

LAW REVIEW 155

Injured National Guard Technician

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Q: I am an Army National Guard technician. I am a civilian employee, although I generally wear my military uniform at work. My colleagues and I provide full-time support for several Army National Guard units in our state, and each of us is required to be a member of one of the supported units. We perform annual training and inactive duty training (drill weekends) with our units. Last year, several of us were mobilized, along with our units, and sent to Iraq. I suffered a serious injury in the line of duty and was medically retired. I returned to my state and applied for reemployment as a technician. The adjutant general of the state has refused to re-employ me, since I am no longer eligible to serve in a supported National Guard unit. I need a job. Help!

A: The Uniformed Services Employment and Reemployment Rights Act (USERRA) has a provision for this kind of situation: “If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel Management [OPM], be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).” 38 U.S.C. 4314(d).

The term “Federal executive agency” includes all departments and agencies in the Executive Branch of the federal government except intelligence agencies (CIA, DIA, FBI, etc.). It includes the United States Postal Service and the Postal Rate Commission, as well as nonappropriated fund instrumentalities of the United States, like the Army and Air Force Exchange Service. *See* 38 U.S.C. 4303(5).

You should ask the adjutant general of your state for a written determination that it is impossible or unreasonable to reemploy you because of your service-connected disability. Then, you should take that written determination to OPM, which should act promptly in finding you a comparable federal civilian position.

Q: That happened months ago, but I am still without a job. The OPM employee I dealt with first said that she had never heard of the provision to which you refer, and she denied that any such provision existed. An Army National Guard judge advocate made a copy of the provision from a law book and provided her the copy. The OPM employee then said that she did not see anything in OPM regulations giving her the authority to direct a federal agency to hire me in a particular job, or requiring the agency to obey any such OPM direction. I have been searching for appropriate federal civilian jobs, and I have made numerous applications, but I have not been selected for any of those jobs. And OPM has not been of any real help.

A: I have heard several such complaints. I think that the USERRA provision could hardly be clearer, but if necessary we (ROA) will ask Congress to enact a clarifying amendment next year. In the meantime, Maj Gen Robert McIntosh, ROA's executive director, has written to the Hon. Kay Coles James, OPM director, asking that she bring this provision to the attention of her staff and that she ensure compliance with USERRA within the Executive Branch of the federal government.

USERRA has several other provisions wherein the OPM director is responsible for ensuring that a returning service member is employed in a Federal executive agency.

1. An employee of a Federal Executive agency leaves the job for voluntary or involuntary service. The employee returns and applies for reemployment, meeting the USERRA eligibility criteria. The OPM Director finds that the pre-service employing agency no longer exists (and its functions have not been transferred to another Federal executive agency), or the OPM Director finds that it is impossible or unreasonable for the pre-service agency to reemploy the returning service member. 38 U.S.C. 4314(b).
2. An employee of the Legislative Branch or Judicial Branch of the Federal Government leaves for voluntary or involuntary service and returns, meeting the USERRA eligibility criteria. The employer finds it impossible or unreasonable to reemploy the individual. 38 U.S.C. 4314(c). *See also* Law Review 34.
3. An employee of a Federal intelligence agency (CIA, DIA, FBI, etc.) leaves for voluntary or involuntary service and returns, meeting the USERRA eligibility criteria. The employer finds it impossible or unreasonable to reemploy the individual. 38 U.S.C. 4315(e).