

ROA Provides a Unique Service, Not Duplicating ESGR

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1.0—USERRA Generally

Kindred spirits but with separate missions, ROA's Service Members Law Center (SMLC) and Employer Support of the Guard and Reserve (ESGR) offer Reserve Component members two unique and important services.

The SMLC is for those Reserve Component members seeking legal information. The SMLC can cite case law and other legal authority in assisting members of the Reserve Components, it can be reached by Reserve Component members after regular business hours, and it offers a data bank of articles on the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are pertinent to those who serve our country in uniform.

ESGR, a Department of Defense (DOD) organization, was founded in 1972, immediately after Congress abolished the draft. Congress and DOD recognized that as the draft ceased to exist, the services would need to provide incentives and minimize disincentives to voluntary enlistment and reenlistment in the Armed Forces, including the Reserve Components. ESGR 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.

ESGR employs several means to accomplish this mission. Working through the Advertising Council, ESGR provides public service announcements on radio and television stations around the country, urging employers to support RC personnel by accommodating their necessary absences from their civilian jobs for military service. ESGR solicits employers to sign the "Statement of Support"—a statement that has no legal effect but offers a psychological effect in encouraging employers to make accommodations and reassuring Reserve Component personnel that their jobs are safe when they are called to the colors. ESGR honors those employers who go above and beyond the requirements of USERRA in supporting Reserve Component members in their civilian employment, through a system of awards culminating in the prestigious national "Freedom Award."

The chief interface between ESGR and the individual Reserve Component member is through ESGR's Ombudsman service. A Reserve Component member calls ESGR toll-free at 800-336-4590, and ESGR headquarters puts the member in touch with an ESGR volunteer ombudsman in the service member's home state. The ombudsman works with the service member and the employer to mediate difficulties arising from the member's service and the absences from civilian work that the service necessitates. This process is informal, non-confrontational, and

quick. Within two weeks, the ombudsman will work out a resolution or advise the service member that obtaining such a quick, informal resolution is not feasible.

ESGR headquarters publishes a monthly newsletter for ombudsmen and other ESGR volunteers. The October 2012 newsletter contains a lengthy article titled “A Little Guidance for ESGR Ombudsmen” written by E. David Hoard, Esq., a DOD Office of General Counsel attorney assigned to work with ESGR. That article begins as follows:

“Question 1: When mediating a USERRA case, why shouldn’t an ombudsman refer an employer to relevant case law or court decisions? Why are they not considered ‘pertinent factual information?’

Answer 1: Ombudsmen must not practice law when handling an ESGR case. Case law or court decisions are not considered ‘pertinent factual information’ [that the ombudsman is permitted to provide to the employer] because legal analysis is required to determine whether or not a particular court decision or case law even applies to the situation.

Discussion: ‘Case law’ and ‘court decisions’ are essentially the same thing, although ‘case law’ is somewhat broader in that it would also include decisions by the Merit Systems Protection Board (MSPB) and other administrative bodies, as well as courts. Depending on the facts and the law that apply to the situation at hand, case law and court decisions may well be pertinent LEGAL [all caps in the original] information. Dispensing the latter, however, is not within the portfolio of our ombudsmen—whether they are lawyers in their ‘day jobs’ or not. Similarly, an ombudsman should not advise an employer whether or not he/she thinks the employer is violating a particular provision of USERRA. The Ombudsman may ask the employer if he/she is aware of a relevant USERRA provision or suggest that the employer may want to take a look at a particular USERRA provision and decide for themselves whether it applies to the situation or not; but ESGR ombudsmen should not advise an employer whether it is or is not in violation of the law. That’s the job of the employer’s lawyer—not yours.”

ESGR may be reluctant to express a definitive opinion as to whether an employer policy or practice violates USERRA, and ESGR is unwilling to let its ombudsmen cite case law and other legal authority, but I do not share that reluctance. I have been practicing law for 36 years, and I have been dealing with USERRA and the predecessor reemployment statute for more than 30 years.

In 2011, the SMLC received and responded to 5,405 e-mail and telephone inquiries, and 63% of them were about USERRA. The pace of inquiries has increased still further in 2012. The center receives inquiries from service members, military family members, employers, attorneys, ESGR ombudsmen, Department of Labor (DOL) investigators, congressional staffers, reporters, and others.

The SMLC accepts calls and e-mails during regular business hours and until 2200 Eastern Time on Mondays and Thursdays. The SMLC can be reached toll-free at 800-809-9448, extension 730, or by e-mail at SWright@roa.org.

The point of the evening availability is to encourage Reserve Component members to call from the privacy of their own homes outside their civilian work hours. If the employer is annoyed with Joe Smith because he has been called to the colors five times in the last 11 years and expects to be called again in 2013, and if the employer is looking for an excuse to fire Joe, the last thing that Joe should do is to give the employer the excuse that he or she is seeking. Thus, it is crucial that Reserve Component personnel not use telephones, computers, e-mail systems, or time that belong to the employer to complain about the employer and to seek assistance in dealing with that employer. I think that this is so important that I make these two evenings per week available so that Reserve Component personnel can reach me outside their civilian work hours. Neither ESGR nor DOL nor any other organization provides this after-hours service. ROA is unique.

You can visit the SMLC's website at www.servicemembers-lawcenter.org. You will find 822 articles (as of December 31, 2012) 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. New articles are added each week.

In addition to the Law Review articles published in *The Officer*, ROA publishes "Reserve Voice"—an electronic newsletter—each week, usually on Wednesday afternoon. Each issue of "Reserve Voice" touts one to five new "Law Review" articles that have come out since the previous week's issue.

In my articles, and in my e-mails and telephone conversations, and in Continuing Legal Education (CLE) presentations that I give to lawyers several times per year, I am not reluctant to discuss case law as well as the text of the statute, the USERRA Regulations, the legislative history of the statute and the regulations, and other legal authorities. It is only through case law that we can understand the application of a statute to a particular set of facts.