

LAW REVIEW 953-update

UPDATE

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

1.1.1.8—Applicability of USERRA to Federal Government as Employer

1.4—USERRA Enforcement

On Dec. 14, 2009, the United States Office of Special Counsel (OSC) announced that it had settled its Uniformed Services Employment and Reemployment Rights Act (USERRA) case against the Department of Homeland Security (DHS), on behalf of Brigadier General (BG) Michael J. Silva, USAR. The terms of the settlement are confidential.

BG Silva is a life member of ROA and our National Vice President-Army. In May 2006, he was working as a contract employee of SPS Consulting for DHS at a Customs & Border Protection (CBP) facility in Lorton, Virginia. Under a contract between CBP and SPS Consulting, BG Silva worked at a DHS facility and reported to DHS officials, but he was paid by SPS. DHS and SPS were his joint employers, in that each had control over certain aspects of the employment relationship.

BG Silva deployed to Iraq in 2006 and returned in Aug. 2007. He met the USERRA eligibility criteria for reemployment: prior notice to SPS and DHS, release from active duty under honorable conditions, and timely application for reemployment. SPS was considering reinstating him into the position that he had left to report to active duty, but the DHS Contracting Officer's Technical Representative threatened to cancel the SPS contract with DHS if it did so, and SPS did not reemploy BG Silva.

BG Silva filed complaints with the Veterans' Employment and Training Service, U.S. Department of Labor (DOL-VETS), alleging that both SPS and DHS had violated USERRA. DOL-VETS investigated his complaint against SPS and, under a Demonstration Project in effect at the time, forwarded his complaint against DHS to OSC for investigation. Both DOL-VETS and OSC found his complaints to have merit. DOL-VETS referred the complaint against SPS to the U.S. Department of Justice (DOJ), which declined to represent BG Silva in filing suit against SPS in federal district court. OSC filed a complaint against DHS before the Merit Systems Protection Board (MSPB).

BG Silva said, "I am very pleased with the actions on my behalf by DOL-VETS and OSC. DOL-VETS investigated my case against SPS and referred it to DOJ. OSC investigated my case against DHS and did a great job representing me before the MSPB. However, I am most disappointed that DOJ refused to file suit on my behalf against SPS. DOJ has adamantly refused to provide any explanation of its rationale for declining to take action in my case. Congress intended that Reserve Component personnel get their civilian jobs back upon return from mobilization, and our Government should bear the responsibility of enforcing USERRA when this does not happen. If DOJ has unfettered discretion to decline representation without any explanation, this makes a mockery of the assurances that Congress has made while placing the burden and cost of enforcing the law upon the servicemembers affected by its violation."

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.