

LAW REVIEW 15058¹

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What Is “*Chevron* Deference?”

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1.7—USERRA regulations

1.8—Relationship between USERRA and other laws/policies

Q: I am a Captain in the Army Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).³

I was recalled to active duty from 2011 to 2013. I was reemployed by my pre-service employer (Daddy Warbucks International or DWI), but I believe that the company did not give me all that I am entitled to under USERRA (seniority credit, pension credit, etc.). I retained private counsel and sued DWI in federal district court.

My lawyer recently provided me a copy of a brief that he filed in this court. In his brief, he cited several provisions of the USERRA Regulations promulgated by the United States Department of Labor (DOL) and he wrote that these regulations are entitled to “*Chevron* deference.” What the heck does that mean?

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1,350 “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.

² Captain Wright was the Director of ROA’s Service Members Law Center (SMLC), as a full-time employee of ROA, from June 2009 through May 2015. During that six-year period, he received and responded to more than 35,000 e-mail and telephone inquiries. Although he is no longer employed by ROA, he is continuing the SMLC on a part-time volunteer basis, as a member of ROA. He answers e-mails and telephone calls at ROA headquarters on Wednesday and Thursday evenings. The telephone number is (800) 809-9448, ext. 730, and the e-mail is SWright@roa.org. Please understand that Captain Wright is a volunteer, and he will not necessarily be able to respond to your inquiry on the same day that you make it.

³ As is 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 USERRA is a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335). Captain Wright has been dealing with the VRRA and USERRA for 33 years. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress in February 1991. The version of USERRA that President Clinton signed in 1994 was 85 per cent the same as the Webman-Wright draft. Captain Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for 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.

A: Your lawyer is referring to an important Supreme Court decision: *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).⁴ The term “*Chevron* deference” refers to the situation wherein an agency that is charged with enforcing a statute has interpreted an ambiguous provision of the statute. In that situation, the courts should defer to the agency’s interpretation so long as it is reasonable.

As one of the two principal drafters of USERRA, I proudly say that most of this law’s provisions are clear and unambiguous, meaning that they are only susceptible to one interpretation, and that is the interpretation that the drafters intended. Of course, there are provisions that are capable of more than one reasonable interpretation. In that situation, the interpretation adopted by DOL in the USERRA Regulations is entitled to *Chevron* deference.

Section 4331 of USERRA⁵ 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).

⁴ The citation means that you can find this case in Volume 467 of *United States Reports*, and this case starts on page 837.

⁵ 38 U.S.C. 4331.