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Army Cadet Command Implicitly Admits that it Violated USERRA in its Treatment of ROTC Employee Michael Hanke

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

1.1.1.8—USERRA applies to the Federal Government
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On September 24, 2012, the United States Office of Special Counsel (OSC)[1] announced that it had reached a settlement with the United States Army Cadet Command (USACC) on behalf of Sergeant First Class (SFC) Michael Hanke of the Wisconsin Army National Guard. OSC had alleged that the USACC violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) when it refused to reemploy Hanke upon his return from active duty in Iraq in 2009-10.

This is the case that I addressed in Law Review 1016,[2] published early in 2010. In that article, I wrote: "This article presents a real situation, but I have changed the name and location to protect the privacy of the claimant." In the article, I referred to the claimant as "Joe Smith" (the pseudonym that I generally use in these "Law Review" articles), and I referred to the location as the Reserve Officers Training Corps (ROTC) unit at the University of California Los Angeles (UCLA). In fact, the claimant's name is Michael Hanke, and this happened at the ROTC unit at the University of Wisconsin at Stout (UWS). Because these facts have been reported in an OSC press release and in articles in the *Washington Post* and other newspapers, I am including them in this follow-up article.

Context

The USACC is responsible for administering Army ROTC units at colleges and universities across the nation. After consulting with the leadership of the university, USACC selects a Professor of Military Science (PMS) to head up each Army ROTC unit. The PMS is a Colonel or Lieutenant Colonel, depending on the size of the unit. The PMS needs a staff of instructors (officers) and support personnel (enlisted Soldiers) to operate the unit. The unit staff is a mixture of Regular Army officers and enlisted personnel and Army Reserve and Army National Guard personnel on Active Guard and Reserve (AGR) orders.

In recent years, the global demand for Soldiers in the Global War on Terrorism has often made it difficult for the USACC to fill the necessary instructor and support positions at ROTC units with Regular Army and AGR personnel. The USACC addressed this problem by providing for a government contractor to provide employees to work at Army ROTC units in both instructor and support roles. As a condition of employment, these contractor employees were required to be officers (instructors) or enlisted Soldiers (support personnel) in the Army National Guard or Army Reserve, in good standing, but they were not in a military status when working at the ROTC units. Nonetheless, they often wore Army uniforms and observed military courtesies. The idea was that the cadets (college students) were not supposed to be able to distinguish Soldiers on active duty from National Guard and Reserve Soldiers not on active duty that were employed in instructor and support positions as employees of a government contractor.

The initial contractor was a company called MPRI. When the MPRI contract expired, the USACC awarded the contract to a company called COMTEK. When this occurred, the MPRI employees were offered the opportunity to remain in their positions as employees of COMTEK. COMTEK was considered to be the "successor in interest" to MPRI with respect to the ROTC contract and obligations to the employees under USERRA and other laws.[3]

When Hanke worked for the PMS at the UWS ROTC unit, from early 2007 to late 2008, he had two joint employers—the USACC and COMTEK. The USACC (through the UWS PMS) controlled almost all aspects of his employment, including training, supervision, scheduling, performance evaluation, and discipline (up to and including firing). COMTEK's only role was to pay him his compensation, by direct deposit in his checking account, after receiving vouchers signed by the UWS PMS.

Contracting out and contracting back in

During the George W. Bush Administration, and previously, the federal procurement policy strongly favored contracting out of federal functions, except those functions that were deemed to be "inherently governmental" and that were reserved for federal employees. Soon after his inauguration, President Obama changed this policy direction by 180 degrees. The Obama Administration's policy favors "contracting back in." All over the Federal Government, contracts with companies that provide services for federal agencies by providing company employees to work at federal facilities were terminated. The Federal Government hired tens of thousands of new employees (many being the same individuals who had been performing these functions as contractor employees). In the worst recession since the Great Depression, the Federal Government was one of the few major employers that was hiring.

