

## LAW REVIEW<sup>1</sup> 10094

### Coverage for National Guard Members on State Duty

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On Nov. 24, 2010, the *Santa Fe Reporter* (SFR) (New Mexico) published an interesting and well-researched article titled “36 Hours, 30 Years Later.” The article details some significant gaps in coverage of National Guard members on state active duty (SAD). Some of the gaps have been closed, but others remain.

On Feb. 2, 1980, Mary Racicot (a Vietnam veteran) was at drill with the 744<sup>th</sup> Medical Detachment of the New Mexico Army National Guard. Her commander (Major James Buckman) called and directed her to load up the unit’s medical equipment and take the five lower ranking Guard members under her to the state penitentiary, to perform damage control at one of the most violent prison riots in our nation’s history.

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<sup>1</sup>I invite the reader’s attention to <https://www.roa.org/page/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 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).

Racicot and her small unit remained at the penitentiary late into the night, treating guards and inmates who had been beaten, raped, and tortured. That night, Racicot was placed on “body detail,” transferring bodies from stretchers to body bags. She wrote, “The most difficult for me was an inmate that had a blow-torch to his face and groin. When I went to move him from the stretcher, his tissue was still melting. It went through my fingers.”

Racicot and her colleagues suffered Post Traumatic Stress Disorder (PTSD) and other serious ill effects. She received counseling, but only 18 years later (1998) and at her own expense. The federal Veterans Administration (VA) (which became the Department of Veterans Affairs in 1989) denied her claim for benefits, on the grounds that she suffered the ill effects while in a state status, rather than a federal

status. The VA paid benefits to six other National Guard riot veterans, only to rescind the benefits in 2002.

When Mary Racicot left active duty and affiliated with the New Mexico Army National Guard, she took two enlistment oaths and became a member of two legally distinct entities. This arrangement is the same for all National Guard members. Racicot became a member of the New Mexico Army National Guard (NMARNG), the state militia. She simultaneously became a member of the Army National Guard of the United States (ARNGUS), one of our nation’s seven Reserve Components (along with the Army Reserve, the Air National Guard of the United States, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve).

Like National Guard members generally, Racicot is considered to be in a “state status” except when called to federal active duty by the President under title 10 of the United States Code (U.S.C.). While in a state status, Racicot and other National Guard members perform training and other duty (including “full-time National Guard duty”) for which they are entitled to receive pay from the United States, under title 32 of the U.S.C. On other days, Racicot and other Guard members perform SAD under state law and receive state pay, not federal pay. In some states, the SAD pay for a day is substantially less than the federal military pay scale for a day.

On Feb. 2, 1980, Racicot and her colleagues were performing title 32 duties while training for federal contingencies at the National Guard armory. When they packed up their gear and traveled from the armory to the penitentiary, they thereby transformed from a title 32 statuses to an SAD status. Thus, they were not entitled to VA benefits for injuries (including PTSD) sustained during the SAD for the riot.

In its article, the *Santa Fe Reporter* wrote: “Since then-Gov. Bruce King didn’t get then-President Jimmy Carter’s official permission to call in the Guard, riot victims are not eligible for federal benefits, Veterans Affairs Public Affairs Officer Jo Ann Pacheco tells SFR via email.” That explanation is not entirely accurate. The Governor of New Mexico did not need the President’s permission to call up

National Guard members for SAD. Governor King could have asked President Carter to call up New Mexico National Guard

members for federal active duty under title 10, but the President almost certainly would have declined such a request. Although extraordinarily serious, the prison riot was a state emergency, not a national emergency. In any case, former Governor King died Nov. 13, 2009, so he is not available to explain his reasoning in the 1980 crisis.

Racicot and her colleagues were effectively state employees during their response to the prison riot. One would think that they should be eligible for state workers' compensation benefits, like other state employees injured in the course and scope of their state employment. New Mexico established its Workers' Compensation Administration (WCA) in 1986, six years after the riot. In 2002, a WCA spokesman told

the *Albuquerque Journal* that access to state workers' compensation benefits for the National Guard riot veterans was "very unlikely."

Racicot and her colleagues fell through the proverbial crack, and even after 30 years they have not been pulled out of this crack. Worse, if something similar were to happen today the National Guard members could easily fall through that same crack. Congress and the state legislatures need to address these issues comprehensively, to ensure that future National Guard members do not suffer the sad fate of Mary Racicot and her colleagues at the 1980 riot. In addition to coverage for injuries sustained in the line of duty while on SAD, other issues are as follows.

### **Right to return to civilian job after SAD**

The Uniformed Services Employment and Reemployment Rights Act (USERRA) gives an individual the right to reemployment with the pre-service employer after voluntary or involuntary service in the uniformed services. USERRA applies to almost all employers in this country, including the Federal Government, state and local governments, and private employers, regardless of size.

National Guard members have reemployment rights under USERRA after title 10 duty or title 32 duty, but not SAD. Every state has a state law to protect National Guard members on SAD, but there are loopholes in those laws. For example, please see Law Review 45 at [www.roa.org/law\\_review](http://www.roa.org/law_review). The complainant in that situation was a member of the Washington Army National Guard, but his civilian job was in Oregon. He was called to SAD by the Governor of Washington. Upon his release from SAD, his Oregon employer refused to reemploy him. USERRA does not apply to SAD. The Washington law cannot apply across the state line in Oregon. The Oregon law by its terms was limited to "a member of the National Guard of this state. This poor fellow fell through the crack and did not get his job back. The law has not been fixed to prevent a recurrence of this sad situation.

## **Default judgment protection while on SAD.**

Congress enacted the Servicemembers Civil Relief Act (SCRA) in 2003, to replace the Soldiers' and Sailors' Civil Relief Act (SSCRA), which dates back to 1917. The SCRA provides many important legal protections to the individual who has left civilian life for active military service, voluntarily or involuntarily. One important protection is to prevent a default judgment being entered against a service member while he or she is deployed and unable to file a timely answer. The SCRA is codified in title 50 Appendix, U.S.C., sections 501- 596.

Section 101 of the SCRA [50 U.S.C. App. 511] defines nine terms used in this law, including the term "military service." "The term 'military service' means—(A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard-- ... (ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds." 50 U.S.C. App. 511(2)(A)(ii). SAD does not give rise to SCRA rights.

The Service Members Law Center will propose federal and state legislation to ensure that National Guard soldiers and airmen not fall through the cracks.

### **Update – May 2022**

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 SCRA by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.<sup>3</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.

The relevant sections cited throughout the article can be found as follows:

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

50 U.S.C. App. § 521 discussing protection of servicemembers against default judgments can be found at 50 U.S.C. § 3931

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.<sup>4</sup>

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<sup>3</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>4</sup>Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

### **Please join or support ROA**

This article is one of 1800-plus “Law Review” articles available at [www.roa.org/page/lawcenter](http://www.roa.org/page/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 in 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 many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, 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 seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. 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.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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