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Being a Nurse Practitioner, rather than simply a Registered Nurse, Is Part of the "Status" to which You Are Entitled upon Reemployment

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

1.3.1.2—Character and duration of service
1.3.1.3—Timely application for reemployment
1.3.2.4—Status of the returning veteran

Q: I am a Major in the Army Reserve and a life member of the Reserve Officers Association (ROA). For years, I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I graduated from college and was commissioned a Second Lieutenant in May 2000. At the same time, I was certified as a Registered Nurse (RN), and I served on active duty as a nurse for just over five years, leaving active duty September 30, 2005. I returned to my home town and soon found a job as a nurse at Beaver Falls Hospital (BFH), where I have worked ever since.

With substantial additional education and specialized experience, I was certified as a Nurse Practitioner (NP) in October 2010, and I became one of five NPs in the BFH Emergency Room. NP is a subset of RN. All NPs are RNs, but not all RNs are NPs. Qualifying as an NP is a

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,400 "Law Review"

[2] Captain Wright is the author or co-author of more than 1,200 of the almost 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. 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 (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. 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, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

professional accomplishment about which I am very proud, and I very much want to work as an NP.

In August 2013, I gave both oral and written notice to my civilian supervisor (the head of the BFH Emergency Department) and to the BFH Personnel Office that I had been accepted for a two-year voluntary recall to active duty in the Army. I entered active duty on October 1, 2013, and I will be leaving active duty on September 30, 2015. I am already home in Beaver Falls on terminal leave. I already have my DD-214 in hand, and it shows that I leave active duty on September 30. I am still receiving my Army salary through the end of September.

When I left my civilian job to go on active duty almost two years ago, Joe Smith was promoted from an RN position to fill my NP position—he had recently completed the NP training and was anxiously awaiting the promotion. Joe has done a fine job—he was named "employee of the year" at the hospital each of the last two years. The other four emergency room NPs who were working with me in September 2013 are still working there and doing well. None is close to retirement, and there is no reason to expect that any of them will leave any time soon. The hospital only needs five NPs in the emergency department, and it will likely be many years before there is a vacancy that would enable me to return to my pre-service job in the emergency department. BFH does not employ NPs, except for the five positions in the emergency department.

I have applied for reemployment at the BFH personnel department. The personnel director told me that I will be welcomed back, but not into the emergency department because there is no vacancy there. The personnel director told me that I will be returning to the RN position that I held before I was promoted to NP in 2010. That RN position pays $10,000 per year less than the NP that I held just before I returned to active duty in 2013.

I protested, asserting that under USERRA I am entitled to the NP position and the salary that goes with the position. The personnel director told me that he would look into the possibility of getting me the NP salary but that returning to the NP position in the emergency department is out of the question. Do you think that my USERRA rights are being violated?

A: Yes, I think that being an NP, rather than merely an RN, is part of the "status" to which you are entitled upon reemployment under USERRA. For purposes of this answer, I am assuming that it is clear that you meet the five conditions for reemployment under USERRA.[3] In 2013, you left your civilian job for the purpose of performing uniformed service, and you gave the employer prior oral or written notice (or both). This two-year period of voluntary active duty probably counts toward your five-year limit with respect to your employer relationship with BFH, but your earlier periods of military duty are exempt, and you are well within the five-year

[3] Please see Law Review 1281 for a detailed discussion of the five conditions.

limit.[4] You have served honorably, and your DD-214 shows that you are not receiving a disqualifying bad discharge enumerated in section 4304 of USERRA.[5] Because you have applied for reemployment while still on active duty, your application is deemed to be in effect as of October 1, the day after you leave active duty.[6] Because your period of service has exceeded 180 days, you have 90 days (starting on the date of release from active duty) to apply for reemployment.[7] Your application for reemployment on October 1 is well within this deadline.

Because you meet the five USERRA conditions as of October 1, the employer has a duty to reemploy you "in the position of employment in which the person [you] *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, *status* and pay, the duties of which the person is qualified to perform."[8]

In your situation, it seems clear that if your BFH career had not been interrupted by this two-year active duty period you would still be working as one of five NPs in the BFH emergency department. The fact that Joe Smith was promoted to take your place and is still working as one of the five emergency department NPs, and that the other four NPs in the department are still working there, clearly demonstrates that this is not one of those cases where the service member's job *would have gone away anyway* even if the person had not been away from work for service at the time.

If you had remained continuously employed, you would still be one of the five NPs. The RN position that you have been offered is not of "like status" to the NP position you held and would have continued to hold. Even if the hospital agrees to raise the salary of the RN position to equal the current pay of the NP position, reemploying you in that position is not sufficient under USERRA.

As is explained in Law Review 15067 and other articles, Congress enacted USERRA[9] in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's 1994 legislative history explains the concept of "status" as follows:

> Although not the subject of frequent court decisions, courts have construed status to include "opportunities for advancement, general working conditions, job location, shift assignment, [and] *rank and responsibility. Monday v. Adams Packing Association, Inc.,* 85 LRRM 2341, 2343 (M.D. Fla. 1973). *See Hackett v. State of Minnesota,* 120 Labor

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[4] Your 2000-05 active duty period does not count because it was before you began your BFH job. Your drill weekends and annual training periods are exempt from the five-year limit under 38 U.S.C. 4312(c)(3). Please see Law Review 201 for a detailed discussion of USERRA's five-year limit.

[5] 38 U.S.C. 4304.

[6] *See Martin v. Roosevelt Hospital,* 426 F.2d 155, 159 (2d Cir. 1970).

