LAW REVIEW 1066

USERRA Overrides Federal Agency Rule on "Outside Employment"

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Q: I recently completed four years of active duty in the Marine Corps. I left active duty and found a job for a federal agency. My current status in the Marine Corps is that I am a member of the Individual Ready Reserve (IRR). I am planning to join the Marine Corps Reserve as an active drilling member.

I informed my immediate supervisor at work of my plans to join the Marine Corps Reserve, and she referred me to an attorney in the agency's ethics office. The attorney told me that I must complete an agency form "requesting permission to engage in outside employment" and must obtain written permission of the agency*before* I am permitted to join the Marine Corps Reserve.

I am concerned about the wording of the agency form. It requires me to acknowledge that my federal job requires my availability 24 hours per day, 365 days per year, and that I will "remain subject to that condition of employment, regardless of whether the employee is performing the [outside] position approved by this application." What happens if the civilian employer tries to call me in to work while I am on a drill weekend or annual training? Does that mean that I must interrupt my Marine Corps Reserve training to report to the civilian job?

Is it lawful for this federal law enforcement agency to require me to get its permission before joining the Marine Corps Reserve? Can the agency require me to interrupt military training to report to the civilian job?

A: The answer is "no" to both questions. Your agency's policy is a clear and egregious violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). You do not need the employer's permission to join the Marine Corps Reserve, and you are not required to notify the employer that you are considering joining the Marine Corps Reserve.

You are not required to give notice to the employer until the first time that you will need to be away from work in order to perform "service in the uniformed services." USERRA defines that term broadly, and it includes active duty, active duty for training, inactive duty training (drills), initial active duty training, funeral honors duty, and time required to be away from a civilian position of employment for the purposes of an examination to determine fitness to perform any such duty. 38 U.S.C. 4303(13).

When you notify the employer that you will need to be away from work for uniformed service, I suggest that you phrase the notice as a request for permission, as a matter of courtesy to the employer. But as a matter of law you do not need the employer's permission to be away from work, for a day or up to five years, in order to perform uniformed service. The employer does not get a veto on your absenting yourself from work in order to perform uniformed service.

If the employer persists in trying to veto your joining the Marine Corps Reserve or in trying to veto your absenting yourself from work to perform uniformed service, you should contact a Department of Defense organization called the National Committee for Employer Support of the Guard and Reserve (ESGR), at 800-336-4590. ESGR headquarters will put you in touch with a volunteer ombudsman in your city, to work with you and your employer to resolve this issue without "making a federal case out of it." If ESGR is unable to help you, your next step would be to make a formal complaint to the Veterans' Employment and Training Service of the U.S. Department of Labor (DOL-VETS), or to retain private counsel and file an action in the Merit Systems Protection Board.

I suggest that you *not* call ESGR, or DOL-VETS, or me, or anyone else, to complain about your employer, while on the clock with the employer. I invite your attention to Law Review 0702, available at www.roa.org/law_review. ESGR answers its toll-free number between 8 a.m. and 6 p.m. Eastern Time Monday through Friday. If you need to contact ESGR outside those hours, in order to avoid calling from work, send an e-mail to Curtis.Bell@osd.mil andUSERRA@osd.mil. Give ESGR your name, your telephone number, and a time when you can be reached outside your civilian work hours.

The employer's form is designed for and is appropriate for an entirely different purpose than the purpose it is being used for in your situation. No law requires the employer to give you permission to take on an outside *civilian job.* If you want to work the evening shift at your local McDonald's, you need the agency's permission to undertake such outside employment, but *the Marine Corps Reserve is fundamentally different from McDonald's.*

The agency ethics attorney who told you that you need the agency's permission to join the Marine Corps Reserve is wrong and should know better. Federal attorneys often show an unfortunate tendency to think only about the specific law that they are charged with enforcing and to ignore other laws that are more directly applicable.

Congress enacted USERRA in 1994, as a long-overdue recodification of the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

Like the VRRA, USERRA applies to essentially all employers in this country, including the Federal Government, state and local governments, and private employers, regardless of size. 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).

The Federal Government, through the enactment and enforcement of USERRA, is requiring all employers to accommodate National Guard and Reserve service by employees and prospective employees. In dealing with its own employees and prospective employees, the Federal Government must do at least as much as it requires other employers to do. "Do as I say, not as I do" has always been a losing argument.

"And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" *Matthew* 7:7 (*King James Bible*)

At several congressional hearings that I have attended, Congress has shown great displeasure and impatience with federal executive agencies that flout USERRA. More than two years ago, Congress enacted section 4335 of USERRA, 38 U.S.C. 4335. This section requires the head of each federal executive agency (in conjunction with the Director of the Office of Personnel Management) to *train* human resources personnel (including supervisors) in the requirements of USERRA. Most federal human resources personnel have not had this required USERRA training or weren't listening when they attended the training.

Section 4311(a) of USERRA provides as follows: "A person who is a member of, *applies to become a member of,*performs, has performed, *applies to perform*, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, *application for membership,* performance of service, *application for service,*or obligation." 38 U.S.C. 4311(a) (emphasis supplied).

USERRA's 1994 legislative history explains the intent of section 4311 as follows: "Current law protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. Trump Shuttle,* 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991)), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2456.