

**New Jersey Teachers Must Be Credited for Military Service
Time for Purposes of Layoffs and Recalls from Layoff**

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

- 1.1.1.7—USERRA applies to state and local governments
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
- 1.7—USERRA regulations
- 1.8—Relationship between USERRA and other laws/policies

Context of the issue

In New Jersey and most states, layoffs and recalls from layoff among teachers and other public sector employees are governed by seniority—the last hired are first let go and last called back. When a budget crunch means that teachers must be laid off, those teachers with the least seniority (because they were most recently hired) are the first (and usually the only) teachers to be laid off.

Being laid off¹ is not the same thing as being fired, in two important respects. Being fired connotes misconduct or poor performance, while being laid off connotes the misfortune of losing one's job simply because the employer needs or can afford fewer employees. Moreover, firing is permanent, while being laid off connotes that there is at least a possibility of being called back to work when economic conditions improve or when vacancies are created when other employees leave.

The reemployment statute and the escalator principle

As I explained in Law Review 104² and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994³ as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II, but since 1941 the VRRA has applied to voluntary enlistees as well as draftees.

¹ In the airline industry, layoffs are called "furloughs." This is exactly the same concept with a different name.

² I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,011 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 169 new articles in 2013.

³ Public Law 103-353. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

The VRRRA has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act, Congress amended the VRRRA to make it apply to state and local governments as well.

In 1946, in its first case construing the VRRRA, the Supreme Court enunciated the “escalator principle” when it held: “The returning veteran does not step back on the seniority escalator at the point he stepped 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).⁴

The escalator principle is codified in section 4316(a) of USERRA, which provides: “A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that the person *would have attained if the person had remained continuously employed.*” 38 U.S.C. 4316(a) (emphasis supplied).

As I explained in Law Review 1281 and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

- a. Must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. Must have given the employer prior oral or written notice.
- c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years. As is explained in Law Review 201 and other articles, there are nine exemptions to the five-year limit—kinds of service that do not count toward the limit.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, must have made a timely application for reemployment with the pre-service employer. After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

An individual who meets these five conditions is entitled, by federal law, to prompt reemployment in the position of employment that he or she would have attained if continuously employed, or in another position for which he or she is qualified that is of like seniority, status, and pay. 38 U.S.C. 4313(a)(2)(A). Moreover, upon reemployment the person

⁴ The citation means that you can find this case in Volume 328 of *United States Reports*, starting on page 275. The particular language quoted is on pages 284 and 285.

must be treated *as if he or she had been continuously employed* for seniority and pension purposes. 38 U.S.C. 4316(a), 4318.

If the individual fails to meet one or more of the five conditions, the employer is not required to reemploy the person. If the employer does take the individual back, although he or she does not meet all five conditions, the employer is not required to treat the person as if he or she had been continuously employed, for seniority and pension purposes.

Relationship between USERRA and state law

Section 4302 of USERRA explains the relationship between USERRA and state laws:

“(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.”

38 U.S.C. 4302.

Under section 4302, USERRA is *a floor and not a ceiling* on the rights of those who are serving or have served in the uniformed services. A state can grant these people *greater or additional rights* beyond their rights under USERRA, but a state cannot take away or limit the rights conferred by Congress when it enacted USERRA.

Article VI, Clause 2 of the United States Constitution (commonly called the “Supremacy Clause”) provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁵ Thus, if a local school district cannot comply with state law without violating federal law, the district must comply with the federal law and ignore the state law.

USERRA is an across-the-board federal floor on the rights of persons who leave civilian employment for uniformed service, meet the five USERRA conditions, and return to their pre-service civilian employers after release from service. Even if a state is above the federal floor in one respect, USERRA does not permit the state to go below the federal floor in another respect.

⁵ Yes, it is capitalized just that way, in the style of the late 18th Century.

Section 4331 of USERRA, 38 U.S.C. 4331, gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* September 20, 2004. After considering comments received and making a few adjustments, the Department of Labor (DOL) published in the December 29, 2005, *Federal Register* the final USERRA regulations. They took effect January 18, 2006. The regulations are published in Title 20, Code of Federal Regulations (CFR), Part 1002 (20 C.F.R. Part 1002). One section of the DOL regulations explains the relationship between USERRA and other laws, contracts, agreements, policies, and other matters:

"How does USERRA relate to other laws, public and private contracts, and employer practices?"

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

(b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) *If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA.* For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave."

20 C.F.R. 1002.7 (emphasis by italics supplied, bold question in original).

How the New Jersey law conflicts with USERRA

New Jersey law provides as follows regarding layoffs of teachers and recalls from layoffs and regarding credit for military service in this system:

“If any teaching staff member shall be dismissed as a result of such reduction [in force, or layoff], such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, *full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this State*, subsequent to September 1, 1940, and the time of service of any member of the American Merchant Marine during World War II who is declared by the United States Department of Defense to be eligible for federal veterans' benefits, shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service, *except that the period of that service shall not be credited toward more than four years of employment or seniority credit.*”

New Jersey Statutes Annotated section 18A:28-12 (emphasis supplied).

