

## LAW REVIEW 15041<sup>1</sup>

May 2015

### **Seniority for PHS Officers within the BOP Medical System**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

- 1.1.3.4—USERRA applies to PHS service
- 1.2—USERRA forbids discrimination
- 1.3.2.11—Vacations, holidays, and days off
- 1.4—USERRA enforcement
- 1.8—Relationship between USERRA and other laws/policies

**Q: I am a Commander (O-5) in the United States Public Health Service (PHS), a Physician's Assistant (PA), and a life member of the Reserve Officers Association (ROA).<sup>3</sup> The PHS is a uniformed service in the United States Department of Health and Human Services (DHHS). There are 6,653 actively serving PHS officers, and I have been actively serving for the last 21 years.**

**PHS officers serve for and with several federal agencies, including the United States Coast Guard (providing health care services for Coast Guard personnel and families), the Indian Health Service (providing health care services for Native Americans on reservations), and the Bureau of Prisons (providing health care services for inmates in federal prisons). I have spent my entire career at the Bureau of Prisons (BOP), mostly at the same prison.**

**The BOP has 121 penal institutions, and each one has a medical unit. There is a great need for medical care among federal inmates, because 17.4% of the inmates are over the age of 50 (according to the BOP website).**

**According to the BOP website, there are about 3,000 medical personnel at the 121 BOP medical units. The BOP website states that 750 of these medical positions are filled by serving PHS officers, while the PHS website states that 873 PHS officers are assigned to the BOP. Either way, PHS officers make up about 25% of the medical care providers for BOP. The other 75% are civilian employees of BOP. The civilian employees are represented by a union. The PHS officers are not eligible to join and are not represented by the union.**

**I have worked for the BOP health care system as a PA for 30 years, since 1985. For the first nine years, I was a civilian employee of BOP. In 1994, my civilian position was converted to a**

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,300 "Law Review" 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. The Reserve Officers Association (ROA) initiated this column in 1997.

<sup>2</sup> Captain Wright was the Director of ROA's Service Members Law Center for six years, from June 2009 through May 2015.

<sup>3</sup> PHS officers have always been eligible for ROA membership, and we currently have 1,201 PHS officers as members.

**PHS officer position and I was commissioned as a PHS officer. I have served in that capacity ever since.**

**Along with two BOP civilian employees, I provide primary health care services for inmates at a particular federal prison. At least two of us need to be at work—only one of us can take vacation at a time. Under the Master Agreement (MA) between the union and BOP, seniority (time spent working for the BOP health care system) determines many important things, including the opportunity to bid for and obtain a favorable work schedule and to get leave requests approved.**

**My two civilian medical colleagues at this BOP medical unit have far less BOP time than I. One has worked for BOP for 30 months and the other for two months. But under the union's interpretation of the MA, these two colleagues have seniority and I do not. Although I have worked for the BOP medical system for 30 years, I lose out to these two civilian colleagues in the selection of favorable work schedules and vacation times. This is most unfair and ought to be illegal.**

**The MA is ambiguous as to how PHS officers like me are to be treated for the purpose of selecting work schedules and vacation times, and among the 121 prisons in the federal system there is a considerable difference of interpretation on this point. At this particular prison, the union has contended and management has agreed that only civilian employees have “seniority” under the MA.**

**I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Is the PHS commissioned corps a “uniformed service” for purposes of USERRA? Have my USERRA rights been violated? If so, what can I do about it?**

***PHS is a uniformed service under USERRA, and you have USERRA rights.***

**A: The PHS commissioned corps is most definitely a uniformed service for USERRA purposes, and I think that you have a good argument that the way that management is treating you violates USERRA. First, let me provide some background.**

As I have explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994. USERRA is codified in title 38 of the United States Code, at sections 4301-4335 (38 U.S.C. 4301-4335). The law enacted in 1994 was 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, the law that led to the drafting of millions of young men (including my late father) for World War II.<sup>4</sup>

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<sup>4</sup> I have been dealing with the VRRA and USERRA for the last 33 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 interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that President Clinton signed on October 13, 1994 was 85% the same as the Webman-Wright draft. I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for

Section 101 of title 10 of the United States Code defines many terms, including the term “armed forces” and the term “uniformed services.” There are five armed forces and seven uniformed services. All armed forces are uniformed services, but not all uniformed services are armed forces. Here is the text of the two pertinent subsections of section 101:

“(4) The term “armed forces” means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(5) The term “uniformed services” means--

(A) the armed forces;

(B) the commissioned corps of the National Oceanic and Atmospheric Administration; and

(C) *the commissioned corps of the Public Health Service.*”

10 U.S.C. 101(a)(4) and (5) (emphasis supplied).

USERRA has its own definition of “uniformed services,” and that definition includes the PHS commissioned corps but not the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA).<sup>5</sup> Section 4303 of USERRA defines 16 terms, including the term “uniformed services” which is defined as follows:

“(16) The term “uniformed services” means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, *the commissioned corps of the Public Health Service*, and any other category of persons designated by the President in time of war or national emergency.”

