

Claims Report

United States Army Claims Service

Tort Claims Note

Claims Arising from the Performance of Duties by Members of the National Guard

The Federal Tort Claims Act (FTCA)¹ provides a remedy for persons who suffer personal injury, death, or property damage as a result of the negligent or wrongful acts or omissions of “employees” of the United States acting within the scope of their employment. Establishing whether a tortfeasor is a U.S. employee is the crucial first step in the FTCA process. Therefore, in evaluating a claim involving the alleged tortious activity of a member of the Army Reserve National Guard (ARNG), careful review of the member’s status and the precise nature of the member’s activities on the day of the incident is the first step in determining whether the state or federal government is responsible.

The ARNG has an unusual status because it is an agency with both federal and state components. All fifty states, Puerto Rico, the Virgin Islands, and Guam have their own National Guard.² In addition, the National Guard Bureau, an adjunct of the United States Departments of the Army and Air Force, gives National Guard personnel federal recognition as part of either the ARNG of the United States or the Air National Guard of the United States.³ A member of the ARNG may be a state employee, federal employee, full-time Active Guard Reserve member, or a traditional National Guard member. Depending on the member’s status, either the state government or the federal government may ultimately be responsible for the payment of claims arising from the tortious activity of a member of the ARNG.

The purpose of the ARNG is to serve as a modern militia in defense of the United States.⁴ Guard members are uniformed, equipped, trained, and subject to federal military standards in much the same way as personnel serving in the regular U.S. Army. The main distinction between regular Army and ARNG

units is that, in general, state governors control the latter.⁵ In terms of national security, the benefit of the ARNG is that its units may be called into active federal service. When called into active federal service, the unit is no longer under the control of its governor, but ultimately under control of the President, as Commander-in-Chief.

In general, ARNG personnel serving in a state active duty status are considered state employees and not federal employees for purposes of the FTCA.⁶ The state exercises immediate control over the member. Moreover, while in a state status, the member is performing a duty that furthers the interest of the state. Thus, National Guard members engaged in activities such as flood disaster relief or riot control are under the call of the governor and performing duties furthering the interests of their respective state rather than the federal government. Under these circumstances, the ARNG members are not considered “federal employees,” and allegations of their negligence are not cognizable under the FTCA.

An ARNG member becomes a federal employee when called into service by the President pursuant to 10 U.S.C. §§ 331-333, or 12406⁷ (“Title 10 status”). In contrast to members serving in a state status, a member in Title 10 status serves pursuant to a federal mission and the ability to direct and control the member’s activity lies with the federal government.⁸ Thus, any negligent acts or omissions of ARNG members in a Title 10 status and acting within the scope of their employment are cognizable under the FTCA.

Claims involving ARNG personnel become more difficult to analyze when the alleged tortfeasor is engaged in training under 32 U.S.C. §§ 316, 502-505⁹ (“Title 32 status”). The ARNG personnel in a Title 32 status are considered “federal employees” for purposes of the FTCA.¹⁰ A common claims scenario involves the allegation of negligence by a member while performing annual training pursuant to 32 U.S.C. § 502. Significantly, although the member is a state employee still under the

1. 28 U.S.C. §§ 1346, 2671-2680 (2000).

2. The District of Columbia National Guard is a federal force. *See O’Toole v. United States*, 206 F.2d 912 (3d Cir. 1993).

3. *Jorden v. National Guard Bureau et al.*, 799 F.2d 99 (3rd Cir. 1986).

4. *Maryland v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds* 382 U.S. 159 (1965).

5. *Lee v. Yee*, 643 F. Supp. 593, 601 (D. Hawaii 1986).

6. *Id.*

7. 10 U.S.C. §§ 331 (to suppress insurrection), 332 (to suppress rebellion), 333 (to safeguard rights of citizens during insurrection), 12406 (against a rebellion or the threat of rebellion against the authority of the United States) (2000).

8. *Id.*

state's control, the member's Title 32 status places him within the definition of "federal employee" for purposes of the FTCA. Therefore, any negligent acts or omissions of ARNG members in a Title 32 status and acting within the scope of their employment are cognizable under the FTCA.¹¹

Claims attorneys and judge advocates should also be familiar with the unique status of federal technicians. Federal technicians are personnel assigned to ARNG units under the command of state officers. Federal technicians are federal employees,¹² often employed in the administration and training of these units, or in the maintenance and repair of equipment issued to the ARNG.¹³ Thus, any negligent act by a federal technician is cognizable under the FTCA if the technician is acting within the scope of his employment.

Claims arising out of the alleged negligent acts or omissions by ARNG members challenge claims attorneys because of the involvement of both state and federal governments. When an ARNG member is the alleged tortfeasor, the claims attorney or judge advocate should conduct a detailed investigation to determine whether the claim is a state or federal responsibility. When determining whether the ARNG member was performing duties in a Title 32 status, a mere review of the scope of employment statement provided by the member's unit is inadequate because it may not be accurate. The attorney should therefore obtain a copy of any orders pertaining to the member and should review the unit's training schedule to determine whether the activity was part of the planned training. The attorney should also interview the ARNG member as to the facts and circumstances surrounding the mission and the training. While documents may indicate that a member's actions were incidental to the unit mission or the individual's military occupational specialty, it is quite possible that the alleged negligent activity

was not a part of the unit's training, or was an activity from which only the state derived a benefit (for example, an Army improvement construction project).