[7] 38 U.S.C. 4312(e)(1)(D).

[8] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied). Upon reemployment, you are also entitled to be treated *as if you had been continuously employed* at BFH for purposes of computing your BFH seniority and pension credit. *See* 38 U.S.C. 4316(a), 4318.

[9] Public Law 103-353. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335).

> Cases (CCH) P. 11,050 (D. Minn. 1991). A reinstatement offer in another city is particularly violative of like status (*See Armstrong v. Cleaner Services, Inc.,* 79 LRRM 2921, 2923 (M.D. Tenn. 1972)), *as would be reinstatement in a position which does not allow for the use of specialized skills in a unique situation.*[10]

I think that reinstating you as an RN, rather than an NP, squarely falls within "reinstatement in a position which does not allow for the use of specialized skills in a unique situation."

I have found two published appellate decisions that are very supportive of your position.[11] Margaret A. Ryan was a Naval Reserve[12] Nurse Corps officer at the time that Saddam Hussein's Iraq invaded and occupied Kuwait and threatened Saudi Arabia. President George H.W. Bush drew "a line in the sand" and promised to protect Saudi Arabia and to liberate Kuwait. As part of his response to the aggression, President Bush called up Reserve Component (RC) units, in the first significant RC mobilization since the Korean War.

Ryan was hired by Rush-Presbyterian St. Luke's Medical Center as a nurse in 1985, and in 1987 she was promoted to the position of "nurse manager" of one of the medical center's facilities. After President Bush drew his line in the sand, and after it became clear that there was a significant possibility that Ryan would be called to active duty by the Naval Reserve, Ryan's supervisor at the medical center pressured her to falsely claim illness in order to get out of her military commitment. To her great credit, Ryan steadfastly resisted this employer pressure.

Ryan was called to active duty, and she met the VRRA requirements for reemployment.[13] The employer agreed to reinstate her, but as the Assistant Nurse Manager rather than the Nurse Manager. Although the pay was the same, Ryan was not satisfied. After the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) turned down her request for assistance, she retained private counsel and sued the medical center in the United States District Court for the Northern District of Illinois. The district court judge granted summary judgment for the employer, holding that there was "no material issue of fact"

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[10] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2464.

[11] *See Ryan v. Rush-Presbyterian St. Luke's Medical Center,* 15 F.3d 697 (7th Cir. 1994) and *Nichols v. Department of Veterans Affairs,* 11 F.3d 160 (Fed. Cir. 1993). The *Ryan* citation means that you can find the case in Volume 15 of *Federal Reporter Third Series,* starting on page 697. This is a 1994 decision of the United States Court of Appeals for the 7th Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The *Nichols* citation means that you can find the case in Volume 11 of *Federal Reporter Third Series,* starting on page 160. This is a 1993 decision of the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that sits here in Washington and has nationwide jurisdiction over certain kinds of cases, including appeals from Merit Systems Protection Board (MSPB) decisions. As is explained in Law Review 15064, the MSPB has jurisdiction to hear and adjudicate claims that federal executive agencies (as employers) have violated USERRA.

[12] The name of the organization was later changed to "Navy Reserve."

[13] She left a civilian job for service, she served honorably, she was released from the period of service without having exceeded the VRRA's four-year limit, and since this was an involuntary call-up the period did not count toward her limit. After her release from active duty, she made a timely application for reemployment at the medical center.

because the Assistant Nurse Manager salary was the same as the Nurse Manager salary. Ryan appealed to the 7th Circuit, which reversed the summary judgment for the employer and remanded the case back to the district court. The parties then settled, with a substantial but undisclosed cash payment from the medical center to Ryan.[14]

Henry P. Nichols was a GS-13 chaplain for the United States Department of Veterans Affairs (VA) and was the "Chief, Chaplain Services" for a specific VA medical center. Nichols left his VA job for a three-year tour of active duty, and he met the VRRA criteria for reemployment. When Nichols left his VA job for active duty, the VA made another chaplain (Aidan J. Walsh) the chief chaplain at the medical center. Walsh apparently did a fine job, and when Nichols returned from active duty the VA balked at reinstating him as chief chaplain, because that would mean displacing Walsh.

When Nichols returned from active duty, he returned to a GS-13 chaplain position at the same VA medical center, but he was not the chief chaplain—he was one of the chaplains reporting to Walsh. Nichols initiated an action against the VA in the MSPB, but the MSPB ruled against him. He appealed to the Federal Circuit and prevailed.

The Federal Circuit held:

> The department first argues that, in this case, Nichols' former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who "left private life to serve their country." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).' *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[15]

For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite your attention to *Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools,* 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital,* 526 F. Supp. 49 (N.D. Miss. 1981).

[14] The fact that the parties settled in no way detracts from the precedential value of this published 7th Circuit decision.

[15] *Nichols,* 11 F.3d at 163.

These are VRRA cases, decided prior to the enactment of USERRA on October 13, 1994. That does not matter. The reemployment statute should be seen as 75 years old, not 21. USERRA's 1994 legislative history includes the following instructive paragraph:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protecting against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[16]

Resolution

At my suggestion, this Major referred the hospital's personnel director and general counsel to this case law and to several of our published "Law Review" articles. The hospital quickly came to its senses and agreed to reemploy her in the NP position in the hospital's emergency department. This matter is now satisfactorily resolved without the need for litigation or for a formal, written complaint against the employer with DOL-VETS.

[16] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2452.