

LAW REVIEW 813

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CATEGORY: 1.1- USERRA Coverage

1.19-USERRA Enforcement

Nonappropriate Argument: Despite its longtime contention, AAFES is not exempt from USERRA.

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

Q: I am a retired Army Reserve colonel and life member of ROA and I have been reading with interest your Law Review column. My 20-year-old son works for the Army and Air Force Exchange Service (AAFES) at the Base Exchange at a nearby Air Force base. He seriously considered joining the Army Reserve and visited repeatedly with a recruiter.

Before signing on the dotted line at the recruiter's office, he inquired of the manager of the Base Exchange as to whether he would get his job back after returning from his Army Reserve initial training. The manager told him that AAFES is exempt from the Uniformed Services Employment and Reemployment Rights Act (USERRA) because it is a "nonappropriated fund instrumentality." Is the manager correct about AAFES being exempt from USERRA?

A: The manager is not correct, but this has been the AAFES line for decades.

AAFES is the largest non-appropriated fund instrumentality (NAFI), by far. Other NAIFs include the Navy Exchange, the Marine Corps Exchange, the Coast Guard Exchange, and officers' clubs and similar entities on military bases at home and abroad.

As I explained in Law Review 104, and other articles, Congress enacted USERRA in 1994, as a complete recodification of the Veterans' Reemployment Rights Act (VRRRA), which can be traced back to 1940. The federal reemployment statute has applied to the federal government (including NAIFs) and to private employers since 1940. Congress amended the law in 1974 to make it apply to state and local governments as well.

Under the VRRRA, prior to the 1994 enactment of USERRA, there was no way for a federal NAFI employee to enforce his or her reemployment rights, because the Merit Systems Protection Board (MSPB) had no jurisdiction to hear appeals filed by NAFI employees. The 1994 enactment of USERRA closed this loophole with respect to USERRA enforcement.

I worked for the U.S. Department of Labor (DOL) as an attorney for a decade; this is when I developed the interest and expertise in the reemployment statute. Together with one other DOL attorney, Susan M. Webman, I largely drafted the interagency task force work product that became USERRA when Congress enacted it (with only a few changes) and President Bill Clinton signed it into law on Oct. 13, 1994.

In the late 1980s, while I worked for DOL, the agency had a whole series of VRRRA cases with AAFES. We contacted the AAFES headquarters, and the AAFES management made it clear that they had no intention of complying with the VRRRA. Their attitude was that accommodating the military training schedules of National Guard and Reserve personnel was inconvenient, and DOL couldn't do anything about it.

I recall drafting a letter that Assistant Secretary of Labor (Veterans' Employment and Training) Donald Shasteen sent to Assistant Secretary of Defense (Reserve Affairs) Steve Duncan, alerting the Department of Defense to the problem of getting AAFES to comply with the VRRRA. Unfortunately, Assistant Secretary Duncan was unable to get AAFES to "get with the program."

When Ms. Webman and I drafted the product that later became USERRA, AAFES was very much on our minds. Our intent was that the new reemployment statute, and its enforcement mechanism, would most definitely apply to

AAFES and other NAFIs. Section 4303 of USERRA defines 16 terms used in the statute. When a statute includes definitions, the statutory definitions control for purposes of that statute. USERRA's definition of "employer" includes "the federal government." 38 U.S.C. 4303(4)(A)(ii). Section 4303 also defines that term, as follows: "The term 'federal government' includes any federal executive agency...." 38 U.S.C. 4303(6). Section 4303 also defines "federal executive agency" and the definition specifically includes "any nonappropriated fund instrumentality of the United States." 38 U.S.C. 4303(5).

USERRA's legislative history clearly buttresses the conclusion that Congress intended that AAFES and other NAFIs should be subject to USERRA. "It is the Committee's intent [House Veterans' Affairs Committee] that the definition of 'agency in the executive branch' include the United States Postal Service, non-appropriated fund instrumentalities of the United States (e.g., military exchanges and officers' clubs), and other specified entities. The intent is to give employees of these entities the same reemployment rights as those extended to other federal employees." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2455.

Section 4324 of USERRA (38 U.S.C. 4324) provides for enforcement of USERRA rights with respect to federal executive agencies. Since NAFIs fall within the statutory definition of "federal executive agency," it is clear beyond any reasonable dispute that NAFIs are subject to USERRA, and to the law's enforcement mechanism, just like any other federal executive agency.

I brought this matter to the attention of BG Keith Lee Thurgood, USAR, the new commander of AAFES (see "The Store Commander," *The Officer*, February-March 2008). He responded as follows: "Thanks for the history lesson, but I can't change what has happened in the past. What I can do is get this right for our great Citizen Soldiers going forward, and I am absolutely committed to that. As an Army Reservist myself, I am fully aware of USERRA and have worked many cases of this type for ESGR [the National Committee for Employer Support of the Guard and Reserve]. We'll get this right." BG Thurgood also informs me that AAFES employs many National Guard and Reserve members and values the unique work and life experiences they bring to the organization.