38 U.S.C. 4303(16) (emphasis supplied).

Section 4311(a) of USERRA provides:

“(a) A person who *is a member of*, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any *benefit of employment* by an employer on the basis of that *membership*, application for membership, performance of service, application for service, or obligation.

38 U.S.C. 4311(a) (emphasis supplied).

Section 4303(2) of USERRA defines the term “benefit of employment” as follows:

“(2) The term “benefit”, “benefit of employment”, or “rights and benefits” means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status,

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Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice. For the last six years (June 2009 through May 2015), I have been the Director of ROA’s Service Members Law Center (SMLC). We are winding down the SMLC on May 31, 2015, but I will continue my interest in and writing about USERRA and other military-relevant laws.

<sup>5</sup> Please see Law Review 15002 (January 2015) for an explanation of how it came to pass that USERRA applies to the PHS but not to NOAA.

account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, *and the opportunity to select work hours or location of employment.*"

38 U.S.C. 4303(2) (emphasis supplied).

Applying these USERRA sections together, it is clear that you are a member of a uniformed service (PHS) and you are being denied a "benefit of employment" (the opportunity to bid for and get favorable work schedules and vacation days) based on your membership in a uniformed service, in violation of section 4311(a) of USERRA.

***An important precedent supports your case.***

I invite your attention to *Gjovik v. Department of Health and Human Services*, 2011 MSPB 90, a decision of the Merit Systems Protection Board (MSPB)<sup>6</sup> on September 30, 2011. Nathan Gjovik was a career PHS officer assigned to duty with the Indian Health Service (IHS), a component of DHHS. Gjovik asserted that IHS violated USERRA when it reassigned him to a different IHS workplace, included false information in his PHS performance evaluations, denied him two promotions, and subjected him to a hostile work environment.

After complaining to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) and receiving no relief, Gjovik (representing himself) brought an action against IHS in the MSPB. Like all MSPB actions, the case originated before an Administrative Judge (AJ) of the MSPB. IHS contended that the MSPB has no jurisdiction over a case of this kind and urged the AJ to dismiss the case for want of jurisdiction.

The AJ overruled the agency's jurisdictional challenge and held that the MSPB did indeed have jurisdiction to hear and adjudicate Gjovik's USERRA complaint. IHS made an interlocutory appeal<sup>7</sup> to the MSPB itself.<sup>8</sup> After reading briefs and hearing oral arguments from IHS and Gjovik,<sup>9</sup> the MSPB held that it did have jurisdiction: "Based on the foregoing, we find that the Board has authority to exercise its jurisdiction pursuant to USERRA even when the appeal is

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<sup>6</sup> The MSPB is a quasi-judicial federal Executive Branch agency that was created by the Civil Service Reform Act of 1978 (CSRA). The CSRA split the former Civil Service Commission (CSC) into three agencies. The Office of Personnel Management (OPM) inherited the majority of the CSC's assets and staff and the headquarters building here in Washington and the function as the personnel office for the Executive Branch. The MSPB inherited the CSC's adjudicatory functions, involving disputes between federal agencies (as employers) and federal employees, under many statutes. The Office of Special Counsel (OSC) inherited the CSC's investigatory and prosecutorial functions. When it was enacted in 1994, USERRA assigned important new responsibilities to both the MSPB and OSC.

<sup>7</sup> Normally, an appeal cannot be made until the initial tribunal has made a dispositive decision. In special circumstances, the appellate court or tribunal will hear an interlocutory appeal of a non-dispositive but important holding. The MSPB agreed that the *Gjovik* case involved such special circumstances and agreed to hear the IHS appeal on an interlocutory basis.

<sup>8</sup> The MSPB has three members, each of whom is appointed by the President with Senate confirmation.

<sup>9</sup> Gjovik represented himself in this appeal. Abraham Lincoln said: "A man who represents himself has a fool for a client." Nonetheless, Gjovik bested the lawyers who represented IHS because he had the better argument.

brought by a career member of the uniformed service and the agency action at issue is taken by the agency employing the uniformed service member in that capacity."

Under section 4324(d)(1) of USERRA,<sup>10</sup> the USERRA claimant but not the defendant agency can appeal an unfavorable MSPB decision to the United States Court of Appeals for the Federal Circuit.<sup>11</sup> The *Gjovik* decision is the last word from the MSPB on this jurisdictional issue. I think that the *Gjovik* precedent strongly supports your case.

#### ***Relationship between the Master Agreement and USERRA***

In its first case construing the VRRA, the Supreme Court established an important principle: "No practice of employers *or agreements between employers and unions* can cut down the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (emphasis supplied).<sup>12</sup>

Section 4302(b) of USERRA codifies this holding in the current law, as follows:

"(b) This chapter [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 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(b) (emphasis supplied).

The Master Agreement between BOP management and the union representing the BOP civilian medical care providers does not and cannot override USERRA. I think that it is clear that putting senior PHS medical care providers behind rookie BOP civilian medical care providers, for purposes of selection of work schedules and vacation days, violates section 4311(a) of USERRA.

