

**Number 93, October 2003:
USERRA Enforcement by OSC (Continued)**

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I discussed enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in Law Review 12 (November 1999). Cases against federal agencies are adjudicated by the Merit Systems Protection Board (MSPB). The Office of Special Counsel (OSC) is charged with enforcing USERRA against federal agencies, by representing federal-sector veterans and Reserve Component personnel in MSPB actions. As Paul Conrad and I discussed in Law Review 67 (March/April 2003), the OSC has essentially ignored its responsibilities under USERRA.

The OSC is headed by the special counsel, who is nominated by the president, with Senate confirmation, for a five-year term. The last confirmed special counsel was Elaine Kaplan, who was appointed by President Clinton in April 1998. Her term expired in April 2003. In July 2003, President Bush nominated Scott J. Bloch, Esq., to be the special counsel. After the nomination was announced, I sent the following letter to Mr. Bloch. He has not responded, probably because he has not yet been confirmed by the Senate. Nonetheless, I hope that he will give a higher priority to USERRA enforcement than the last special counsel.

Dear Mr. Bloch:

Congratulations on your nomination to be the special counsel! I am writing to bring to your attention an important responsibility of OSC that has been largely ignored, and of which you may not be aware. I am talking about enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4333.

USERRA was enacted in 1994, and it replaced the Veterans' Reemployment Rights (VRR) law, which was formerly codified at 38 U.S.C. 2021-2026, and which can be traced back to 1940. The basic idea of the VRR law and USERRA is that a person who leaves a civilian job for voluntary or involuntary military service (including training in the National Guard and Reserve) is entitled to re-employment in his or her civilian job following service.

I first became interested in re-employment rights when I was employed as an attorney for the U.S. Department of Labor (DOL), between 1982 and 1992. With one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that became USERRA, with some changes in Congress, of course.

At the Reserve Officers Association (ROA), I write a Law Review column for The Officer, ROA's magazine. The Law Review Archive is on ROA's Web site, www.roa.org. Click on "Legislative Affairs" then "Law Review Archive" at the bottom of the drop-down menu. I invite your attention specifically to Law

Review 67 (March/April 2003), entitled "Enforcement of USERRA Against Executive Agencies." For your convenience, I am enclosing a paper copy of that article.

According to the Department of Defense (DoD), about 10 percent of National Guard and Reserve personnel are civilian employees of the federal government. As you probably know, more than 300,000 National Guard and Reserve personnel have been called to active duty since September 2001, and more than 200,000 of those personnel are still on active duty today. About 20,000 of those 200,000 are federal employees. In the coming months, they will be leaving active duty and returning to their civilian jobs.

Like the VRR law, USERRA applies to the federal government, to the states and their political subdivisions, and to private employers (regardless of size). The VRR law had no real enforcement mechanism with respect to the federal government as a civilian employer. One of the big improvements made by USERRA was to establish a real enforcement mechanism against federal executive agencies (all executive branch agencies except intelligence agencies). That enforcement mechanism involves the OSC and the Merit Systems Protection Board (MSPB). I invite your attention to 38 U.S.C. 4324.

I also invite your attention to 38 U.S.C. 4301(b): "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." Unfortunately, the federal government is far from a model employer. The worst offenders are the United States Postal Service and the Bureau of Prisons (in the Department of Justice).

Persons claiming USERRA violations can file complaints with the Veterans' Employment and Training Service (VETS), in DOL. See 38 U.S.C. 4322(a). VETS investigates and attempts to obtain compliance. If the employer is a federal executive agency, and if VETS is unable to obtain compliance, the complainant can request that DOL refer the case to the OSC. See 38 U.S.C. 4324(a)(1). "If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board." 38 U.S.C. 4324(a)(2)(A).

In the almost nine years since USERRA was enacted (October 13, 1994), the OSC has brought not one single USERRA case to the MSPB. Your two predecessors, and the OSC staff, have simply disclaimed the role that Congress assigned OSC when it enacted USERRA. The OSC position has been, "Congress did not consult us before giving us this additional responsibility, and Congress did not give us any additional resources, so we just say no."

I am writing to ask you to undo this policy, as your first order of business. I recognize that the OSC has many important responsibilities and a limited budget, but I respectfully suggest that USERRA enforcement should have the highest priority for your new office, especially as 20,000 federal employees return from active duty over the coming months. You should vigorously enforce USERRA, even if that means that you have to cut back on something else. The brave young men and women who have left their civilian jobs to serve our country under conditions of physical danger and financial deprivation certainly deserve no less.

Several times each month, I address attorneys and Reserve Component personnel about USERRA. I would welcome the opportunity to have you accompany me on one of those occasions, to give you an appreciation for USERRA and the need for USERRA enforcement. Please contact me by telephone or e-mail.

Sincerely,
Samuel F. Wright

*Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.