

LAW REVIEW 16019¹

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Does Army National Guard Recruit Have Right to Get out of Apartment Lease?

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

Update on Sam Wright

4.0—SCRA generally

4.2—SCRA right to terminate a lease or contract

Q: I own and operate an apartment building in Albuquerque, New Mexico. I have read several of your “Law Review” articles about the Servicemembers Civil Relief Act (SCRA). When a tenant gets out of a lease early by joining the military or being transferred by the military that is a nuisance for me, as the landlord.

I read with particular interest your Law Review 13121 (September 2013). In that article, you discussed the situation of a member of the New Mexico Army National Guard who lived in El Paso, Texas and who was selected to perform a tour of “full-time National Guard duty” at the Office of the Adjutant General of New Mexico, in Santa Fe. He moved from an apartment in El Paso to a new apartment in Santa Fe, because he could not reasonably commute from El Paso to his new assignment in Santa Fe. In your Law Review 13121, you indicated that this man could not take advantage of section 571 of the Appendix of title 50 of the United States Code to maintain his domicile in Texas, which has no state income tax, while living in New Mexico for this National Guard assignment, because “full-time National Guard duty” does not qualify as “military service” for purposes of the SCRA.

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1400 “Law Review” articles about the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other 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. I am the author of more than 1200 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. From 2009 to 2015, I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015) concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an “of counsel” relationship. To arrange a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

In my apartment building, I have a tenant—let's call her Mary Jones. She recently joined the New Mexico Army National Guard, with no prior military experience. She provided me a copy of her orders—she will report to Army “boot camp” in April, but only for nine weeks. After that, she will come right back here to Albuquerque, and she will then be a traditional National Guard part-timer.

Jones sent me a certified letter, apparently drafted by a lawyer. The letter refers to section 535 of the Appendix of title 50 of the United States Code, and the letter demands that I release Jones from the lease, which runs until December 31, 2016.

It seems to me that Jones does not have the right to get out of the lease, under the terms of the SCRA. If section 571 does not apply to persons on “full-time National Guard duty” then the same applies to section 535, right?

A: Mary Jones has the right to terminate the apartment lease under these circumstances. As I shall explain in detail below, the term “full-time National Guard duty” has a specific meaning in the United States Code. A three-year Active Guard and Reserve (AGR) tour at the office of the Adjutant General of a state qualifies as “full-time National Guard duty.” Initial active duty training (boot camp) performed by a person who has just joined the National Guard does not qualify as “full-time National Guard duty.”

First, let me point out that just last year the confusing and cumbersome “Appendix” in title 50 was abolished. Until last year, the SCRA was codified in the Appendix of title 50, at sections 501 and following. The SCRA is now codified in title 50, at sections 3901 and following.³

Section 3955 of title 50 applies to a person who “enters military service” during the term of a lease on premises (apartment, house, office, farm, etc.). Section 3911 (the definitions section) defines “military service” as follows:

The term “military service” means—

- (A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard—
 - (i) active duty, *as defined in section 101(d)(1) of title 10, United States Code.*⁴

Section 101(d)(1) of title 10 defines the term “active duty” as follows:

³I invite your attention to Law Review 15115 (December 2015). The article is titled “The SCRA Has Moved.” The article includes a very helpful conversion table prepared by Colonel John S. Odom, Jr., USAF (Ret.), an attorney in Louisiana and the nation’s foremost expert on the SCRA.

⁴ 50 U.S.C. 3911(2)(A)(i) (emphasis supplied).

The term “active duty” means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. *Such term does not include full-time National Guard duty.*⁵

Section 101(d)(5) of title 10 defines the term “full-time National Guard duty” as follows:

The term “full-time National Guard duty” means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia, *under section 316, 502, 503, 504, or 505 of title 32* for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.⁶

I have reviewed the enumerated title 32 sections (316, 502, 503, 504, and 505). None of those sections apply to initial active duty training (boot camp) performed by a National Guard recruit. Mary Jones’ upcoming period of initial active duty training (boot camp) does not qualify as “full-time National Guard duty” as defined by section 101(d)(5) of title 10. Accordingly, this period does qualify as “active duty” for purposes of section 101(d)(1) of title 10 and as “military service” for purposes of section 3911(2)(A) of title 10. Jones has the right to terminate the apartment lease under these circumstances.

As is described in Law Review 116 and other articles, Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after the United States entered World War I. For almost a century, a person entering military service voluntarily or involuntarily has had the right to terminate a premises lease. In 2003, Congress expanded the lease termination provision to include vehicle leases as well as premises leases.

As Nathan Richardson and I explained in Law Review 14080 (July 2014), 75% of American men and women aged 17-24 are disqualified from military service because of medical issues (especially obesity and diabetes), use of illegal drugs or certain prescription medications (including medications prescribed for attention deficit hyperactivity disorder), felony convictions, educational deficiencies (no high school diploma), etc. Only 1% of young Americans in the 17-24 cohort are both eligible for military service and willing to consider enlisting. The services need to recruit more than half of that 1% to meet their recruiting goals for the Active

⁵ 10 U.S.C. 101(d)(1) (emphasis supplied).

⁶ 10 U.S.C. 101(d)(5) (emphasis supplied).

Component (AC) and the Reserve Components⁷ (RC). More than 920,000 RC members have been called to the colors since September 11, 2001, the “date which will live in infamy” for our time.

In 1973, almost two generations ago, Congress abolished the draft and established the All-Volunteer Military (AVM). The end of the draft does not mean that our country no longer needs young men and women in the military—quite the contrary, we need them now more than ever. Congress enacted the SCRA and the Uniformed Services Employment and Reemployment Rights Act (USERRA) along with many other laws to encourage qualified young men and women to serve in the military, in the AC and the RC.

Congress fully recognized that the SCRA sometimes imposes burdens on landlords and other parties, and USERRA sometimes imposes burdens on employers and co-workers of those who are called to serve. These burdens are inordinately slight, as compared to the immense burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who enlist in our nation’s armed forces.

On August 20, 1940, Prime Minister Winston Churchill addressed the House of Commons and said:

The gratitude of every home in our island, in our empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few.

Churchill’s paean to the Royal Air Force in the Battle of Britain applies equally to the relative handful of Americans⁸ who have prevented a recurrence of the horrors of that terrible Tuesday morning almost 15 years ago, by their prowess and their devotion. Please do not carp about the trouble and expense that inure to you because Mary Jones has enlisted in the Army National Guard and needs to terminate her lease a few months early to report to boot camp. Because Mary Jones and others like her have chosen to enlist, it is not necessary to draft you, your children, or your grandchildren.

⁷ Our nation has seven Reserve Components: the Army National Guard, the Army Reserve, the Air National Guard, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

⁸ Only about 1% of the U.S. population has served our country in uniform since September 11, 2001.