well as to the Military Departments, the Defense Agencies, and OSD."

Pertinent also is Title 32, USCA 709, and National Guard Regulation No. 51 and Air National Guard Regulation No. 40-01 adopted pursuant thereto, the Foreword of which provides:

"This is the regulation prescribed under Act of 13 August 1968 (82 Stat. 755; 32 USC 709) by the Secretary of the Army and the Secretary of the Air Force and approved by the Secretary of Defense for the administration of National Guard technicians. As required, it modified and supplements the Civil Service laws, and Civil Service Commission and Department of Defense civilian

personnel regulations and rules. This regulation will be used in lieu of Army and Air Force civilian personnel regulations which are not applicable to the administration of National Guard technicians. It will be used by the State Adjutant General, together with the Civil Service Commission's Federal Personnel Manual System and applicable issuances of other Federal agencies as specified herein, in administering technicians as Federal civilian employees. This regulation is also used by operating officials below the State level in carrying out their responsibilities for the technician program and in keeping technicians informed. It is equally applicable to both Army and Air National Guard technicians and must be uniformly applied. These technicians are by law Federal employees of the Army or the Air Force, as determined by their service assignment. As Federal employees, technicians are subject to all Civil Service laws and Civil Service Commission and Department of Defense civilian personnel rules and regulations, except as modified by this regulation. Changes to this regulation may be issued as required only after prior approval by the Secretaries of the Army, Air Force and Defense. This requirement applies to all substantive policy and procedural changes, as well as proposals for changes in current authorities for the technician program." (Emphasis added.)

Title 32, USCA 700 and its implementing National Guard Regulation No. 51, para. 2-4, vests authority for the administration of National Guard technicians in the Chief, National Guard Bureau, and delegates to the Adjutant General of each State the responsibility for "implementation and administration of the technician program," including "compliance with Statutes and regulations concerning management and administration of the

above cited. Furthermore, it is our opinion that the Adjutant General of Texas, a State of Texas Official, who is appointed by the Governor of Texas, is not prohibited by Article 5154c from complying with the provisions of Federal Executive Order No. 11491, DoD Directive No. 1421.1 and NGR 51/ANGR 40-01.

While it might initially appear that Article 5154c and Executive Order No. 11491, DoD Directive No. 1421.1 and NGR 51/ANGR 40-01 are in direct conflict, the Federal provisions apparently granting to federal employees all the rights and privileges denied employees of the State of Texas, it is not necessary to find a conflict when we consider that the definition of public employees covered by Article 5154c is limited to employees of the State of Texas or one of its subdivisions.

We do not believe the Legislature intended that the public employees covered by Article 5154c should include employees of the federal government. In any event, it is well settled that when federal law and state law conflict in the same areas of jurisdiction and subject matter, the state law must yield to and is preempted by valid federal law. Mayo v. U.S., 63 S. Ct. 1137, 319 U.S. 441; U.S. v. Georgia Public Service Comm., 83 S. Ct. 397, 371 U.S. 285; U.S. v. Allegheny County Pa., 64 S. Ct. 908, 322 U.S. 174; Maryland v. Wirtz, 88 S. Ct. 2017, 392 U.S. 183. We must presume under the well settled canons of statutory construction that the Legislature did not intend to enact invalid legislation and did not intend that Article 5154c should cover federal employees.

We pass now to consideration of whether the Adjutant General, as an officer of the State of Texas but in command and supervision of these federal employees and as a federal agent must comply with the Executive Order and Defense Directive in question. Our opinion is that he must. Article 5781, Vernon's Civil Statutes, with reference to his powers and duties, in its relevant portions, provides, as follows:

"Section 4....He...shall perform as near as practicable, such duties as pertain to the Chiefs of Staff of the Army and Air Force and the Secretaries of the military services, under the regulations and customs of the United States Armed Forces....

technician programs." The Adjutant General is further expressly charged, among other things, with employment, assignment, promotion, reassignment, suspension, discipline and separation of technicians, determination of their technical qualifications and ability to perform their duties, maintaining control of expenditure of man months and funds, authorizing administrative absences, establishing the hours of duty and the work week, and providing information to technicians on their responsibilities and obligations as federal employees and concerning their privileges and rights, including the right of appeal and the procedures for requesting review of grievances and complaints. Paragraph 2-4b (20) further provides that the Adjutant Generals of each state shall exercise such other authority as may be delegated to them by the Chief, National Guard Bureau. As a General Officer of the National Guard he is subject to designation by the federal government to act as its agent when so authorized and as permitted by Article XVI, Sections 33 and 40, Constitution of Texas.

You are concerned whether Article 5154c, Vernon's Civil Statutes, Sections 1 and 2, are applicable to National Guard technicians and their relationship to the Adjutant General. The Sections read, in part:

"Section 1. It is declared to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City or Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, hours, or conditions of employment of public employees, and any such contracts entered into after the effective date of this Act shall be null and void.

"Section 2. It is declared to be against the public policy of the State of Texas for any such official or group of officials to recognize a labor organization as the bargaining agent for any group of public employees."

In answer to your first question, we have concluded that we must give an affirmative answer. The technicians of the Texas National Guard and the Texas Air National Guard are federal employees, who must be governed by the federal laws

"Section 8. The Adjutant General shall prescribe regulations not inconsistent with the law for the government of his department..."

In answer to your second and third questions you are advised that in the opinion of this office both of these questions may be answered in the affirmative, provided, however, that the Chief, National Guard Bureau, has delegated the responsibility to the Adjutant General to recognize a labor organization of federal employee National Guard technicians and enter into a collective bargaining contract with such employees pursuant to the federal laws heretofore cited. The National Guard Regulation No. 51 does not expressly cover recognition of labor unions and collective bargaining and consequently there remains the question of interpretation as to whether such matters are impliedly delegated to an Adjutant General. It has been a policy of this office not to interpret federal laws and regulations nor to advise with reference to the duties of federal agencies. Attorney General Opinion No. C-90 (1963). Consequently, we must defer this matter to the Chief, National Guard Bureau, who is authorized by that regulation to delegate such authority to the Adjutant General. You are, therefore, advised to contact that office for its interpretation of authority or delegation thereof, to collectively bargain and recognize such a labor organization. We find no state law impediments to the exercise of such authority, provided it is properly delegated to the Adjutant General by the National Guard Bureau.

This opinion does not apply to those National Guard technicians who are employed as state employees and receive pay from state appropriations. The Adjutant General may not recognize a labor union representing such employees or negotiate a collective bargaining contract with them. Article 5154c.

S U M M A R Y

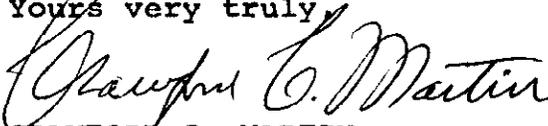
Federal Executive Order No. 11491, DoD Directive No. 1421.1 and NGR 51/ANGR 40-01 grant to federal employees who are employed by the Texas National Guard and the Texas Air National Guard as technicians the right to belong to a labor organization that represents

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them in all matters pertaining to their employment. State employee National Guard technicians paid by the State have no such right, however.

The Adjutant General may recognize a labor organization of such federal employee National Guard technicians and enter into a collective bargaining contract with them, provided the Chief, National Guard Bureau, properly delegates such responsibility to him. The Attorney General of Texas will defer construction of federal laws and regulations to the appropriate federal authorities.

Yours very truly,


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