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Is it Unlawful for my Civilian Employer To Contact the Commanding Officer of my National Guard Unit?

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1.1.1.7—USERRA applies to state and local governments

1.3.1.2—Character and duration of service

1.7—USERRA regulations

1.8—Relationship between USERRA and other laws/policies

Q: I am a Sergeant First Class in the Army National Guard. I recently joined ROA after you amended your constitution to permit noncommissioned officers to join. I have found most useful your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I am a local police officer, and the police chief constantly hassles me about my drill weekends, my annual training, and especially about the possibility that I may be called to active duty for a year or more. The police chief has demanded that I provide him the name and telephone number of the commanding officer (CO) of my National Guard unit. I am reluctant to provide the chief that information, because I don't want my CO to be bothered by my civilian employer. Is it unlawful for my civilian employer (the police chief) to contact my National Guard CO?

A: No.

As I explained in Law Review 30¹ (October 2001) and other articles, you have the right to time off from your civilian job (federal, state, local, or private sector) in order to perform voluntary or involuntary service in the uniformed services (active duty, active duty for training, inactive duty training, etc.) without regard to frequency, duration, or burden on the civilian employer, provided you do not exceed the cumulative five-year limit on the duration of the period or

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 976 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. We added 122 new articles in 2012 and other 154 so far in 2013.

periods of uniformed service relating to that particular civilian employer.² But it is DOD policy to try to minimize the burden on the employer, where possible to do so.

On January 23, 1998, the Department of Defense (DOD) published USERRA regulations in the *Federal Register*, at 62 FR 3466. The DOD USERRA regulations are published in Volume 32 of the Code of Federal Regulations, Part 104. DOD policy, as stated in these regulations, is to encourage civilian employers to communicate with appropriate military authorities concerning issues of this kind. The pertinent regulations language is as follows: “It is DOD policy to support non-career service [in the uniformed services] by taking appropriate actions to inform and assist uniformed Service members and former Service members who are covered by the provisions of ... [USERRA], and individuals who apply for uniformed service of their rights, benefits, and obligations under ... [USERRA]. Such actions include: ... (d) Considering requests from civilian employers of members of the National Guard and Reserve to adjust a Service member’s scheduled absence from civilian employment because of uniformed service or make other accommodations to such requests, when it is reasonable to do so.” 32 C.F.R. 104.4(d).

I hope that your National Guard CO will deal with the police chief politely but firmly. If the police chief objects to a specific drill weekend—that the weekend comes at a very busy time for the police department—your CO could reschedule your drill period for that specific weekend, if doing so will not unduly detract from the readiness of your unit. As between our country’s need to defend itself and the needs of a civilian employer, the needs of the nation must always take priority. If the police chief is objecting to your membership in the Army National Guard or objecting to most or all scheduled training periods, your CO needs to tell the police chief that his objections and requests will not be honored and that federal law protects your civilian employment, despite the police chief’s objections.

Q: When I told my CO that the police chief would likely be calling him, the CO said, “Please don’t have him call me. I am a part-timer myself, just like you. I am having problems with my own civilian employer, about my National Guard service. If the civilian employers of unit members start calling me at my own civilian job, that will only magnify my own employer problems and possibly lead to my being fired.” Where do I go from here?

A: I suggest that your unit CO needs to run this issue up the chain of command, perhaps to the Adjutant General of your state. There needs to be someone in the military chain of command who can receive and respond to the complaints and requests of civilian employers, and I think that this person needs to be a full-timer and above the level of the unit CO.

I also suggest that you contact Employer Support of the Guard and Reserve (ESGR) at 800-336-4590. ESGR is the DOD organization, founded in 1972, that seeks to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women

² Please see Law Review 201 (August 2005) for a detailed summary of the five-year limit. All involuntary service and some voluntary service (including National Guard training) are exempted from the computation of your five-year limit.

of the National Guard and Reserve. ESGR headquarters can put you in touch with an ombudsman in your city, and that ombudsman can work with the police chief and appropriate National Guard authorities to work out these problems. Good luck.