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I Am a Disabled Veteran and a Federal Employee— Am I Entitled to Leave without Pay for a Medical Condition that Is not Service-Connected?

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.8—Relationship between USERRA and other laws/policies
9.0--Miscellaneous

Q: I am a service-connected disabled veteran. I was drafted in 1968 and was wounded in action in 1969, in Vietnam. I lost my left leg as a result of those wounds. Using my ten-point preference as a service-connected disabled veteran, I obtained a federal civilian job in June 1985 and have been continuously employed by the Federal Government ever since. I have long intended to keep my federal job until June 2015 and then retire with 30 years of federal civilian service.

In November 2013, I contracted a bad case of pneumonia, and I have been out from work ever since. I have exhausted all of my sick leave and annual leave, and then I applied to take leave without pay (LWOP), which my agency management declined to grant me. My physician

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

informs me that it is likely that I will be fully recovered and able to return to work by June 2014. I want to return to work this summer and then retire from federal service about a year later. My agency management is not willing to wait for me to recover from the pneumonia and is pushing me to retire now, before I am ready.

I have read with great interest your Law Review 13080 (June 2013), concerning Executive Order (EO) 5396, signed by President Herbert Hoover on July 17, 1930. In the article you wrote that a federal agency is *required* to grant LWOP to a federal employee who is a disabled veteran and who needs LWOP for medical treatment.

I provided to my agency's personnel office a copy of EO 5396 and your Law Review 13080, and I reiterated my request for LWOP for medical treatment and recuperation. The personnel office insists that the right to LWOP for medical treatment for a disabled veteran like myself only applies if the medical treatment is for the service-connected condition. The personnel office cited *Desiderio v. Department of the Navy,* 4 M.S.P.B. 171 (Nov. 17, 1980) in support of this proposition.

I acknowledge that my 2014 pneumonia is not related to the wounds I received in combat as a young man, but I do not see anything in your Law Review 13080 or in EO 5396 which limits the right to time off for medical treatment to situations where the medical treatment was necessitated by a condition that was incurred during military service.

What do you think? Am I entitled to LWOP in 2014 under EO 5396?

A: I believe that the answer to that question is *yes,* but I acknowledge that the matter is not entirely free from doubt. There is no legislative history to refer to on the question of what President Hoover had in mind in 1930, and since he has been dead for half a century we cannot ask him.

In 2012, Thomson/West Publishing Company published *Reading Law: The Interpretation of Legal Texts* by Supreme Court Justice Antonin Scalia and law professor Bryan A. Garner. This highly regarded book details the *rules of statutory construction* developed by the courts in Great Britain, the United States, Canada, and other common law countries over many centuries. The everyday work of courts includes determining the meaning of words included in contracts, wills, statutes, executive orders, and other legal documents.

At pages 221-24, Justice Scalia and Professor Garner set forth and then explain the "Title-and-Headings Canon" which is stated as follows: "The title and headings are permissible indicators of meaning."

The title of EO 5396 is "Special Leaves of Absence to be Given Disabled Veterans in Need of Medical Treatment." This heading is *not* something that was added later by a publisher or codifier. This heading appeared at the top of the document that was prepared for President Hoover's signature on July 17, 1930. It can be presumed that President Hoover read the

heading and the simple two-paragraph executive order carefully before he decided to affix his signature.

If President Hoover had intended that the right to LWOP for necessary medical treatment of disabled veterans should only apply if the medical treatment was necessitated by the same service-connected medical condition that caused the disability, he would have directed that the order be redrafted before he affixed his signature. It is reasonable to infer that President Hoover intended a broad and generous interpretation of EO 5396, not a narrow and stingy interpretation.

In its first case construing the federal reemployment statute, the Supreme Court held: "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).[3] *See also Boone v. Lightner,* 319 U.S. 561, 575 (1943), wherein the Court called for a similar liberal construction of the Soldiers' and Sailors' Civil Relief Act.[4] I assert that EO 5396 should similarly be liberally construed for the benefit of veterans like you, and the right to LWOP for medical treatment is not limited to treatment for service-connected medical conditions.

