LAW REVIEW 135

Employer Quotas Revisited

By CAPT Samuel F. Wright, JAGC, USNR*

Q: I read with great interest Law Review 122, "May We Forbid Current Employees Permission to Join Reserves?" (*The Officer,* April 2004). I am a recently retired police officer in Nassau County, N. Y., and also retired from the Army Reserve as a major. Many years ago, after I left active duty and became a Nassau County police officer, I applied for permission to join the Army Reserve. The police chief informed me that Nassau County has a quota system—not more than 2.5 percent of all sworn police officers are permitted to be members of the National Guard or Reserve. My name was put on a waiting list. Six years later, the police chief sent me a letter informing me that I would be permitted to join the Reserve, which I did at that time. But I lost out on six of my prime military years, and that definitely put a crimp in my Army Reserve career. I ended up retiring as a major. If I had been permitted to join the Army Reserve when I first asked for permission, I think that I would have made it to colonel, or at least lieutenant colonel. I am still mad about that.

My son is now a police officer for the same Nassau County police department. After the September 11 atrocities, he asked for permission to enlist in the Army Reserve. His experience seems to be a mirror image of my own a generation earlier. The police chief told him that the same 2.5 percent quota is still in effect. My son is still waiting for the police chief to give him permission to enlist in the Army Reserve.

I made a copy of Law Review 122 and mailed it to the police chief of Nassau County, with a cover letter in which I told the chief that his quota policy was inconsistent with the Uniformed Services Employment and Reemployment Rights Act (USERRA), citing your article. I received a polite but perfunctory response from the county attorney, telling me that the Nassau County quota policy has been tested in court and has been found not to be unconstitutional or unreasonable. The county attorney cited *Hughes v. Frank,* 414 F. Supp. 468 (EDNY), *affirmed,* 300 F.2d 300 (2nd Cir. 1976), *cert. denied,* 97 S. Ct. 1650 (1977). What gives?

A: I am familiar with *Hughes v. Frank,* and I think that it is a very weak reed for Nassau County to rely upon in defense of the quota policy. I think that case was wrongly decided 28 years ago, and it certainly does not reflect the state of the law today, under USERRA, which was enacted in 1994.

Under the Veterans' Reemployment Rights (VRR) law, which preceded USERRA, there was a specific limit on active duty (four years) but no specific limit on active duty for training or inactive duty training. As I described in Law Review 30, there was a 20-year argument in the courts as to whether there was an implied limit or "rule of reason" on the burden that an employee-Reservist could put on his or her civilian employer for military training and service.

Hughes v. Frank was one of the cases supporting this "rule of reason" argument. The only difference was that *Hughes* dealt with the cumulative burden on the employer relating to all employees who were members of the National Guard or Reserve. Most of the "rule of reason" cases dealt with the burden on an employer from one particularly lengthy period of Reserve or National Guard training.

As I described in Law Review 30, the Supreme Court ended the debate about the rule of reason when it decided *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991). In a very clear and definitive 8-0 decision (Justice Clarence Thomas did not participate because the oral argument was held just before his Senate confirmation.), the Court explicitly overruled the "rule of reason" cases. The Court held that the lack of an express limit under section 2024(d) of the VRR law [formerly codified at 38 U.S.C. 2024(d)] meant that there was no limit. It is not proper for the courts to create implied limitations upon explicit rights conferred by Congress. Although the Supreme Court did not mention *Hughes v. Frank,* that case is clearly inconsistent with the Court's holding in *King v. St. Vincent's Hospital.*

Congress enacted USERRA just three years after *King* was decided. I invite your attention to section 4312(h) of USERRA: "In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [USERRA's five-year limit, discussed in Law Review 6] and the notice requirements established in subsection (a)(1) [Law Review 5] and the notification requirements established in subsection (e) [Law Review 7] are met." [38 U.S.C. 4312(h).]

Section 4312(h) drove a stake through the heart of the already dead "rule of reason." USERRA's legislative history, cited in Law Review 30, buttresses this conclusion. I reiterate my statement that quota policies are unlawful, and that includes the Nassau County policy.

I am sympathetic to the problems of a police chief with a lot of officers who are members of the National Guard and Reserve, especially when something like September 11 happens and those Guard and Reserve members get called to active federal service. But Congress has already done the balancing here. Congress has decided that the needs of the military outweigh the needs of civilian employers, even employers in the public safety business. Please remember that we are at war, and the president has warned us that the global war on terrorism will be long and hard.

Please look back to the history of World War II. Hundreds of thousands of police officers, firefighters, and other public employees volunteered for or were drafted into military service. Local police and fire departments did not close up shop. They made do, just as all of America made do. Other police officers and firefighters delayed their retirements or came back from retirement "for the duration."

There was only a minimum of carping. All recognized that the sacrifices they were being asked to make on the home front paled in comparison to the sacrifices made by young Americans (and some not-so-young Americans) on battlefields all over the world, from Bataan to Bastogne.

In its first case construing the VRR law, the Supreme Court held that the law is to be "liberally construed for the benefit of he who has laid aside his civilian pursuits to serve his country in its hour of need." [*Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).] Of course, the Court was referring to members of America's "greatest generation" who had just won World War II. I respectfully submit that those eloquent words apply equally to the members of Generation X and Generation Y, and a few baby boomers, who are now serving.

**Military title used for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. Government.*