

LAW REVIEW 1220
February 2012

**Reservists Should Be Permitted To Take Licensed
Customs Broker Exam**

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

1.1.1.8—USERRA Applies to Federal Government

1.2—USERRA Forbids Discrimination

1.4—USERRA Enforcement

Q: I am a Master Sergeant in the Army Reserve. I have been called to active duty twice and will likely be again, but I am not on active duty at this time. Accordingly, I need a civilian job to support myself and my family. I recently started a new job with a company in the importation business. The company told me that I need to become licensed as a customs broker to stay in this job.

The licensing of customs brokers is administered by Customs and Border Protection of the Department of Homeland Security (CBP-DHS). I found the form I need to register to take the licensed customs broker examination. The form asks me a series of questions, including "Are you a federal employee?" The form states explicitly that federal employees are not eligible to take the exam or to become licensed customs brokers.

I called CBP-DHS to inquire as to my eligibility to register for this test. A CBP-DHS employee told me that as an Army Reservist I am a "federal employee" and am precluded from taking the exam. She also told me that if I were in the Army National Guard, rather than the Army Reserve, I would be eligible. She told me that National Guard members are considered to be "state employees" but reservists are considered to be "federal employees."

This is not fair! I need this job to support my family, and I need to become a licensed customs broker to keep the job. Help!

A: I entirely agree with you that it is unconscionable and probably unlawful for CBP-DHS to preclude you and others like you from becoming licensed customs brokers. Accordingly, I have sent the attached letter to the Honorable Alan D. Bersin, the Commissioner of Customs and Border Protection:

February 26, 2012

Honorable Alan D. Bersin
Commissioner of Customs & Border Protection
Department of Homeland Security
1300 Pennsylvania Ave. NW
Washington, DC 20229

Re: Is a military reservist, not on active duty, eligible to take test and become a licensed customs broker?

Dear Mr. Bersin:

I am writing on behalf of a service member. The service member is eligible to take and desires to take the test to become a licensed customs broker. The test is administered by your organization. The registration form for the test requires the applicant to answer a series of questions, and one question is "Are you a federal employee?" The form makes clear that federal employees are not eligible to take the test or to become licensed customs brokers.

The service member is a Master Sergeant in the United States Army Reserve (USAR). He is not currently on active duty, but he performs drill weekends and annual training with his USAR unit. He has been called to active duty previously and will likely be again, but in the meantime he needs a full-time civilian job to support himself and his family. Our member recently took a new job with a company that is in the importation business. He is currently performing duties that do not require that he be a licensed customs broker, but his new employer has made it clear that he needs to become licensed to remain employed.

When he obtained the registration form for the test, he noticed the "federal employee" question and he called a member of your staff to inquire as to whether a military reservist is a "federal employee" and thereby precluded from taking the test and becoming licensed. Your staffer told him that, as a member of the Army Reserve, he is a "federal employee" and cannot register for the test. She also told him that if he were a member of the Army National Guard, rather than the Army Reserve, he would be permitted to take the test and become licensed, because a National Guard member is a "state employee" rather than a "federal employee."

I respectfully submit that this distinction between the "federal reserve" and the National Guard is nonsensical. More importantly, there is no good reason to preclude members of the Reserve Components (including the National Guard) from becoming licensed customs brokers, and there is a very good reason for you to clarify that Reserve Component members not on active duty are eligible.

Our nation has seven Reserve Components, and under the Total Force Policy our nation is more dependent now than ever before on these components. Since the terrorist attacks of September 11, 2001, 842,067 Reserve Component members have been called to the colors, as of February 21, 2012. For your information, I am enclosing a copy of the most recent weekly report of the Office of the Assistant Secretary of Defense for Reserve Affairs (OASDRA).

