

LAW REVIEW¹ 11104

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Reserve and National Guard Personnel Who Die During a Drill Weekend

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

5.3—Death Gratuity

On December 2, 2011, Fox News reported on the tragic case of Captain Samson Luke, ARNG. On January 9-10, 2010 (Saturday and Sunday), Captain Luke was scheduled to perform at the Arkansas National Guard drill weekend. After a grueling Saturday performing his National Guard duties outside in freezing weather, Captain Luke died of a heart attack while at his home for the evening.

Captain Luke performed his National Guard inactive duty training (drills) at an armory that was located just 12 miles from his home. Accordingly, he was not entitled to reimbursement for a hotel room—that is limited to National Guard and Reserve members who perform drills at least 50 miles from home.

¹I 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.

²BA 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.

The Army initially appointed a casualty assistance officer to help the widow and four young children, and the Army arranged for the remains to be buried on January 18, 2010 (what would have been Captain Luke's 35th birthday). Without notice, the Army pulled the casualty assistance officer and informed the family that it would not pay for the funeral and related expenses because Captain Luke was not in a duty status at the time of his death.

Section 1481 of title 10, United States Code, provides as follows concerning the circumstances under which a military service will provide for the recovery, care, and disposition of the remains of a deceased service member:

- (a) The Secretary concerned [the Service Secretary, like the Secretary of the Army] may provide for the recovery, care, and disposition of the remains of the following persons:
 - (1) Any Regular of an armed force under his jurisdiction who dies while on active duty.
 - (2) A member of a reserve component of an armed force who dies while—
 - (A) on active duty;
 - (B) performing inactive-duty training;
 - (C) performing authorized travel directly to or from active duty or inactive-duty training;
 - (D) remaining overnight immediately before the commencement of inactive-duty training, or remaining overnight, between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training;
 - (E) hospitalized or undergoing treatment for an injury, illness, or disease incurred or aggravated while on active duty or performing inactive-duty training; or
 - (F) either—
 - (i) serving on funeral honors duty under section [12503](#) of this title or section [115](#) of title [32](#);
 - (ii) traveling directly to or from the place at which the member is to so serve; or

(iii) remaining overnight at or in the vicinity of that place before so serving, if the place is outside reasonable commuting distance from the member's residence.³

Under 37 U.S.C. 206(a), a member of the National Guard or Reserve is entitled to 1/30th of his or her monthly base pay (essentially, one day of base pay) for a period of at least two hours of approved training. Captain Luke probably performed a four-hour drill period on Saturday morning and another four-hour drill period on Saturday afternoon. At the end of his Saturday afternoon drill, he drove home, expecting to return early Sunday morning for the next drill period.

If Captain Luke's drill site had been 120 miles from his home, instead of 12 miles, he likely would have spent Saturday night at a hotel or military quarters provided by the Army. His family would have been entitled to benefits under section 1481 if he had suffered a heart attack and died while in such temporary lodging. Similarly, the services would be due if he had died while driving to his drill or returning home from his drill or while performing the drill.

Each month, several National Guard and Reserve service members (not on active duty) die of natural causes, accidents, or homicide or suicide. Most of them die during the four weeks between drill weekends, but a few die during the drill weekend. Dying at home on Saturday night, between the Saturday drills and the Sunday drills, does not entitle the member to these section 1481 benefits, any more than dying midway between the January drill weekend and the February drill weekend would qualify. No matter how tragic and compelling the circumstances, the Army (or any federal agency) is not entitled to award benefits costing federal dollars without specific statutory authority. *See Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).⁴

The Fox News story focused on eligibility for the service of providing a funeral and disposition of the remains of the decedent. A much more important question is eligibility for the \$100,000 death gratuity. Under 10 U.S.C. 1475(a)(2), the gratuity is payable to the family of a "Reserve of an armed force who dies while on inactive duty training." Because Captain Luke was not performing inactive duty training at the moment of his death, the family is not eligible for this death gratuity.

Senator Mark Pryor of Arkansas is very much aware of and interested in this tragic situation. During the debate on the Senate version (S. 1867) of the National Defense Authorization Act (NDAA) for Fiscal Year 2012, he offered an amendment, which was adopted and became section 634 of S. 1867. This section would amend sections 1475(a)(3), 1478(a), and 1481(a)(2) of title 10, in order to accord both the \$100,000 death gratuity and the recovery, care, and distribution of remains services to the survivors of a Reservist or National Guard member who

³10 U.S.C. 1481(a)(1) and (2).

⁴I invite the reader's attention to Law Review 1104 for a detailed discussion of the implications of the *Richmond* case. You can find more than 900 articles at www.servicemembers-lawcenter.org, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

died “while staying at the Reserve’s residence, when so authorized by proper authority, during the period of such inactive duty training or between successive days of inactive duty training.”

It is clear that Senator Pryor had Captain Luke’s situation in mind when he drafted this amendment. If this provision is enacted in its present form, the retroactive effective date will be January 1, 2010, just days before Captain Luke’s death.

The House of Representatives passed its version of the 2012 NDAA (H.R. 1540) several months ago. The House bill has no provision similar to section 634 of the Senate version. A conference committee will resolve the differences between the two bills, so that identical language can be passed by both chambers and signed by the President. It is likely but not certain that Senator Pryor’s amendment will make it into the final version to be signed into law by the President. We will keep the readers informed of developments on this important issue.

Update – May 2022

Senator Pryor’s amendment made it into the final version of the bill. The relevant portion of 10 U.S.C. § 1481 reads as follows: “staying at the member’s residence, when so authorized by proper authority, during a period of inactive duty training or between successive days of inactive duty training.”⁵ This section took effect on the December 31, 2011, the date the amendment was enacted, and applied to deaths that occurred on or after December 31, 2011.⁶

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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

⁵10 U.S.C. § 1481(a)(2)(E).

⁶National Defense Authorization Act for Fiscal Year 2012, Pub. L. No 112-81, § 651, 125 Stat. 1298 (2011).

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.

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Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002