



Decision

Matter of: Federal Energy Regulatory Commission—Use of Appropriated Funds to Indemnify Parties Who Negligently Harm FERC Inspectors

File: B-332444

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DIGEST

The Federal Energy Regulatory Commission (FERC) asks whether its appropriated funds are available to indemnify certain parties for liability incurred if the parties negligently harm FERC inspectors performing official duties. The Federal Employees' Compensation Act (FECA) establishes a statutory framework through which federal employees can receive compensation from the federal government if they are injured or die in the performance of their official duties. The compensation provided by FECA is federal employees' exclusive remedy against the United States for injury or death suffered in the performance of their official duties. If FERC instead assumes liability for the death or injuries of its inspectors, it would circumvent the process established by FECA and provide an alternative remedy for its inspectors to recover against the United States. Because FERC does not have any specific statutory authority to circumvent FECA or provide such an alternative remedy, it may not use its appropriated funds to indemnify these parties.

DECISION

The Federal Energy Regulatory Commission (FERC) requests our decision on the availability of its appropriated funds to indemnify certain parties for liability they may incur if they negligently harm FERC inspectors performing official duties.¹ In accordance with our regular practice, we contacted FERC to obtain more information and its views on this matter.² FERC provided us with information and its legal

¹ Letter from Acting General Counsel, FERC, to General Counsel, GAO (Aug. 14, 2020) (Request Letter).

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-1064SP

views.³ Because the United States Department of Labor, Office of the Solicitor, Division of Federal Employees' and Energy Workers' Compensation (FEEWC), provides legal services in connection with the workers' compensation program under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101-8193, we also contacted the FEEWC attorneys to obtain their views.⁴ We conclude that FERC's appropriated funds are not available for the proposed indemnity.

BACKGROUND

FERC regulates jurisdictional hydropower and natural gas facilities, which are located on private land, to ensure that these facilities are safely constructed, operated, and maintained.⁵ As part of its responsibilities, FERC issues licenses to program participants to authorize them to safely construct and operate these facilities.⁶ According to FERC, it also conducts periodic inspections of these facilities, and program participants arrange for third parties to transport FERC inspectors to these inspections.⁷

FERC states that its inspectors "may face potential hazards" when inspecting facilities.⁸ Because of these potential hazards, some private landowners and transportation providers ask FERC inspectors to waive owner or provider liability for

[06-1064SP](#); Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, FERC (Apr. 7, 2021).

³ Letter from General Counsel, FERC, to Assistant General Counsel for Appropriations Law, GAO (May 7, 2021) (Response Letter); Request Letter.

⁴ Telephone Conversation with Counsel for FECA, Office of the Solicitor, Assistant General Counsel for Appropriations Law, GAO, and Senior Attorney, GAO (June 21, 2022).

⁵ 42 U.S.C. §§ 7171, 7172; Request Letter, at 1.

⁶ 42 U.S.C. §§ 7171, 7172; Request Letter, at 1. For ease of reference here, we refer to preliminary permits, exemptions, licenses, and relicenses as licenses. See Request Letter, at 1 (stating that FERC uses inspections "to issue preliminary permits, exemptions, licenses, and relicenses"). We also refer to applicants for, and recipients of, licenses as program participants.

⁷ Response Letter, at 5; Request Letter, at 1.

⁸ Request Letter, at 1. FERC states its inspectors encounter hazards such as "steep grades, unguarded edges, uneven walking surfaces, open water, confined spaces, trenches, wet/slippery/icy surfaces, high elevations, active construction sites, electrical hazards, and wildlife including snakes, ticks, and alligators." *Id.* Between 2000 and 2020, FERC states one employee sprained an ankle after tripping in a parking lot and another employee sustained recoverable injuries by a transportation provider. *Id.* at 2.

injuries sustained by inspectors.⁹ Some private landowners even condition access to their land “upon an assurance of no liability” if the FERC inspector is injured.¹⁰

In light of these parties’ concerns about their liability risk, FERC is considering entering into agreements to indemnify these parties for injuries or damages sustained by FERC inspectors in the course of inspecting jurisdictional hydropower and natural gas facilities.¹¹ Before providing such an indemnity, FERC requests a decision on its authority to use its appropriated funds to enter into these types of agreements.¹²

DISCUSSION

At issue here is the availability of FERC’s appropriated funds to indemnify program participants, private landowners, or transportation providers for liability they incur if they negligently harm FERC inspectors performing official duties. For the reasons explained below, we conclude FERC’s appropriated funds are not available for this purpose.

FERC states that, as a government agency, it has sovereign immunity.¹³ Sovereign immunity shields the United States from suit unless Congress enacts a statute that unequivocally and expressly waives immunity.¹⁴ Such a statute may prescribe the terms and conditions of the waiver, and any such terms and conditions must be strictly observed.¹⁵ Without an act of Congress, agencies do not have the authority to waive sovereign immunity.¹⁶

The Federal Employees Compensation Act (FECA) waives sovereign immunity for any government employees who are injured or die in the performance of their official duties.¹⁷ FECA compensation is the exclusive remedy against the United States for covered employees’ injury or death while in the performance of their official duties,

⁹ Request Letter, at 1. FERC is not aware of any authority to require its employees to waive their rights and advises against waiver. *Id.*

¹⁰ Response Letter, at 2; Request Letter, at 1.

