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The National Guard Must Be a Model Employer under USERRA

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Q: I am a Sergeant First Class in the Army National Guard of New Caledonia.[1] I am also a technician for the National Guard. My technician job is a civilian job, but as a condition of employment I must maintain my membership in the Army National Guard, and I have done that. I perform inactive duty training (drill weekends) in my military capacity, and I sometimes perform annual training with my unit, in my military capacity. If the unit were to be mobilized, I would probably go with the unit, in my military capacity. On regular work days, I am a civilian employee, although I normally wear my Army uniform and observe military courtesies at work.

The Adjutant General (TAG) of our state (head of the state's National Guard) has adopted a written policy which provides: "Permanent technician personnel are not authorized to volunteer for title 10 or ADOS [Active Duty Operational Support] tours." I recently heard of an opportunity to go on active duty, and I submitted an application. My technician supervisor found out about my application and threatened me with punishment (maybe firing) for having made an "unauthorized" application in violation of this written policy.

I think that the TAG's written policy violates the Uniformed Services Employment and Reemployment Rights Act (USERRA). What do you think?

A: I agree with you that this policy, on its face and as it has been applied to you, is a clear violation of USERRA.

First, it should be noted that the TAG is your *civilian employer* and is bound by USERRA, just like any other civilian employer (federal, state, local, or private sector). Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law, including the term "employer." That definition includes the following: "In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the adjutant general of the State in which the technician is employed." 38 U.S.C. 4303(4)(B).

Congress enacted USERRA in 1994, to replace the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. USERRA's legislative history explains the rationale for defining the TAG as the civilian employer of National Guard technicians, as follows: "Section 4303(4)(B) would provide that the employer of a National Guard technician shall be the Adjutant General of the State where the technician is employed. Because of the mix of State and Federal attributes of National Guard

technicians, these persons have had difficulty enforcing their rights under the existing reemployment statute [VRRA]. The purpose of this provision is to clarify that National Guard technicians are to be considered to be State employees for purposes of chapter 43 of title 38 [USERRA], but not necessarily for any other purpose, except as otherwise provided by law." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2454-55.

National Guard technicians have a unique hybrid status—partly state and partly federal, and partly civilian and partly military. But for purposes of USERRA they are considered to be civilian employees of the state, and the TAG (a state official) is considered to be their civilian employer. Thus, the enforcement mechanism for National Guard technicians claiming USERRA rights is through the appropriate federal district court, not through the Merit Systems Protection Board.

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).

It appears to me that you have been threatened with the denial of a benefit of employment, and possibly with denial of retention in employment, on the basis of your application for service. Such a denial violates section 4311(a).

USERRA's legislative history explains the purpose and effect of section 4311(a) as follows: "Current law [the VRRA] 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, Inc.,* 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of 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." 1994 *USCCAN* at 2456.

Like the VRRA, USERRA applies to essentially all employers, including the Federal Government, state and local governments, and private employers, regardless of size. If the Secretary of the Department of Corrections of the state published a memorandum stating that corrections officers are "not authorized" to apply for active duty, any attempt to enforce such a memorandum would clearly violate USERRA. In his relationship with the National Guard technicians, the TAG is their civilian employer and has no better rights than the Secretary of the State Department of Corrections.

Under USERRA, the employee must give the employer prior oral or written notice, before absenting himself or herself from the civilian job for the purpose of performing service in the uniformed services (active duty, active duty for training, inactive duty training, funeral honors duty, etc.). *See* 38 U.S.C. 4312(a). This is a notice requirement, not a permission requirement. The employee does not need the employer's permission, and the employer

does not get a veto on the employee leaving work (for a day, for a year, or for up to five years) to perform uniformed service.

USERRA does not require an employee to give the employer notice before *applying for service.* I get questions about this scenario frequently. I generally advise the RC member not to tell the employer that he or she has applied to go on active duty, at least until it is reasonably certain that he or she will in fact be going on active duty. Don't get your employer all spun up, only to learn that your service does not want you to go on active duty at this time.

My principal concern with the TAG's written memorandum in this situation is with the "optics"—to use "Inside the Beltway" lingo. The appearance is terrible. 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). As a civilian employer, the National Guard must strive to be a model among models.

By this memorandum, the TAG has created the appearance that he considers himself above USERRA, with respect to his relationship with his own civilian employees, the technicians. This appearance must necessarily undermine the TAG's moral standing to advocate for his Soldiers and Airmen, with respect to their civilian employers. "Do as I say and not as I do" has always been a losing argument.

"Any 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).*

I call upon the TAG of the state in question to amend the subject memorandum by deleting the offending sentence. I call upon all the TAGs to review their policies and practices, with respect to National Guard technicians volunteering for active duty.

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[1] We are withholding the identity of the state in question, at least for now. We are hopeful that The Adjutant General (TAG) of the state will amend the written policy to bring it into compliance with federal law (USERRA). I frequently receive complaints from National Guard technicians, to the effect that the National Guard, as their civilian employer, is flouting USERRA.