#### ***How your USERRA case will be adjudicated, and how you will be represented***

Under section 4322(a) and (b) of USERRA,<sup>13</sup> a person who claims that his or her USERRA rights have been violated by any employer (federal, state, local, or private sector) can file a written USERRA complaint with DOL-VETS. You have already filed such a complaint, and DOL-VETS is already at work on investigating your complaint.<sup>14</sup>

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<sup>10</sup> 38 U.S.C. 4324(d)(1).

<sup>11</sup> Congress created the Federal Circuit in 1982, merging the former Court of Claims and the Court of Customs and Patent Appeals. The Federal Circuit has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

<sup>12</sup> The citation means that you can find this case decision in Volume 328 of *United States Reports*, and this case starts on page 275. The specific language quoted can be found at page 285. For a detailed discussion of the important *Fishgold* case, please see Law Review 0803 (January 2008).

<sup>13</sup> 38 U.S.C. 4322(a) and (b).

<sup>14</sup> Under section 4324(b)(1) [38 U.S.C. 4324(b)(1)], you could have bypassed DOL-VETS and filed your case directly with the MSPB. I think that you were wise to file initially through DOL-VETS.

DOL-VETS will investigate your complaint, and if the agency concludes that your USERRA rights have been violated it will make “reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of [USERRA].”<sup>15</sup> DOL-VETS is expected to complete its investigation within 90 days after receiving your complaint.<sup>16</sup>

After completing its investigation, DOL-VETS will advise you of the results of the investigation and of your right to seek relief through the MSPB.<sup>17</sup> If you so request, DOL-VETS will refer your case to OSC.<sup>18</sup> If OSC agrees that your case has merit, it may initiate an MSPB case on your behalf and represent you, at no cost to you.<sup>19</sup>

If OSC decides not to represent you, it must notify you of the declination of representation within 60 days after receiving the referral from DOL-VETS.<sup>20</sup> Upon receipt of the OSC declination, you may bring your own case to the MSPB.<sup>21</sup> If you bring your own case to the MSPB (after bypassing DOL-VETS, after declining to ask DOL-VETS to refer your case to OSC, or after OSC has declined your request for representation), and if you retain private counsel, and if you prevail, the MSPB may award you attorney fees as part of the relief.<sup>22</sup>

In the MSPB case, the losing party at the AJ level (complaining employee or agency defendant) may appeal to the MSPB itself. The complaining employee but not the agency can appeal an unfavorable MSPB decision to the Federal Circuit.<sup>23</sup>

#### ***ROA takes action on your behalf.***

ROA Executive Director Jeffrey E. Phillips has written a letter to VADM Vivek H. Murthy, USPHS, the Surgeon General of the United States and head of the PHS commissioned corps, to alert him to this issue and to express ROA’s concern about the way that you and other PHS officers are being treated. We will follow up on this matter, and we will keep the readers informed of new developments in this case.<sup>24</sup>

#### **UPDATE TO LAW REVIEW 15041**

(August 2015)

The Public Health Service (PHS) officer at issue in this article filed a formal written complaint with the Veterans’ Employment and Training Service of the United States Department of Labor

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<sup>15</sup> 38 U.S.C. 4322(d).

<sup>16</sup> 38 U.S.C. 4322(f).

<sup>17</sup> 38 U.S.C. 4322(e).

<sup>18</sup> 38 U.S.C. 4324(a)(1). In lieu of requesting referral to OSC, you can bring your case directly to the MSPB, as Gjovik did. 38 U.S.C. 4324(b)(2) and (3).

<sup>19</sup> 38 U.S.C. 4324(a)(2)(A).

<sup>20</sup> 38 U.S.C. 4324(a)(2)(B).

<sup>21</sup> 38 U.S.C. 4324(b)(4).

<sup>22</sup> 38 U.S.C. 4324(c)(4).

<sup>23</sup> 38 U.S.C. 4324(d)(1).

<sup>24</sup> ROA has suspended the Service Members Law Center (SMLC) effective May 31, 2015, but the “Law Review” column will continue. Although I am no longer employed by ROA, I remain interested in USERRA and other military-relevant laws and will continue to write “Law Review” articles as time permits.

(DOL-VETS). In her complaint, she asserted that the practice of the Bureau of Prisons (BOP) at least at this particular prison violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).

This USERRA complaint was assigned to Mr. Daniel A. Friedman, a DOL-VETS Assistant Director for Veterans' Employment and Training. Mr. Friedman completed his investigation expeditiously and agreed with the claim that giving rookie BOP civilian health care providers priority over veteran PHS health care providers, in the selection of work schedules and days off, violated USERRA. Mr. Friedman communicated that conclusion to the warden of the prison, and the unlawful policy has been changed to bring it into compliance with USERRA. This DOL-VETS case has been resolved successfully and closed.

ROA congratulates Mr. Friedman and DOL-VETS for their timely and effective action on behalf of this ROA member.