LAW REVIEW 835

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CATEGORY: 2.0: Paid Leave for Government Employees

Paid Military Leave for Federal Employees on Long-Term Military Duty

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

Q: I am a commander in the Navy Reserve and also a civilian employee of the Department of the Navy (DON). I left my DON job to serve on active duty for three years, from December 2004 to December 2007. I gave my DON supervisors ample notice of my involuntary call to active duty (for one year) and my voluntary extensions (for two additional years). I met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I followed your Law Review 77 and carefully met and documented my meeting each of the criteria. I returned to work at my DON civilian job on Jan. 2, 2008.

During my career as a federal civilian employee, I have taken paid military leave each year for my annual training in the Navy Reserve. I believe that I am also entitled to the 15 days of paid military leave each fiscal year for the three years that I was on full-time active duty. Is that correct? I did not think to apply for that paid military leave during my active duty period. I was not aware of my right to it, and I was fully engaged with my military duties and not thinking much about my civilian job back home. I was in Iraq for a substantial part of that three-year period.

I applied for payment for the military leave shortly after I returned to work, but my application was declined. I was told that I could have received the paid military leave if I had applied for it each year during my active duty period, but that there is no provision for paying it to me now, after I have returned to work. Have I been treated fairly and lawfully?

A: I think that you have been treated unfairly, and at least arguably unlawfully. USERRA does not require your civilian employer to pay you for time that you are away from work for military service or training, but you have the right to 15 days per federal fiscal year of *paid* military leave under section 6323 of Title 5 of the U.S. Code (5 U.S.C. 6323). The pertinent language is as follows:

"Subject to paragraph (2) of this subsection [paragraph 2 deals with part-time federal employees and is not pertinent to your case], an employee as defined by section 2105 of this title [the definition is very broad, and you most certainly qualify] or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to pay without loss in *pay,* time, or performance or efficiency rating for *active duty,* inactive-duty training (as defined in section 101 of Title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve member of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year." 5 U.S.C. 6323(a) (1) (emphasis supplied).

It is clear beyond any question that the right to paid military leave under this section applies to long-term active duty, as well as short-term annual training and the like. USERRA provides, "... a person who is absent from a position of employment by reason of service in the uniformed services shall be—(A) deemed to be on furlough or leave of absence while performing such service; and (B) entitled to such other rights not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice or plan in effect at the commencement of such service or established while such person performs such service." 38 U.S.C. 4316(b) (1). I invite the reader's attention to Law Reviews 41, 58, and 158 for a detailed discussion of this "furlough or leave of absence clause."

A federal employee who is away from work for long-term active duty is entitled to receive the 15 days of *paid* military leave under 5 U.S.C. 6323 until the person leaves active duty or until the person has exhausted the five-year limit under USERRA, whichever comes first. I invite the reader's attention to Law Review 201 for a detailed discussion of the five-year limit. Your initial year of *involuntary* service (mobilization) clearly did not count toward your five-year limit with the federal government as your civilian employer. The two follow-on years of voluntary extensions may or may not have counted, depending on the specific wording of your orders. But it is clear that you have not exceeded the five-year limit, even if those two voluntary years count.

Here is what DON should have done while you were on active duty. DON should have put you back on the civilian payroll at the start of each fiscal year (federal fiscal years start on October 1). You should have drawn your federal civilian pay (without deduction for your military pay) until the 15 days of paid military leave was exhausted. DON should have done this as a matter of course, whether or not you thought to make a specific request for this entitlement.

In determining the rate of use of your 15 days of paid military leave, you should not be charged for weekends and federal holidays because you were not normally expected to work at your civilian job on those days. *See Butterbaugh v. Department of Justice,* 336 F.3d 1332 (Fed. Cir. 2003). Please see Law Review 151 for a detailed discussion of the implications of *Butterbaugh*.

For example, in October 2007 your 15 days of paid military leave for Fiscal Year 2008 would not have been exhausted until Monday, Oct. 22, 2007. The three weekends (Oct. 67, 1314, and 2021) should not be included in computing the exhaustion of the 15 days, and Oct. 8 (Columbus Day, a federal holiday) should also be excluded from the computation. Thus, at the start of each fiscal year you should have been paid for an entire pay period and for more than half of a second pay period. The GS-14 pay that you lost, because DON did not comply with its responsibilities under 5 U.S.C. 6323, was well in excess of $20,000.

The purpose of USERRA, as well as the Servicemembers' Civil Relief Act, to the maximum extent feasible, is to remove civilian concerns from the servicemember's plate while the member is on active duty, so that he or she can devote full time and attention to military responsibilities. This is a safety issue, your safety and the safety of your colleagues. You should not lose $20,000 or more because you were devoting your full attention to your military duties and you did not know to make a claim for the paid military leave while you were on active duty.

USERRA's very first section expresses the "sense of Congress that the federal government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b). If the federal government should be a model employer, then Department of Defense (DoD) organizations, including DON, should strive to be the model among models. After all, DoD is the principal beneficiary of USERRA.

Let this case be a learning point for other federal employees who are called to the colors. You should apply for the paid military leave under 5 U.S.C. 6323 at the start of each federal fiscal year (October 1), while you are on active duty. If you wait until after you have returned to work, you may find that you have missed out on this valuable benefit.

This situation also gives me the occasion to reiterate advice I gave in Law Review 191 (September 2005) and Law Review 0760 (November 2007). When you are called to the colors, you should give a *limited power of attorney* to a trusted colleague at work—to give that individual the authority to make bids and applications on your behalf during your absence, and to serve as a conduit if the employer has questions of you that cannot wait until you return to work. This step will enable you to devote your full time and attention to your military duties while you are serving at the tip of the spear. This advice applies to all recalled Reservists and National Guard members, not just those who work for the federal government.