

Law Review 13025

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The Escalator and the Sequester

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Q: I am an Army Reserve Lieutenant Colonel and a life member of ROA. I have been reading and utilizing your “Law Review” articles for years.

I am also a civilian employee of the Department of the Army (DA). I supervise a unit of 100 civilian DA employees, 30 of whom are considered “temporary.” One of the temps is Joe Smith (not his real name). Joe was hired in March 2010, for a one-year appointment, and he did a great job. His one-year appointment was renewed in March 2011 and March 2012, for one year each time.

In April of last year, shortly after his third one-year appointment, Joe was involuntarily called to active duty with his Army National Guard unit. He is currently serving on active duty in Afghanistan. He is expected to leave active duty and return to work in April.

Because of the budget crisis and the distinct possibility that sequestration will kick in, DA headquarters has directed that all “temporary” DA employees be terminated at this time. How does that square with the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

I have read and reread your Law Review 1281 and other articles. It seems clear beyond any doubt that Joe will meet the USERRA eligibility criteria for reemployment when he is released from active duty in April. He left his civilian job for military service and gave us prior notice. He is well within the five-year limit, and since this was an involuntary call-up it does not even count toward his five-year limit. He has served honorably and will certainly not receive a disqualifying bad discharge from the Army. He recently told me, by e-mail, that he will be applying for reemployment in the civilian job as soon as he gets home, well within the 90-day deadline.

In our organization, it is very common for individuals to start out as temps for 3-5 years, and then the best of them are offered “permanent” federal civilian jobs. Indeed, that is how I began my career with this organization, many years ago. Last summer, as the supervisor, I put in paperwork to make Joe a permanent employee, but the personnel office refused to consider it because Joe was in Afghanistan on active duty. In my informed opinion, it is very likely that Joe would have been made a permanent employee in about September 2012 if he had not been called to the colors in April 2012.

What are Joe’s USERRA rights in this situation?

A: Assuming that Joe meets the five eligibility criteria in April, he will be entitled to be reemployed “in the position of employment in which the person *would have been employed* if the continuous employment of such person [Joe] 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).

This provision is based on the “escalator principle” enunciated by the Supreme Court in its first case construing the reemployment statute. “The returning veteran does not step back on the seniority escalator at the point he left off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

The position that the returning veteran is entitled to upon reemployment is called the “escalated reinstatement position” or ERP. The ERP can be the same position that the veteran left, or a better position, or a worse position, or no position at all, depending upon what would have happened if the veteran had remained continuously employed in the civilian job.

If Joe can establish, based on your testimony and other evidence, that he *probably would have been promoted to permanent status* but for his call to the colors, Joe is entitled to reemployment as a permanent employee. On the other hand, if Joe cannot establish that, he may be entitled to no job at all, based on the consideration that all the temporary employees were terminated in February 2013, and Joe would have been terminated as a temp in February even if he had not been on active duty at the time. As I explained in Law Review 13024 (January 2013)[\[1\]](#) and other articles, the returning veteran’s proper position on the escalator can be better than the position he or she left, the same position, a worse position, or no position at all, based on what would have happened if the veteran had remained continuously employed.

It should also be noted that the personnel office violated Joe’s rights when it refused to consider your nomination of him to be a permanent federal employee, based on his being on active duty at the time. The Office of Personnel Management (OPM) USERRA Regulations provide: “[Federal] Agency promotion plans must provide a mechanism by which employees who are absent because of ... uniformed service can be considered for promotion.” 5 C.F.R. 353.106(c).

USERRA provides that OPM is to promulgate regulations about the application of this law to federal executive agencies, as employers. 38 U.S.C. 4331(b)(1). OPM has adopted such regulations, and federal agencies are required to comply.

Q: If there is a conflict between USERRA and the Executive Order that provides for terminating temporary federal employees, in response to the possibility of sequestration, which prevails?

A: Under the U.S. Constitution, Article VI, Clause 2, a federal statute is the supreme law of the land and trumps an executive order.

Q: If there is a dispute here, how is that dispute to be resolved?

A: Under section 4324 of USERRA (38 U.S.C. 4324), Joe can file a complaint with the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency created by the Civil Service Reform Act of 1978. The MSPB will conduct a hearing and adjudicate Joe’s claim that his USERRA rights have been violated. If the MSPB determines that the DA violated Joe’s USERRA rights, the MSPB will order DA to come into compliance and to compensate Joe for any pay and benefits that he lost because of the violation.

[\[1\]](#) I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 847 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. We added 122 new articles in 2012 and an additional 24 in January.