Law Review 12105

October 2012

What Are the Reserve Components?

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

1.1.3.3—USERRA Applies to National Guard Service
1.1.3.4—USERRA Applies to PHS Service
1.1.3.5—USERRA Does Not Apply to NOAA Service
1.1.3.6—USERRA Applies to NDMS Service
1.8—Relationship between USERRA and other Laws/Policies

Q: I am a volunteer for the Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR). This is the 40-year-old organization that seeks to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve. One of the ways that we seek to accomplish this mission is by giving recognition to employers that go above and beyond the requirements of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in supporting Guard and Reserve personnel and in accommodating their necessary absences from work for military training and service. An award that we frequently give at the state level is the "Seven Seals Award." What are the seven seals?

A: The name of this ESGR award refers to the seven Reserve Components of our nation's armed forces: The Army Reserve, the Army National Guard of the United States (ARNGUS), the Air Force Reserve, the Air National Guard of the United States (ANGUS), the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

Q: Why is the Coast Guard Reserve on this list? The Coast Guard is not part of DOD.

A: Section 101(a)(4) of title 10 of the United States Code [10 U.S.C. 101(a)(4)] provides that our nation has five armed forces: the Army, Navy, Marine Corps, Air Force, and Coast Guard. Although the Coast Guard is not in DOD, the Coast Guard is just as much an armed force as the Army. In time of war, the Coast Guard can become a separate service within the Navy, but the Coast Guard is an armed force at all times, not just in those rare instances when it is operating as part of the Navy.

The first Congress established the Revenue Cutter Service (RCS) in 1790, as part of the Department of the Treasury. In 1915, the RCS merged with two other organizations and became the United States Coast Guard. The RCS-Coast Guard is our nation's oldest *continuously operating* maritime service, in that it has been in operation continuously since 1790. There was a time, during the 1790s, when the United States Navy ceased to exist.

The Coast Guard was part of the Department of the Treasury until 1967, when Congress established the Department of Transportation and moved the Coast Guard to that new department. After the terrorist attacks of September 11, 2001, Congress established the Department of Homeland Security and moved the Coast Guard again.

Q: Why do the Army and the Air Force have two Reserve Components each, while the other armed forces have only one each?

A: Until World War II, the permanent, established U.S. Army was tiny. A military operation of any size required the president to mobilize militia forces from the various states. This was the pattern followed for the War of 1812, the Mexican War, the Civil War, and the Spanish-American War. Mobilization problems for the Spanish-American War demonstrated the need for a better organized and trained militia.

As the 19th century turned to the 20th, Congress correctly anticipated that the new century would bring major new responsibilities to the United States as an emerging world power. One result was the enactment of the Militia Act of 1903, 32 Stat. 775, also known as the Dick Act. The law was named for Senator Charles W.F. Dick of Ohio, a Major General in the Ohio Militia and chairman of the Senate Committee on the Militia.

The Dick Act gave federal status and federal aid to the organized militia forces of the various states, and these federally recognized and supported state military forces became the Army National Guard. Federal funding of the militia during the first 13 years after the enactment of the Dick Act exceeded federal funding during the century preceding enactment. The Dick Act required National Guard members to attend 24 drills and five days of annual training per year, and for the first time provided for pay for annual training. National Guard units were subject to inspection by Regular Army officers and had to meet certain standards. When National Guard units were mobilized for World War I, they were much better prepared than the Spanish-American War cohort mobilized less than a generation earlier.

The Dick Act provided for the dual enlistment system utilized to this day. Let us discuss the hypothetical but realistic Joe Smith, who enlisted in the Virginia Army National Guard in 2009. Joe took two enlistment oaths, one to the Commonwealth of Virginia and one to the United States of America. Joe joined two overlapping but legally distinct entities: the Virginia Army National Guard and the Army National Guard of the United States. Joe performs inactive duty training, annual training, and full-time National Guard duty in his status as a member of the Virginia Army National Guard; that is title 32 duty, referring to title 32 of the United States Code. When he is called to active duty, voluntarily or involuntarily, that is title 10 duty, referring to title 10 of the United States Code.

Joe is in title 32 status all the time, except when he is called to federal active duty and transformed to title 10 status. Joe performs inactive duty training and annual training while in title 32 status. He can also perform "full-time National Guard duty" while in his title 32 status. If he leaves his civilian job to perform title 10 duty or title 32 duty (annual training duty, inactive duty training, or full-time National Guard duty), and if he meets the USERRA eligibility criteria, he has the right to reemployment under USERRA.

In addition to the kinds of duty that give rise to reemployment rights under USERRA, Joe is subject to being called to state active duty by the Governor of Virginia, to restore order during a riot, to fill sandbags in anticipation of a flood, or for some other state emergency. USERRA does not protect Joe with respect to absences from his civilian job for such state active duty, but Virginia and every other state have state laws to provide such protection.[1]

The Dick Act greatly improved the training, capability, and accessibility of the Army militia forces, but early in the 20th Century Congress recognized the need for purely federal military forces, so Congress created the Army Reserve in 1908, the Naval Reserve (later renamed Navy Reserve) in 1915, and the Marine Corps Reserve in 1916. The Coast Guard Reserve was established a generation later, in the lead-up to World War II.