Your agency's personnel office cited *Desiderio v. Department of the Navy,* 4 M.S.P.B. 171 (Merit Systems Protection Board 1980). I think that case is a very weak reed to rely upon for the proposition that a disabled veteran's right to LWOP for medical treatment is limited to treatment for service-connected conditions.

The Merit Systems Protection Board (MSPB) is a quasi-judicial federal executive agency created by the Civil Service Reform Act of 1978 (CSRA). The MSPB was only two years old when it decided *Desiderio* in 1980.

The CSRA split the former Civil Service Commission (CSC) into three agencies: The Office of Personnel Management (OPM), the MSPB, and the Office of Special Counsel (OSC). OPM inherited the CSC's administrative functions as the personnel office for the Executive Branch of the Federal Government, along with most of the CSC staff. The MSPB inherited the CSC's adjudicatory functions, and the OSC inherited the investigative and prosecutorial functions. Congress decided that it was unseemly to consolidate all these diverse functions in a single agency like the CSC.

A federal employee who has completed the initial year of probationary or "career conditional" employment and who is then fired has the right to appeal the firing to the MSPB. Ronald Desiderio was a career employee of the Department of the Navy at the Philadelphia Navy Yard.

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[3]The citation means that you can find this Supreme Court decision in Volume 328 of *United States Reports* starting on page 275, and the specific language quoted can be found on page 285.

[4]In 2003, Congress substantially rewrote the Soldiers' and Sailors' Civil Relief Act, and the new statute is called the Servicemembers Civil Relief Act.

He had a very poor attendance record. He missed 356 hours of work in 1978 and another 461 hours (331 hours unauthorized) in 1979. He was fired in early 1980, and he appealed to the MSPB. Like any MSPB case, *Desiderio* was heard initially by an Administrative Judge (AJ)[5] of the MSPB. In this case, the AJ sustained the firing on July 25, 1980, and Desiderio appealed to the MSPB itself.

The MSPB consists of three members, each of whom is appointed by the President with Senate confirmation. The *Desiderio* case was decided by Ersa H. Poston, one of the three members.[6] On behalf of the MSPB, Member Poston affirmed the firing on November 17, 1980.

Desiderio could have appealed the MSPB decision to the United States Court of Appeals for the Third Circuit[7] but he did not do so. This case is of very limited precedential value.

Ronald Desiderio served on active duty in Vietnam and was discharged in 1969 with a compensable injury to his right arm. He attributed his missed work hours in 1978-79 to "stomach problems" but did not document the nature of the asserted health problems. He attributed the "stomach problems" to stress he had suffered a decade earlier in Vietnam but offered no evidence of any such connection.

Yes, it is true that the MSPB decision includes the statement that "appellant at no time [during 1978-79] received treatment for his injured right arm." But Desiderio clearly was a leave abuser who was grasping at straws to save his job. Applying *Desiderio* to your very different facts is a huge stretch, in my view.

I invite your attention to: https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/leave-without-pay/. This is the "Fact Sheet: Leave Without Pay" published by OPM. The pertinent bullet in the fact sheet states: "Executive Order 5396, July 17, 1930, provides that disabled veterans are entitled to LWOP for necessary medical treatment." Please note that the fact sheet does *not* say that disabled veterans are entitled to LWOP for medical treatment only if the treatment is for the service-connected condition.

I would be prepared to argue that in a case like yours you are entitled under EO 5396 to LWOP from your civilian federal job, as a disabled veteran, to be treated for pneumonia and that you are not required to show that your present medical condition is related to your military service in Vietnam 45 years ago. If your federal agency refuses to grant you LWOP for this medical treatment, you can appeal to the MSPB, and I think that you have a good case.

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[5]Actually, in 1980, these officials were called "presiding officials." Today, they are called AJs.

[6]The fact that the case was decided by just one member, not the three-member board, means that the case is worthy of even less precedential value.

[7]The 3rd Circuit is the federal appellate court that sits in Philadelphia and hears appeals from Delaware, New Jersey, Pennsylvania, and the Virgin Islands. Congress created the Federal Circuit in 1982, and after 1982 MSPB decisions are reviewed by the Federal Circuit.

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ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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