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Relationship between Union Agreement and USERRA

By CAPT Samuel F. Wright, JAGC, USNR*

Q: I am a firefighter in Washington state and a Marine Corps Reservist. I am a member of the International Association of Firefighters, and my local union is negotiating with the city for a new collective bargaining agreement (cba). I have asked the union to include the text of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and some of your Law Review articles in the text of the cba. What do you think of that idea? What is the relationship between USERRA and the cba?

A: As I explain in Law Review 104, USERRA was enacted in 1994 as a complete rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. In its first case construing the VRR law, the Supreme Court held: "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)]. Section 4302(b) of USERRA, 38 U.S.C. 4302(b), provides that USERRA supersedes a cba or a state law, local ordinance, or employer policy or practice that limits your USERRA rights or puts additional conditions upon your exercise of those rights. (See also Law Review 149.)

USERRA is a floor and not a ceiling on your rights as a person who is serving or has served in the uniformed services. Section 4302(a) of USERRA provides that this federal law does not supersede any other law, ordinance, cba, contract, policy, or practice that accords greater or additional rights. In other words, the cba can give you additional rights or benefits, but it cannot take away any of the rights that USERRA gives you. (Please see Law Review 18.)

Q: My union and the city are negotiating for a new cba to replace the one that was agreed to three years ago and that is about to expire. The current cba provides that an employee who is away from work for military service does not continue accruing vacation days or sick days while on active duty. Is that unlawful?

A: No. The Supreme Court has held that the returning veteran is not entitled to claim the vacation days that he or she would have accrued if he or she had been continuously employed. [See Foster v. Dravo Corp., 420 U.S. 92 (1975).] Similarly, the Second Circuit Court of Appeals has held that the returning veteran is not entitled to claim the sick days that he or she would have accrued if continuously employed. [See LiPani v. Bohack Corp., 546 F.2d 487 (2d Cir. 1976).]

In its initial 1946 VRR case, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at

the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." [Fishgold, 328 U.S. at 284-85.] Section 4316(a) of USERRA, 38 U.S.C. 4316(a), codifies the escalator principle. The escalator principle applies to perquisites of seniority, not short-term compensation for services. Vacation days and sick days are a form of short-term compensation, not a perquisite of seniority.

On the other hand, the rate at which you earn vacation after returning to work can be and often is a perquisite of seniority. Let us assume that employees with fewer than five years of seniority earn one week of vacation per year, employees with 5-20 years of seniority earn two weeks, and employees with more than 20 years of seniority earn three weeks. You have worked there for four years when you are called to active duty for 18 months. When you return to work, you start earning two weeks of vacation per year, but you are not entitled to the vacation days that you would have earned during those 18 months.

Q: What about bonuses? If the fire department meets its goals for the year, each employee who worked during the year is entitled to a bonus. If I miss the whole year because of military service, am I entitled to the bonus?

A: Probably not. The bonus is a form of short-term compensation, not a perquisite of seniority. If you were not there, you did not earn the bonus. Of course, the city can give you the bonus if it wants to-the employer can always do more than the law requires. And if you were there for some significant part of the year, you should receive at least a pro rata share of the bonus.

Moreover, you may be entitled to the whole bonus if you can show that other employees who are away from the job for a substantial part of the year for non-military leaves of absence (jury duty, educational leave, maternity leave, etc.) receive the whole bonus. This is based on USERRA's "furlough or leave of absence" clause, 38 U.S.C. 4316(b). [See also Law Reviews 41 and 58.]

Q: The bonus is awarded on the first business day of the new calendar year, like Monday, January 3, 2005. I know a firefighter who is a member of the Army Reserve. She was called to active duty at the very end of 2004, after having worked for essentially the entire year. She was denied the bonus because she was on active duty and not present for work January 3. Is this lawful?

A: No. Because she worked the whole year 2004, she earned the bonus. Depriving her of the bonus because she is not present on the "magic date" when the bonus is awarded is a violation of USERRA.

Q: What about health insurance coverage? The cba provides that an employee leaving for military service will have his or her health insurance coverage terminated upon

departure, and upon return the employee must wait until the annual “open season” to reinstate the coverage. Is this lawful?

A: No. If the returning employee meets the USERRA eligibility criteria, as described in Law Review 77, he or she is entitled to immediate reinstatement of the health insurance coverage upon return to work. There must be no waiting period and no exclusion of “pre-existing conditions” unless the Department of Veterans Affairs has determined the condition to be service-connected. [See 38 U.S.C. 4317(b). I also invite your attention to Law Reviews 10, 69, 85, 118, and 142.]

Q: What about pension credit? The cba provides that pension credit will be provided to an employee returning from military service “in accordance with state law.”

A: The returning veteran who meets the USERRA eligibility criteria is entitled to continuous service credit in the pension plan, in accordance with federal law, specifically Section 4318 of USERRA, 38 U.S.C. 4318. I invite your attention to Law Reviews 4, 9, 40, 74, 75, 76, 82, 107, and 119.

Q: Whom should I contact if I need assistance in enforcing my USERRA rights?

A: Contact the National Committee for Employer Support of the Guard and Reserve (ESGR), a DoD organization, 1-800-336-4590. The ESGR Web site is www.esgr.org.

* Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government. The best way to reach Captain Wright is by e-mail, at **samwright50@yahoo.com**.