The Air Force was part of the Army until 1947, when Congress made it a separate service within the new DOD, after merging the Department of War with the Department of the Navy. The Air Force Reserve and Air National Guard were created in 1948, soon after the creation of the Air Force as a separate service.

Q: In this time of budget constraints, would it make sense to merge the Army Reserve into the Army National Guard and the Air Force Reserve into the Air National Guard?

A: That proposal has been floated by a few "wonks" in Congress and the Pentagon, but mostly by the National Guard Association of the United States. ROA believes that the supposed cost savings from such a proposed merger are greatly exaggerated and the collateral effects would be seriously detrimental. On August 6, 2012, our Executive Director [Major General Andrew B. Davis, USMC (Ret.)] wrote an article titled "Merging Guard and Reserve is the wrong idea at the wrong time." The article was published in "Congress Blog" of *The Hill* newspaper, the oldest newspaper serving Capitol Hill here in our nation's capital. General Davis' article includes the following two paragraphs:

"Amidst our current fiscal environment ROA acknowledges the plain fact that hard budget decisions must be made across all uniformed services. Yet we urge caution when considering proposals of this nature: cost savings at the expense of strategic responsibility. The facts are, no major defense proponent has called for this change – not the secretary of Defense, no governor, no service chief, and no chief of a Reserve or Guard component. No case has been made to support any substantive national security advantage to a merger. As proposed, such a move would in fact deter the RC's flexibility in national security operations as the President and Combatant Commanders would find their access to the Reserves limited by law and politics. Federal Reserve forces would find their operability substantially constrained if their roles and missions were restricted to a Governor's control and limited to the scope of state level responses. Under current law, Federal Reserve assets are adaptable; eligible to deploy across a wide range of natural and man-made domestic security emergencies.

More broadly, merger proposals ignore the long and distinguished history of each respective service. All too often the Guard and Reserve are lumped into one category of public awareness. The fact is: the Guard and Reserve are distinctly different. The Guard is largely made up of combat formations and the Reserve is combat support and combat service support. Guard personnel are drawn from their state. Reserve units draw their personnel from across State borders and regions. A merger would have untold consequences on careers and unit viability. Confusion would reign as legal issues between Title 10 (governing federal forces) and Title 32 (governing state forces) are sorted through. Simply put, this is a classic case of 'if it isn't broken, don't fix it.' Even discussion of merger adds to the ongoing burdens of serving Reserve and Guardsmen – 63,000 are currently activated and serving both in this country and around the world – while other units and personnel are preparing for their missions. The merger idea should be left at rest while other major ideas addressing both the active and reserve components receive our thoughtful attention."[2]

It should also be noted that there have been attempts by Governors to use their authority over state National Guard units to "throw a monkey wrench" into the implementation of federal foreign policy and national defense policy. *See Perpich v. Department of Defense,* 496 U.S. 334 (1990). That important Supreme Court decision contains a fascinating scholarly treatise on the history of the militia system (back to 1636), the Dick Act, and the dual enlistment system for the National Guard.

ROA long-timers will recognize that the proposed Guard-Reserve merger idea is not new. I invite the reader's attention to *The ROA Story,* by John T. Carlton and John F. Slinkman, published by ROA in 1982, and particularly to Chapters 13-15 (pages 497-525), about ROA's successful efforts to beat back this merger proposal during the Lyndon Baines Johnson Administration.

Q: I have heard reference to the "uniformed services." How are the "uniformed services" different from the "armed forces?"

A: Every armed force is a uniformed service, but not every uniformed service is an armed force. Under 10 U.S.C. 101(a)(5), the seven uniformed services are the five armed forces plus the commissioned corps of the Public Health Service (PHS) and the commissioned corps of the National Oceanic & Atmospheric Administration (NOAA). The PHS Corps is a commissioned corps in the Department of Health and Human Services, and the NOAA Corps is a commissioned corps in the Department of Commerce. Neither the NOAA Corps nor the PHS Corps has enlisted members. The PHS Corps has a nascent Reserve Component, formed to address the possibility of a major public health emergency, either natural or man-made.

USERRA has its own definition of "uniformed services"—in 38 U.S.C. 4303(16). For USERRA purposes, the PHS Corps qualifies as a uniformed service but the NOAA Corps does not. I invite the reader's attention to Law Review 50[3] for an explanation of why Congress chose to accord reemployment right to persons leaving civilian jobs for PHS service but not for NOAA service. There is legislation pending in Congress that would amend USERRA in order to cover NOAA Corps service. We will keep the readers informed on developments concerning this important issue.[4]

[1] Virginia and many other states also have "State Guard" organizations that are purely state in character—that do not receive federal funding and are not subject to federal call-ups. USERRA does not protect the civilian jobs of individuals who leave civilian jobs for such State Guard service.

[2] I also invite the reader's attention to General Davis' column titled "Interest Growing to Merge Reserves, Guard" on pages 4-5 of the November-December issue of *The Officer,* ROA's journal.

[3] Please see www.servicemembers-lawcenter.org. You will find 805 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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.

[4] Persons who leave civilian jobs for training or real-time service as intermittent disaster response appointees in the National Disaster Medical Service (part of the Department of Health & Human Services) also have reemployment rights under USERRA. Please see Law Review 100 (December 2003).