In accordance with the "contracting back in" policy, the USACC began early in 2009 reconsidering its relationship with COMTEK. In the summer of 2009, the USACC canceled the COMTEK contract. The COMTEK instructors and support personnel were given a few weeks to submit applications for federal civilian employment, to serve as federal employees in essentially the same roles they had been filling as contractor employees. Almost all the COMTEK employees applied for these federal positions, and almost all of those who applied were selected.

The USACC violated USERRA by refusing to consider Hanke's application for direct USACC employment.

SFC Hanke was on active duty in Iraq in the summer of 2009. Despite the immense logistical difficulties because of the distance between Wisconsin and Iraq and Hanke's service in a combat zone, Hanke learned of the opportunity to apply for a USACC civil service position. He submitted a proper application by the deadline. On behalf of the USACC, the UWS PMS refused to consider Hanke's application, on the grounds that Hanke would likely remain on active duty for several more months and was not immediately available to begin the new civil service position.

The only reason that Mr. Hanke was not immediately available, in the summer or fall of 2009, to start a new federal position was that he was on active duty and was expected to remain on active duty until approximately March 2010. Under these circumstances, refusing to hire Mr. Hanke because of his immediate unavailability violated section 4311(a) of USERRA. *See McLain v. City of Somerville,* 424 F. Supp. 2d 329 (D. Mass. 2006).[4] OSC agreed to represent Michael Hanke on this theory and also on the alternative theory that the USACC was the successor in interest to COMTEK.

The USACC was COMTEK's successor in interest, and the USACC had a legal duty to reemploy Hanke upon his return.

As I explained in Law Review 1281 and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

1. Must have left a civilian position of employment for the purpose of performing service in the uniformed services.
2. Must have given the employer prior oral or written notice.
3. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service relating to the employer relationship for which the individual seeks reemployment.
4. Must have been released from the period of service without having received a punitive or other-than-honorable discharge that disqualifies him under section 4304 of USERRA, 38 U.S.C. 4304.
5. Must have made a timely application for reemployment after release from the period of service.

It seems clear that Hanke met these five conditions. He left his position at the UWS ROTC unit to report to active duty as ordered, and he gave prior notice to both COMTEK and the USACC. He has not exceeded the five-year limit. Because this period of service was involuntary, it does not count toward his five-year limit.[5] He served honorably and was released without a bad discharge. After he was released from active duty, he made a timely application for reemployment with both the USACC and COMTEK.

Because Hanke met the five conditions, the employer had the duty to reemploy him "in the position of employment in which the person [Hanke] *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

Thus, the touchstone is the position that Hanke *would have attained* if his employment at the UWS ROTC unit had not been interrupted by his call to the colors, not the position that Hanke left in 2009, when he reported to active duty. Hanke left a position as an employee of COMTEK with the USACC as his joint employer. The "contracting back in" policy was implemented during the time that Hanke was serving on active duty in Iraq. If Hanke had not been on active duty at the time, he would have been offered the opportunity (along with all the other COMTEK employees) to apply for a civil service position at the USACC, and he almost certainly would have been selected for the position, as the other COMTEK employees were selected. Thus, the position to which Hanke was entitled under USERRA, after he was released from active duty in March 2010, was as a civil service USACC employee at the UWS ROTC unit.

The USACC violated USERRA when it refused to reemploy Hanke in the position that he would have attained, with reasonable certainty, if he had not been called to the colors in 2009. Employer Support of the Guard and Reserve (ESGR) and others brought this requirement to the attention of the USACC leadership[6] but they refused to budge.

Hanke filed a claim with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and that agency also found his claim to have merit and tried to persuade the USACC to comply with federal law. Upon Hanke's request, DOL-VETS referred the case to OSC, with a recommendation that OSC bring an enforcement action, on behalf of Hanke, in the Merit Systems Protection Board. Finally, the USACC agreed to pay Hanke for the money he lost because the USACC violated USERRA, but the USACC still refuses to acknowledge wrongdoing or to promise that this violation will not recur.