¹¹ Request Letter at 2.

¹² Request Letter, at 1.

¹³ Response Letter, at 3.

¹⁴ *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

¹⁵ *Sherwood*, 312 U.S. at 590–591; *Beers v. Arkansas*, 61 U.S. 527, 529 (1857).

¹⁶ *Wagstaff v. United States Department of Education*, 509 F.3d 661, 664 (5th Cir. 2007), *cert. denied*, 554 U.S. 904 (2008).

¹⁷ Response Letter, at 3, n. 4.

and employees are not entitled to sue the United States or recover damages for such injury or death under any other statute.¹⁸ If a third party is liable for a covered employee's injury or death for which the employee or the employee's beneficiary receives FECA compensation, FECA allows the Department of Labor (DOL) to recover damages from the third party.¹⁹ Specifically, FECA provides the right to require the employee or the employee's beneficiary (1) to sue the third party tortfeasor to recover, or (2) to assign to the United States their right of action so that the United States is in a position to sue the tortfeasor who injured the employee.²⁰

To fund FECA benefits, Congress established the Employees' Compensation Fund, which is managed by DOL.²¹ This Fund is financed by both congressional appropriations and any monies the Fund receives from tortfeasors sued by DOL, federal agencies, or covered employees.²² Where DOL pays out FECA compensation to a covered employee, FECA requires that DOL recoup the compensation from the covered employee's agency.²³ Further, where such employee sues and recovers damages from a tortfeasor, the employee is required to refund DOL for a portion of their FECA compensation.²⁴ Any refunded amounts are credited to the Employees' Compensation Fund.²⁵

¹⁸ 5 U.S.C. § 8116(c) ("The liability of the United States . . . with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States."); Response Letter, at 3 n.4 ("FECA is an exclusive remedy for federal employees as a result of an injury or death, and they lose the right to sue the government for the same.").

¹⁹ 5 U.S.C. § 8131(a).

²⁰ 5 U.S.C. § 8131(a).

²¹ 5 U.S.C. § 8147.

²² 5 U.S.C. §§ 8131(c), 8132, 8147.

²³ See 5 U.S.C. § 8147(b) (requiring DOL to provide to all agencies with employees receiving FECA benefits an estimated cost of these benefits before August 15th of each year, and requiring such agencies to include in their budget requests an appropriation to cover FECA costs for the prior year).

²⁴ 5 U.S.C. § 8132 (requiring a FECA claimant who recovers from a third party to refund DOL for the amount of any compensation received by the claimant and credit DOL any surplus on future payments of compensation payable to the claimant, but authorizing the claimant to retain a minimum of twenty percent of the award and reasonable attorney's fees proportionate to the refund to DOL).

²⁵ 5 U.S.C. § 8132.

The FERC inspectors at issue here are government employees who are covered by FECA. If they are injured or die while inspecting jurisdictional hydropower and natural gas facilities, they or their beneficiaries will be entitled to FECA benefits, which will be paid to them from the Employees' Compensation Fund. Further, FERC will be responsible for refunding the Fund for any compensation provided to the inspectors or their beneficiaries. The covered employees or their beneficiaries may also be required by DOL to sue the program participants, private landowners, or transportation providers for their damages, and were they to recover, they would be required to refund DOL for a portion of any FECA compensation they received. If FERC were instead to assume liability for the inspectors' harm with its appropriated funds, it would circumvent this statutorily established process.

We have long recognized that an agency may not use the device of a contract or agreement to circumvent or do indirectly what it is not permitted to do directly.²⁶ Through FECA, Congress enacted a statutory framework that allows federal employees who suffer harm in the course of their employment to receive compensation from the Employees' Compensation Fund and further permits DOL to recoup compensation from liable third parties. In this act, Congress also specifically articulated that the compensation provided by FECA is federal employees' exclusive remedy against the United States for injury or death suffered in the performance of their official duties. The proposed indemnity would circumvent the statutory framework established by FECA and authorize an alternative remedy through which covered employees could seek redress from the government for their harm. Congress has not authorized FERC to establish such an alternative remedy for injuries to its inspectors, and, therefore, FERC's appropriated funds may not be used for this purpose.

CONCLUSION

FERC's appropriated funds are not available to indemnify licensees, private landowners, or transportation providers for liability they incur when they negligently cause FERC inspectors to sustain injuries or damages while the inspectors are performing official duties.



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²⁶ B-331090, June 8, 2020 (stating that an agency "may not craft agreements to circumvent legislatively enacted restrictions on its authority"); 55 Comp. Gen. 1059, 1061 (1976) ("It is axiomatic that an agency cannot do indirectly what it is not permitted to do directly."). Cf. *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'" (citation omitted)).