Law Review 13044

March 2013

National Guard Bureau Chief Testifies about Need for Employer Support

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

1.1.1.2—USERRA applies to small employers
1.1.3.1—USERRA applies to voluntary service
1.1.3.3—USERRA applies to National Guard service

On March 20, 2013, General Frank J. Grass (Chief of the National Guard Bureau) testified at a hearing conducted by the Subcommittee on Defense of the House Appropriations Committee. He identified the challenges that the National Guard confronts, and the first challenge he mentioned was "employment stability for National Guard members employed by relatively small employers." He stated that the burden on smaller employers created by call-up of National Guard members "creates a lot of turbulence."

It should be noted that, unlike other federal laws, the reemployment statute has never had a minimum threshold for applicability.[1] As I explained in Law Review 104[2] and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. USERRA's 1994 legislative history states: "This chapter [USERRA] would apply, as does current law, to all employers regardless of the size of the employer or the number of employees. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992)."[3]

With regard to the problems between National Guard members (and Reservists as well) and their civilian employers (especially smaller employers), General Grass proposed "increased deployment predictability and closer relations between Employer Support of the Guard and Reserve [ESGR] volunteers and local employers." Increased predictability and more notice to civilian employers is certainty to be sought, but General Grass devoted a substantial part of his testimony to the increased reliance on National Guard troops for homeland security missions, for both natural disasters (like Hurricane Sandy) and man-caused disasters (like the terrorist attacks of September 11, 2001).

These disasters are by their nature unpredictable. Who could have predicted Hurricane Sandy a week in advance? Who could have predicted 9/11 even an hour in advance?

Under section 4312(a)(1) and section 4312(b) of USERRA, a person who will be away from work for uniformed service must (as a condition for reemployment) give prior oral or written notice to the civilian employer, unless giving such notice is precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(a)(1), 4312(b). No specific amount of advance notice is required. USERRA's legislative history addresses the notice requirement as follows:

"The Committee [House Committee on Veterans' Affairs] believes that the employee should make every effort, when possible, to give timely notice. The issue of timely notice should be considered on a case-by-case basis. In the event that an employee is notified by military authorities at the last minute of impending military duty, resulting short notice given to the employer should be considered timely." House Rep. No. 103-65, 1994 *USCCAN* at 2459.

For more than a decade, it has been the policy of the Army National Guard and Army Reserve to rely primarily upon *involuntary* call-ups to meet personnel needs for Operation Noble Eagle, Operation Enduring Freedom, Operation Iraqi Freedom, Operation New Dawn, and other post-9/11 operations. For example, the Army National Guard currently has 25,139 personnel on active duty for these contingency operations, and 23,071 of them (91.8%) are on involuntary active duty. For the Army Reserve, the figure is 13,613, and 10,648 (78.2%) of them are involuntary.

The Air National Guard and Air Force Reserve have chosen a very different policy. The Air National Guard currently has 4,724 on active duty, and 1,844 (39%) of them are involuntary. For the Air Force Reserve, the figure is 2,927, and 1,175 (40.1%) are involuntary.[4]

I prefer the Army policy to the Air Force policy. To the extent that our nation needs to call up Reserve Component personnel for ongoing military operations, these personnel needs should be met primarily by the involuntary call-up of established units, on a predictable schedule, and employers should be informed of the schedule. The Air Force policy almost guarantees that a relative handful of Air National Guard and Air Force Reserve personnel will volunteer repeatedly, and often with little or no notice to their civilian employers. The Air Force policy serves to aggravate rather than ameliorate employer-support problems.[5]

Of course, the call-up of National Guard members for domestic emergencies (natural or man-made) will of necessity be with little or no notice.

I am pleased that the relationship between military personnel needs and USERRA has been recognized at the NGB Director (four star) level.

---

[1] Title VII of the Civil Rights Act of 1964 (outlawing employment discrimination based on race, color, sex, religion, or national origin) applies to employers with 15 or more employees.

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 866 articles about 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.

[3] House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN) 2449, 2452*. *Cole v. Swint* is a 1992 decision of the United States Court of Appeals for the 5th Circuit. The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. You can find the *Cole* case in Volume 961 of *Federal Reporter, Second Series,* starting on page 58. The case involves an employer (Swint) who had only one employee (Cole), and the VRRA was held to apply.

[4] I receive a weekly report, by e-mail, from the Office of the Assistant Secretary of Defense for Reserve Affairs. These figures come from the report dated March 12, 2013.

[5] Of course, USERRA applies equally to voluntary and involuntary service, but I contend that a military policy of relying primarily on the involuntary call-up of units on an announced schedule better serves to gain and maintain the support of civilian employers.