In one respect, section 18A:28-12 provides veterans *greater or additional rights beyond USERRA* and is not superseded by USERRA. In that respect, this section of state law is not superseded or overridden by USERRA. In another way, this state law section seems to limit USERRA rights and is superseded. To understand this relationship, let us discuss two hypothetical but realistic individual situations.

Joe Smith and Mary Jones, classmates at Rutgers University and in the Air Force ROTC, graduated from Rutgers and were commissioned Air Force Second Lieutenants in May 1996. Both served on active duty for five years and were released from active duty in May 2001. After release from active duty, Smith affiliated with the Air Force Reserve and Jones decided not to affiliate. Both were hired as rookie school teachers by the same New Jersey school district in September 2001.

Under section 18A:28-12, both Smith and Jones were given four years of New Jersey teaching seniority credit for their five-year active duty periods (May 1996 to May 2001). They were not entitled to this seniority credit under USERRA, because they did not work for the school district before serving on active duty in the Air Force. The federal law did not require the school district to credit this active duty at all, so the state law limiting the credit to four years (for five years of active duty) is valid.

In January 2003, about half-way through his second academic year with the school district, Smith was involuntarily called to active duty with his Air Force Reserve unit.⁶ Smith deployed to Southwest Asia and participated in military operations related to the March 2003 invasion and occupation of Iraq. Smith served honorably and was released from active duty a year later, in January 2004, and then he made a timely application for reemployment. At that point, Smith met the five USERRA eligibility criteria.

Smith returned to work for the school district in January 2004, but the school district's personnel office refused to credit him for his year of active duty (January 2003 to January 2004) for layoff protection purposes. The school district's attorney advised the district superintendent that under section 18A:28-12 Smith is limited to four years of seniority credit for military service time, and Smith has already received the four years of credit, when he was hired in September 2001.

The school district's attorney is wrong and should be returned to law school and forced to retake Constitutional Law 101. Under the Supremacy Clause, federal law (USERRA) supersedes and overrides New Jersey law. USERRA requires the school district to accord Smith seniority credit for his 2003-04 active duty period, without regard to what the state law may provide.

It is perhaps not surprising that section 18A:28-12 conflicts with USERRA. The state legislature in Trenton enacted this section in 1967, seven years before Congress amended the VRRRA to make it apply to state and local governments.

Service Members Law Center

As the Director of the Service Members Law Center (SMLC), I receive and answer questions like this every day, from service members, military family members, employers, attorneys, DOL investigators, ESGR (Employer Support of the Guard & Reserve) ombudsmen, congressional and state legislative staffers, reporters, and others. In 2013, I received and responded to 9,193 inquiries, or 766 per month on average. Almost half the inquiries were about USERRA, and the other half were about everything you can think of that has something to do with military service and law. I am available at 800-809-9448, extension 730, or by e-mail at SWright@roa.org.

If you are calling me or e-mailing me to complain about your civilian employer or to seek advice and assistance in dealing with the employer, *please do not use the employer's telephone, computer, or time*. As you can appreciate, you have no reasonable expectation of privacy when you use the employer's equipment or time. Moreover, if the employer is annoyed with you because you have been called to the colors five times since the 9/11 terrorist attacks, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking.

⁶ The result would be exactly the same if he had volunteered.

I am here at my post answering calls and e-mails during regular business hours Monday-Friday and also until 10 pm Eastern Time on Mondays and Thursdays. The point of the evening availability is to enable Reserve and National Guard personnel to call me or e-mail me from the privacy of their own homes, outside their civilian work hours.

ROA is unique in providing this after-hours service. Neither ESGR, nor DOL, nor any other government agency or military association provides Reserve and National Guard personnel the opportunity to speak to a live human (to say nothing of an expert attorney) after 5 pm local time.

I have been dealing with the VRRRA and USERRA for 32 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for DOL as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in early 1991. The version signed into law by President Clinton on October 13, 1994 was about 85% the same as the Webman-Wright draft.

I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for ESGR, as an attorney for the United States Office of Special Counsel, and as an attorney in private practice. I joined ROA's full-time staff in June 2009, when we established the Service Members Law Center.

The focus of my legal career, since I graduated from law school and passed the Texas bar exam in 1976, has been on protecting the legal rights (especially reemployment rights and voting rights) of service members. I am continuing that focus as the Director of the Service Members Law Center. We need your support in maintaining and expanding this vital service for today's generation of Reserve and National Guard personnel.