

## LAW REVIEW<sup>1</sup> 10018

### SCRA Applies to USPHS Officers

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

[About Sam Wright](#)

#### 4.5—Protection from State/Local Tax Authorities

**Q: I retired from the Public Health Service (PHS) in May 2006, after a 23-year career as a PHS dentist. I was born and raised in California where I also attended college. I moved to Illinois for dental school. In 1979 I signed up for the PHS and spent a year in Arizona assigned to an Indian Health Service (IHS) clinic. Not yet certain about my future career, I left the PHS in 1980. I rejoined the PHS in 1984 while living in Oregon and was assigned to an IHS facility in that state. My wife is from Washington, and we requested an assignment there. In 1989 I was reassigned to an Indian reservation in Washington. I established my residency there (voter registration, driver's license, automobile registration, etc.) and maintained my Washington domicile for the rest of my PHS career.**

**For the last eight years of my PHS career (May 1998 to May 2006), I was assigned to an IHS clinic at a reservation in Oregon. Realizing that I would likely end my career there, I**

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<sup>1</sup>I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup>BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

purchased a house near the reservation. After I retired from PHS, my wife and I remained in the house, and I joined a civilian dental practice.

I was a domiciliary of the State of Washington after I was assigned there in 1989, and I maintained my Washington domicile throughout the rest of my career. I voted in Washington in each major election, usually by absentee ballot. I never registered or voted in any of the places where the PHS assigned me for duty. I registered to vote in Oregon in June 2006, a month after I retired.

I acknowledge that I am an Oregonian as of May 2006, and I have been paying Oregon state income tax since I retired. But the State of Oregon contends that I was an Oregon domiciliary during the last eight years of my active PHS service and that I owe tens of thousands of dollars of Oregon state income tax. I contend that the Servicemembers Civil Relief Act (SCRA) shielded me from having to pay Oregon state income tax while I was in active PHS service. The state tax department contends that the SCRA does not apply to PHS officers like myself. What do you think?

A: I believe that the state tax department is wrong and that it would be unlawful (under federal law) for Oregon to charge you state income tax for the period prior to your retirement from the PHS.

Title 10 of the United States Code, section 101 (the definitions section) defines several terms, including “armed forces” and “uniformed services.” The armed forces are the United States Army, Navy, Marine Corps, Air Force, and Coast Guard. 10 U.S.C. 101(a)(4). The uniformed services are the armed forces plus the commissioned corps of the PHS and the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA). 10 U.S.C. 101(a)(5).

The SCRA is codified in title 50 Appendix of the United States Code, sections 501 through 596 (50 U.S.C. App. 501-596). The SCRA’s definition section makes clear that PHS and NOAA officers are covered while in active service. “The term ‘military service’ means— ... (B) in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service.” 50 U.S.C. App. 511(2)(B).

“A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.” 50 U.S.C. App. 571(a).

“Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.” 50 U.S.C. 571(b).

When you reentered active service in the PHS, in 1984, you were living in and domiciled in Oregon, and for the next five years you were assigned to PHS duty in Oregon. In 1989, the PHS reassigned you to Washington, where you remained for three years. While serving in Washington, you made a bona fide change of your domicile, from Oregon to Washington. You did this right. You simultaneously had a physical presence for a significant time in the state in which you wished to establish your domicile and the intent to make that place your domicile. Having changed your domicile to Washington, the SCRA entitled you to maintain your Washington domicile for the remainder of your PHS career, and that is what you did.

**Q: The Oregon tax department's fallback argument is that I was domiciled in Oregon, not Washington, during the 1998-2006 period, because I purchased a house in Oregon and worked on a part-time basis with the dental practice that I joined on a full-time basis after I retired from the PHS. What do you think?**

**A:** I think that the state's argument is invalid. Every human being has one and only one domicile at a time. Until your PHS retirement, your domicile was Washington, not Oregon. You came to Oregon because the PHS assigned you to duty in that state. Your decision to remain in Oregon after your PHS retirement is irrelevant.

"For purposes of voting for any Federal office ... or a State or local office, a person who is absent from a State in compliance with military or naval orders shall not, solely by reason of that absence—(1) be deemed to have lost a residence or domicile in that State, *without regard to whether or not the person intends to return to that State*; (2) be deemed to have acquired a residence or domicile in any other State; or (3) be deemed to have become a resident in or a resident of any other State." 50 U.S.C. App. 595 (emphasis supplied).

**Q: The state has also stated that the SCRA is unconstitutional insofar as it is construed to forbid the state from taxing my PHS income. What do you think?**

**A:** The United States Supreme Court rejected a claim by the State of Colorado that the prior version of the SCRA was unconstitutional insofar as it forbade Colorado to tax the personal property of an Air Force officer who physically resided in the state (pursuant to military orders) but was domiciled in Louisiana. *See Dameron v. Brodhead*, 345 U.S. 322 (1953). I discuss that case and its implications in detail in Law Review 0917 (April 2009).

I think that *Dameron* is right on point to your situation. It would be frivolous for Oregon to argue that the SCRA is unconstitutional or that it does not apply to your situation.

**Q: I had an attorney to represent me in this matter. His fee (computed on an hourly basis) had already added up to more than half of the amount of money in controversy, at the time I discharged him. There is an important legal issue involved here, but it makes no sense for me to spend more on attorney fees than I can ever hope to recover, if I win. Help!**

**A:** In *Dameron*, the amount in controversy was only \$23.51. The United States Department of Justice (DOJ) represented Dameron, at no charge, in the state trial court, the state supreme court, and the United States Supreme Court. I will inquire of DOJ as to whether it is willing to represent you.

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), if you proceed with private counsel and prevail, the court can award you reasonable attorney fees, in addition to back pay and other relief. See 38 U.S.C. 4323(h)(2). We need a similar fee-shifting provision for the SCRA. Please see Law Review 0942 (Sept. 2009).

**Update – March 2022<sup>3</sup>**

## **SCRA**

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.<sup>4</sup> The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant section cited throughout the article can be found at:

50 U.S.C. App. § 511 discussing the definitions can be found at 50 U.S.C. § 3911.

50 U.S.C. App. § 595 discussing the guarantee of residency for military personnel and spouses of military personnel can be found at 50 U.S.C. § 4025.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.<sup>5</sup>

## **Private Right of Action**

The Veterans benefits Act of 2010 added a provision that allows service members who have been harmed by a violation of the SCRA to recover.<sup>6</sup> The provision in the SCRA reads as follows:

### **(a) In general**

Any person aggrieved by a violation of this chapter may in a civil action—

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<sup>3</sup>Update by Second Lieutenant Lauren Walker, USMC.

<sup>4</sup>*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra> (last visited Mar. 10, 2022).

<sup>5</sup>Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

<sup>6</sup>PL 11-275, 124 Stat. 2864.

- (1) obtain any appropriate equitable or declaratory relief with respect to the violation;
- (2) recover all other appropriate relief, including monetary damages; and
- (3) be a representative party on behalf of members of a class or be a member of a class, in accordance with the Federal Rules of Civil Procedure, notwithstanding any previous agreement to the contrary.

**(b) Costs and attorney fees**

The court may award to a person aggrieved by a violation of this chapter who prevails in an action brought under subsection (a) the costs of the action, including a reasonable attorney fee.

50 U.S.C. § 4042.

There is now a similar fee-shifting provision in the SCRA that is similar to the USSERA. Therefore, it could be beneficial for an individual to litigate important legal issues that arise under the SCRA because recovery of attorney fees is now possible.

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This article is one of 2,300-plus “Law Review” articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s eight<sup>7</sup> uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for

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<sup>7</sup>Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448.

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