I believe that there is at least one other COMTEK ROTC employee who was on active duty at the time of the "contracting back in" in 2009 and who missed out on the opportunity to apply for and receive a civil service ROTC position with the USACC. Readers—if you can identify that person, please have him or her contact me. It is not too late to bring a new USERRA case on behalf of that person.

Under USERRA, the obligation to reemploy the returning veteran is on the "employer." Section 4303 of USERRA defines 16 terms that are used in this law, including the term "employer" which is defined as follows:

"(4)

(A) Except as provided in subparagraphs (B) and (C), the term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—

(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;

(ii) the Federal Government;

(iii) a State;

(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and

(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.

(B)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.

(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.

(D)

(i) Whether the term 'successor in interest' applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:

(ii) Substantial continuity of business operations.

(iii) Use of the same or similar facilities."

(III) Continuity of work force.

(IV) Similarity of jobs and working conditions.

(V) Similarity of supervisory personnel.

(VI) Similarity of machinery, equipment, and production methods.

(VII) Similarity of products or services.

(ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test under clause (i)."

Successor in interest is an important consideration in employment law generally, not just USERRA. Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. The VRRA did not specifically mention successors in interest, but this legal theory was utilized

to impose VRRA liability on the successor employer.[7] In order to remove any doubt on this question, those who drafted USERRA included "successor in interest" in USERRA's definition of "employer."

There are two kinds of successors—transactional successors and functional successors. Applying USERRA and other laws to transactional successors is not controversial. Applying this law to functional successors is more difficult but nonetheless feasible.

As to transactional successors, let us take the hypothetical but realistic Joe Smith. Joe was a pilot for Northwest Airlines and an officer in the Air Force Reserve. Joe left his Northwest Airlines job for active duty in the Air Force. Joe meets the USERRA eligibility conditions for reemployment in that he gave prior notice to Northwest Airlines, he has not exceeded the five-year limit, he served honorably and did not receive a bad discharge, and he made a timely application for reemployment after he was released from active duty.

While Joe was on active duty, Northwest Airlines merged with Delta, and the new combined airline is called Delta. After he was released from active duty, Joe applied for reemployment at Delta. Delta is clearly the successor in interest to the former Northwest Airlines. This application is not controversial. Delta would almost certainly not deny that it is the successor to Northwest and that it is obligated to reemploy a guy like Joe.

For a more controversial application of the successor in interest principles, I invite your attention to *Coffman v. Chugach Support Services, Inc.,* 411 F.3d 1231 (11th Circuit 2005).[8] I discuss *Coffman* in detail in Law Reviews 79, 0634, and 0847.

Charles S. Coffman, an Air Force Reservist, worked for Del-Jen, Inc. (DJI), the company that had the Base Operating Support (BOS) contract with the Air Force for Tyndall Air Force Base in Florida. Coffman was called to active duty for a year, and he gave proper notice to DJI, his civilian employer. DJI hired a woman for the job that Coffman had temporarily vacated and informed her that her position was temporary and that when Coffman returned from active duty he would most likely be returning to his pre-service job and displacing her.

While Coffman was on active duty, the Air Force contract with DJI expired, and the service awarded the new BOS contract to Chugach Support Services (CSS). Of the 100 DJI employees on the Tyndall AFB BOS contract, CSS hired 98 of them. This included the woman that DJI had hired to replace Coffman on a temporary basis, but it did not include Coffman.

When Coffman returned from active duty, he made a timely application for reemployment with CSS, and he met the USERRA eligibility criteria. CSS denied that it was the successor in interest to DJI and refused to reemploy Coffman. Coffman sued CSS in the United States District Court for the Northern District of Florida, which granted summary judgment for CSS. Coffman appealed to the 11th Circuit, which affirmed the summary judgment.