Claims Under 10 U.S.C. § 2012

Claims personnel should also be familiar with potential ARNG claims arising from activities authorized by 10 U.S.C. § 2012, which permits Army support to eligible organizations outside the Department of Defense (DOD). Effective 10 February 1996, units or individual members of the armed forces engaged in civil-military innovative readiness training (IRT) activities may provide support and services to specified non-DOD organizations and activities.¹⁴ The IRT is defined as military training conducted off base in the civilian community that utilizes the units and individuals of the armed forces under the jurisdiction of the Secretary of a military department or a combatant commander, to assist civilian efforts in addressing civic and community needs of the United States, its territories and possessions, or the Commonwealth of Puerto Rico.¹⁵

Certain units and personnel typically provide the civic and community assistance under 10 U.S.C. § 2012. These include combat service support units, combat support units, and personnel primarily in the areas of healthcare services, general engineering, and infrastructure support and assistance.¹⁶ Assistance is available only if requested by a responsible official of the benefiting organization. It may not be provided if reasonably available from a commercial entity unless the commercial entity has agreed to the armed forces providing the service.¹⁷

As a further condition, the unit's assistance must accomplish valid unit training requirements.¹⁸ An exception is made, how-

9. 32 U.S.C. §§ 316 (instructing civilians at rifle ranges), 502 (attending drill assemblies or participating in training at encampments, maneuvers, outdoor target practice or other exercises), 503 (participating in field exercises independently of or in conjunction with the Army or the Air Force or both), 504 (participating in small arms competition or attending schools for the ARNG), 505 (attending regular service schools and field exercises) (2000).

10. "Employee of the government includes . . . members of the National Guard while engaged in training or duty under §§ 316, 502, 503, 504, or 505 of Title 32." 28 U.S.C. § 2671 (2000).

11. In 1981, Congress amended the FTCA to make the federal government liable for acts or omissions of National Guard personnel serving in a Title 32 status. Guard personnel in a Title 32 status remained state employees, but were considered federal employees under the FTCA. Prior to the amendments, claimants injured by National Guard personnel in a Title 32 status were not entitled to relief under the FTCA, but under the National Guard Claims Act, which provided a limited administrative remedy, with caps placed on damages. 32 U.S.C. § 715. The limited relief afforded to the claimants was often made worse by states that had not yet waived sovereign immunity or consented to be sued for the negligent acts of their employees. This failure to waive sovereign immunity left Guard personnel at risk for being personally liable for their allegedly negligent acts. The 1981 amendments, therefore, provided an avenue of relief for claimants injured by Guard personnel in a Title 32 status and acting within the scope of employment, while eliminating the risk that a Guard member would be personally liable for his or her negligent acts.

12. *Id.* § 709(e).

13. *Id.* § 709(a).

14. 10 U.S.C. § 2012(a) (2000).

15. U.S. DEP'T OF DEFENSE, DIR. 1100.20, SUPPORT AND SERVICES FOR ELIGIBLE ORGANIZATION AND ACTIVITIES OUTSIDE THE DEPARTMENT OF DEFENSE para E2.1.8 (30 Jan. 1997) [hereinafter DOD Dir. 1100.20].

16. *Id.* para. 4.2.

17. 10 U.S.C. § 2012(c).

ever, if the assistance consists primarily of military manpower and the total assistance for a single project does not exceed 100 man-hours.¹⁹ In these cases, unit volunteers will meet most manpower requests, and assistance other than manpower will be extremely limited. Government vehicles may be used, but only to provide transportation of personnel to and from the work site.²⁰

Individual—as opposed to unit—assistance must involve tasks directly related to the member’s military occupational specialty.²¹ In addition, the assistance must not adversely affect the quality of training or the performance of the unit or member.²² Further, it must not result in a significant increase in the cost of training.²³ Organizations and activities eligible for assistance under 10 U.S.C. § 2012 include: any federal, regional, state or local governmental entity; youth and charitable organizations specified in 32 U.S.C. § 508; and any other entity approved by the Secretary of Defense.²⁴

Claims involving ARNG members arising from projects authorized by 10 U.S.C. § 2012 are cognizable under the FTCA even though a government entity or private organization may

derive a benefit. Despite the expanded authority for the participation of ARNG personnel in civic and community activities, the ARNG continues to be involved in community projects which do not fall within the realm of 10 U.S.C. § 2012. These projects may be accomplished in a state active duty status, and any claims generated by such projects remain solely the state’s responsibility.

Conclusion

Given the number of missions undertaken by the ARNG, claims attorneys and judge advocates will encounter a variety of claims alleging property damage and personal injury arising from the performance of duties by members of the ARNG. Whether a claim is cognizable under the FTCA or is a state responsibility is a question that should be expeditiously resolved. Claims attorneys will accomplish this by conducting a thorough investigation and working closely with the state Staff Judge Advocate and the Claims Service area action officer. Ms. Schulman and Captain Lozano.

18. *Id.* § 2012(d)(1)A(i).

19. *Id.* § 2012(d)(2).

20. DOD DIR. 1100.20, *supra* note 15, para. 4.4.2.1.3.

21. 10 U.S.C. § 2012 (d)(1)(A)(ii).

22. *Id.* § 2012(d)(1)(B).

23. *Id.* § 2012(d)(1)(C).

24. *Id.* § 2012(e).