

**Letter To Federal Agency Concerning USERRA Case
Involving an Agency Employee**

By CAPT Samuel F. Wright, JAGC, USNR*

As ROA's ombudsman, Captain Wright sent this letter to the general counsel of a federal agency, concerning a USERRA case involving an employee of that agency. For the magazine, we have edited out all references to the name of the National Guard member and the agency.

Dear Mr. Blank:

Here at the Reserve Officers Association (ROA), I write a "Law Review" column for The Officer, our monthly magazine. You can find the back issues on our Web site, www.roa.org. Click on "Legislative Affairs" then "Law Review Archive." You will find more than 100 articles, mostly by me and mostly about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

USERRA was enacted in 1994, and it is codified at 38 U.S.C. 4301-4333. USERRA was a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. The VRR law was codified at 38 U.S.C. 2021-2026.

One of the major improvements made by USERRA was the establishment of an enforcement mechanism for federal-sector re-employment rights cases. The VRR law applied to the federal government, as a civilian employer, as well as state and local governments and private employers, but there was no real enforcement mechanism for federal-sector cases. The Merit Systems Protection Board (MSPB) would apply the VRR law as a defense to a charge of "unexcused absence," but only if the employee otherwise could appeal to the MSPB. A federal employee in the first year of federal employment cannot, generally speaking, appeal a dismissal to the MSPB.

As you know, probationary employment is a subset of at-will employment. If I am an at-will employee, the employer can fire me for any reason except a reason that is forbidden by federal law. For example, if the employer fires me for activities protected by the National Labor Relations Act, the National Labor Relations Board does not lose the authority to remedy such a violation simply because I am an at-will or probationary employee. The same principles apply under USERRA.

Under the VRR law, some federal supervisors and personnel offices made a mockery of this law's protection by the simple expedient of firing a federal employee-Reservist

before the employee passed the one-year employment point. Prior to the enactment of USERRA, such a wrongfully discharged employee had no remedy and no forum for the adjudication of his or her claim. When USERRA was drafted, we made sure to provide a remedy for federal employees in this situation. I invite your attention to 38 U.S.C. 4324(c)(1), which provides that "the Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b)." (Emphasis supplied.)

It is clear beyond any room for disagreement that USERRA gives the MSPB jurisdiction to adjudicate a USERRA claim involving a federal employee, even if the employee cannot otherwise invoke MSPB jurisdiction. This conclusion is buttressed by USERRA's legislative history. I invite your attention to House Rep. No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2472. In two published cases, the MSPB has held that it has jurisdiction to hear and adjudicate USERRA complaints by probationary federal employees who cannot otherwise get to the MSPB. I invite your attention to *Jasper v. United States Postal Service*, 73 MSPR 367 (1997) and *Petersen v. Department of the Interior*, 71 MSPR 227 (1996).

All of this brings us to the case of Major John Doe, a member of the Army National Guard. Major Doe was hired by your Timbuktu regional office on 14 July 2002. His civilian supervisors gave him a hard time about his National Guard responsibilities and ultimately fired him on 29 May 2003, shortly before his one-year anniversary of employment. He appealed the dismissal to the MSPB.

I have in front of me the "Initial Decision" of MSPB Administrative Judge [Name Withheld], dated 27 October 2003. Judge [Withheld] found that the MSPB had jurisdiction under USERRA, citing *Jasper* and *Petersen*. She also found that Mr. Doe (who represented himself at the hearing) had met his burden of proof and had established that your agency had violated USERRA.

I also have in front of me the "Agency Motion for Extension of Time to File Petition for Review and Designation of Counsel." This motion was signed by an attorney in your office on 10 November 2003. On that same date, MSPB Clerk Bentley M. Roberts Jr. granted your agency an extension until 22 December 2003, to file the petition for review.

In her motion, your staff attorney averred that "the instant matter raises novel legal issues involving the interplay of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the statutory probation period found in 5 U.S.C. 7511(a)." With all due respect, that is not a novel legal issue. That issue was definitively resolved in *Jasper* and *Petersen*, the cases cited by Judge [Withheld].

I respectfully submit that your agency has willfully violated USERRA, its legislative history and intent, and the policy of the Bush administration in the way that it treated

Major Doe. Please do not compound the violation by proceeding with this appeal.

I 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." As an agency that enforces employee protections, your agency should, I respectfully submit, be especially careful about observing employee protections in its relationship with its own employees.

More than 300,000 members of the National Guard and Reserve have been called to active duty since the 11 September atrocities. More than 30,000 of those are federal employees, and several of them have made the ultimate sacrifice. Accordingly, I am writing to ask you to do three things:

- a. Drop your appeal of the Doe case.
- b. Completely and immediately comply with the administrative judge's decision and order.
- c. Review all of your agency's internal personnel policies to ensure that they are fully consistent with USERRA.

Thank you for your kind attention to this request.

Note: After receiving this letter, the agency dropped its appeal and complied with the administrative judge's decision and order. The National Guard officer is back at work, with back pay. It is unclear whether the agency has comprehensively reviewed its personnel policies to ensure consistency with USERRA.

*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.