

## LAW REVIEW 136

### More on Disabled Veterans

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**Q: I read with great interest Law Review 121 (*The Officer*, April 2004), titled “Reemployment of Disabled Veterans.” I am the commanding officer of an Army Reserve unit that was deployed to Kuwait and Iraq and has now returned. We suffered one dead and several wounded. One of the wounded soldiers has sought re-employment at our state prison, where he had been a guard. Because of a serious disability, which is likely to be permanent, he cannot return to his prison guard job. The State Department of Corrections (DOC) has offered him a job as a “clerk-trainee” in the prison’s mailroom. That job pays only about 60 percent of what the guard job pays, and the pension plan is much less generous. Perhaps most galling, the DOC has said that he must start over as a brand-new employee, with no seniority, because the mailroom job is in a different bargaining unit with a different union. I think that the DOC personnel office does not understand the Uniformed Services Employment and Reemployment Rights Act (USERRA). What do you think?**

**A:** At a minimum, this returning veteran is entitled to take with him to the new job the seniority that he had accrued as a guard, including the additional seniority that he would have accrued if he had remained continuously employed. In Law Review 120 (*The Officer*, April 2004) and Law Review 129 (*The Officer*, June 2004), I referred to and explained the *Veterans’ Reemployment Rights (VRR) Handbook* and the draft *USERRA Handbook*. The *VRR Handbook* states: “The disabled veteran carries his old seniority date with him to the new position and must be allowed to use that date for all seniority related purposes.” [1988 *VRR Handbook*, page 16–2.]

USERRA’s legislative history also supports this veteran’s claim to his seniority as he is transferred to the alternate position that is consistent with his disability: “If a position other than the ‘escalator’ position is offered to a returning disabled servicemember, full company seniority is *always* to be accorded to the disabled serviceperson, *regardless of whether seniority follows an employee under other circumstances.*” [House Rep. No. 103-65, 1994 *United States Code Congressional and Administrative News* 2449, 2465 (emphasis supplied).]

Moreover, I question whether the mailroom job is the “closest approximation” of the guard job, within the meaning of 38 U.S.C. 4313(a)(3). The draft *USERRA Handbook* contains this paragraph: “The disabled veteran is entitled to the position for which he or she is qualified and which provides the ‘closest approximation’ in terms of seniority, status, and pay, to his or her escalator position. In searching for alternate positions, the employer should look above as well as below, because it is possible the disabled veteran’s closest approximation position will be slightly higher in grade than the position to which he or she would be entitled had he or she not become disabled. Figuratively speaking, the job search might resemble a spiral, with the escalator position

at the center. Each succeeding job search should be closest to the original, both above and below it. If several jobs meet the criteria, the disabled veteran should be made aware of each and be given an opportunity to express his or her preferences."

Moreover, it should be noted that the employer is the state government as a whole, not just the Department of Corrections. [See *Ryan v. City of Philadelphia*, 559 F. Supp. 783 (E.D. Pa. 1983), *affirmed*, 732 F.2d 147 (3d Cir. 1984).] If the state government conducts a proper search of the entire state payroll, and looks up as well as down, it can do better than the mailroom clerk job for this young man. I respectfully suggest that the state must do better for its citizen and employee who laid aside his or her civilian pursuits to serve this country in its hour of need, and who returned with a serious service-connected disability.

*\* Military title shown 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.*