According to this report, the 842,067 activations include 362,045 members of the Army National Guard of the United States (ARNGUS), 204,159 members of the USAR, 50,495 members of the United States Navy Reserve (USNR), 61,206 members of the United States Marine Corps Reserve (USMCR), 92,593 members of the Air National Guard of the United States (ANGUS), 63,570 members of the United States Air Force Reserve (USAFR), and 7,999 members of the United States Coast Guard Reserve (USCGR).

Members of ARNGUS and ANGUS are simultaneously members of state military organizations, the present-day equivalents of the state militia. When a member of ARNGUS or ANGUS responds to a federal call to active duty, it is in his or her federal capacity, not state capacity. Thus, contrary to your staffer's understanding, a member of ARNGUS is just as much a "federal employee" as a member of the USAR.

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. I had a hand in the drafting of USERRA when I was an attorney for the United States Department of Labor (DOL). USERRA protects service members (including but not limited to Reserve Component members) in two important ways. Under section 4312, an individual who leaves a civilian job for voluntary or involuntary service in the uniformed services, whether for five hours or five years, is entitled to reemployment in the pre-service civilian job upon honorable release from the period of service. Under section 4311, an individual is protected from employer discrimination with respect to initial employment, retention in employment, promotions, and benefits of employment, on the basis of membership in a uniformed service, application to join a service, performance of service, or application or obligation to perform service.

USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). USERRA applies to almost all employers in the United States, including the Federal Government, the states and their political subdivisions, and private employers, regardless of size. The United States Merit Systems Protection Board (MSPB) adjudicates cases involving alleged USERRA violations by federal agencies, and USERRA cases involving state and local governments and private employers are litigated in the federal courts.

The MSPB has held that its jurisdiction, with respect to a claim that a federal agency has violated USERRA, is not limited to cases involving federal employees. If a federal agency stands in the way of USERRA compliance by a private company, as the Department of Homeland Security (DHS) stood in the way of the reemployment of Brigadier General Michael J. Silva by a DHS contractor called SPS, then the federal agency is violating USERRA, and such a violation is remediable by the MSPB.

I invite your attention to *Silva v. Department of Homeland Security*, 2009 MSPB 189 (September 23, 2009). I also invite your attention to my [Law Review 0953](#), concerning the important implications of the *Silva* case. For your convenience, I am enclosing a copy of the article. By standing in the way of our member taking the test and becoming a licensed customs broker, and thus continuing to earn a livelihood when not on active duty, DHS is (I respectfully submit) violating USERRA, just as DHS violated USERRA when your Contracting Officer's Technical Representative threatened SPS with cancellation of its contract if it complied with USERRA by reemploying Brigadier General Silva when he returned home from a year in Iraq.

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 home to the United States Coast Guard, DHS should, I respectfully submit, especially strive for "model employer" status. DHS and DOD are the principal beneficiaries of USERRA. Without a law like USERRA, the services would not be able to recruit and retain a sufficient quality and quantity of personnel to defend our country.

Time is of the essence because the deadline to apply for the next licensed customs broker examination is fast approaching. I call upon you to announce to your staff and also to potential test-takers that members of the Reserve Components are eligible to take the test and to become licensed customs brokers. If you have questions of me, please call me at (202) 646-7730.

Very respectfully,

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Copy to:

Admiral Robert J. Papp, USCG (Commandant of the USCG)
Honorable Ivan K. Fong (General Counsel of DHS)
Major General Andrew Davis, USMC (Ret.) (ROA Exec. Director)
Brigadier General Michael J. Silva, USA (Ret.)

Enclosures (as stated)

Law Review 1220 Update

The Reservist referred to in Law Review 1220 is William Nusbaum. After the Department of Homeland Security refused to let him register for the April 3, 2012 examination, he filed suit. As a partial settlement, he is being permitted to take the exam.

The Service Members Law Center of the Reserve Officer Association is most interested in hearing from others similarly situated. If you ever faced employment discrimination, such as the one explained in this Law Review, due to the fact that you are a Reservists, please send me an email at swright@roa.org.