The District Court and the 11th Circuit held that there can be no finding of successor in interest in the absence of a merger or transfer of assets. These courts rejected the argument that a "functional successor" can be a successor in interest for purposes of USERRA and other employment laws. The 6th Circuit (Kentucky, Michigan, Ohio, and Tennessee) has accepted the "functional successor" theory in a similar context. *See Cobb v. Contract Transport, Inc.,* 452 F.3d 543 (6th Cir. 2006). *See also Murphree v. Communications Technologies, Inc.,* 2006 WL 3103208 (E.D. La. 2006).

Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this statute, including the term "employer." Section 4303(4) defines the term "employer." The statutory definition includes "any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph." 38 U.S.C. 4303(4)(A)(iv). Until 2010, USERRA did not define the term "successor in interest."

On October 13, 2010, President Obama signed into law the Veterans' Benefits Act of 2010 (VBA-2010), Public Law 111-275. Section 702 of VBA-2010 amended section 4303(4) of USERRA by adding a new subsection (D), as follows: "(D)(i) Whether the term 'successor in interest' applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors: (I) Substantial continuity of business operations. (II) Use of the same or similar facilities. (III) Continuity of work force. (IV) Similarity of jobs and working conditions. (V) Similarity of supervisory personnel. (VI) Similarity of machinery, equipment, and production methods. (VII) Similarity of products or services.

(ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, *or other form of succession* shall not be considered when applying the multi-factor test under clause (i)." 38 U.S.C. 4303(4)(D) (emphasis supplied).

There does not appear to be any legislative history (committee reports, floor debates, etc.) on section 702 of VBA-2010, but the inclusion of the "or other form of succession" language means that there can be a finding of successor in interest without a merger or acquisition. It is clear that the intent of section 702 was to overrule *Coffman.* This clarification is important, because there have been other cases like Mr. Coffman's case, including the *Hanke* case.

Returning to *Hanke,* OSC strenuously argued that the 2010 USERRA amendment means that the USACC is the successor in interest to COMTEK, with respect to the obligation to reemploy Michael Hanke. The USACC eventually, grudgingly accepted this argument and agreed to settle the case. The *Washington Post* reported: "The settlement is equivalent to several years of salary, although the exact amount is confidential under the terms of the agreement."

Michael Hanke expressed gratitude to OSC for its assistance in working out this settlement, but he added: "By no means does it make up for the damage done, emotionally and physically." This quotation comes from the *Washington Post* article.

Conclusion

OSC is headed up by the Special Counsel of the United States, who is appointed by the President and confirmed by the Senate, for a five-year term. The current Special Counsel is Carolyn Lerner. Her five-year term began in June 2011 and she will likely remain in office until June 2016, regardless of the outcome of the November election.

In announcing the settlement of the *Hanke* case, Special Counsel Lerner said: "OSC will continue to press for the employment and reemployment rights of our veterans and National Guard and Reserve members, and for all federal agencies to live up to their obligation to be a model employer under USERRA."[9]

I congratulate Special Counsel Lerner and the entire OSC staff, and especially my good friend Joseph M. Scaturo, the OSC attorney who handled this case.

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[1] OSC is an independent federal investigative and prosecutorial agency, created by the Civil Service Reform Act of 1978 (CSRA). The agency's responsibilities include serving as a secure channel for fraud, waste, and abuse allegations involving federal agencies, preventing and remedying Prohibited Personnel Practices (including reprisal for whistleblowing), and enforcing the Hatch Act, the Uniformed Services Employment and Reemployment Rights Act, and other civil service laws, rules, and regulations.

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 796 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

[3] Please see Law Review 723 for a discussion of "successor in interest" in connection with the transition from MPRI to COMTEK.

[4] I discuss *McLain* in detail in Law Review 0746.

[5] *See* 38 U.S.C. 4312(c). Please see Law Review 201 for a definitive discussion of what counts and what does not count toward exhausting the five-year limit.

[6] I brought it to the attention of the USACC Commander by sending him a copy of my Law Review 1016, but he did not respond.

[7] *See Leib v. Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991).

[8] The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia.

[9] Ms. Lerner was referring to the first section of USERRA, which provides: "It is 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).