Number 161, March 2005:

Does USERRA Apply to Voluntary Service (Cont'd)

By CAPT Samuel F. Wright, JAGC, USNR*

Most ROA members are familiar with the hullabaloo concerning the leaking of the December 20, 2004 memorandum from the chief of Army Reserve (LTG James R. Helmly, ROA life member) to the Army chief of staff. As a person who is concerned about operational security, I worry when I see a memorandum from a three-star to a four-star splashed across the nation's television screens and newspaper pages. However, the memorandum is now in the public domain, so we have put a copy on our Web site, www.roa.org. You may be surprised when you read General Helmly's memorandum, because it is quite different from what you have read in newspaper articles that take certain snippets of the memorandum entirely out of context.

For example, General Helmly has called for more, not less, use of the involuntary mobilization authorities. I invite the reader's attention to General Helmly's second numbered paragraph: “Demands to use 'volunteers' from the Reserve Components threaten to distort the very nature of service in the Reserve Components. Use of RC soldiers for wartime service is not an anomaly in our Nation's history. Arguments for less use or no use of the RC in this war fail to recognize the potential grave danger to future RC readiness and involuntary use policies, caused by a failure to modernize RC readiness and mobilization policies and procedures. Requirement to use other than involuntary mobilization authorities places the burden of responsibility for service on the Soldier's back instead of the Army's back. While the Soldier is still protected under USERRA, the Soldier is seen as having a clear choice by his family and employer. Faced with this, the most likely 'volunteers' are those who often enjoy lesser responsible positions in civilian life. While some have expressed surprise and indignation at being mobilized for this war, most have not. They have understood it to be inherent in their voluntary contract for service. Consequently, failure to use the inherent authorities of involuntary mobilization during this threatening period in our Nation's history will set a difficult, dynamic precedent for future involuntary use of the Nation's Reserve Components.” (Emphasis supplied.)

I am pleased that General Helmly has avoided the mistake made so often in the past by flag and general officers. He clearly recognizes that the Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to voluntary as well as involuntary military service. That was equally true of the Veterans' Reemployment Rights (VRR) law, the re-employment statute in effect before the 1994 enactment of USERRA. I invite the reader's attention to Law Review 30, “Does USERRA Apply to Voluntary Service?” The answer is a most emphatic yes.

But I certainly recognize the validity of General Helmly's larger point-legalities aside, the

employer is certainly more likely to “get back at” the RC member who has repeatedly volunteered, and the employer may do this in a subtle way that is difficult to detect and correct through the legal system. And it is not just the civilian employer; perhaps even more critical is the reaction of the RC member's spouse.

There are some other practical considerations that I would like to address. First, voluntary service will, in many but not all cases, count toward the individual's cumulative five-year limit with respect to that particular civilian employer. All involuntary service and some voluntary service are exempted in computing that limit. I invite the reader's attention to Law Reviews 6 and 42. If we continue to ask RC members to volunteer, some may eventually go over their five-year limits and lose their civilian job rights.

Moreover, although USERRA makes no distinction between voluntary and involuntary service, employers are free to make that distinction when awarding benefits over and above the requirements of federal law. For example, neither USERRA nor any other federal law requires employers to pay differential pay to RC members who leave their civilian jobs for either voluntary or involuntary service in the uniformed services, but many patriotic and supportive employers make this accommodation voluntarily. Because employers are not required to pay differential pay in any case, an employer can, without violating USERRA, pay differential pay to those involuntarily called while denying that extra-statutory generosity to volunteers. Please see Law Review 18.

I have spent most of the last quarter century screaming to all who would listen, and to many who did not want to listen, that the re-employment statute applies to voluntary as well as involuntary military service or training. Now, I am coming to appreciate better the argument that General Helmly has made, and that I have heard many others make at least since 1987. Of course, it helps that General Helmly has made the argument in a more intelligent, nuanced, and effective way than all of the others I have heard or read over the years. Bravo Zulu to General Helmly!

* 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**.**Number 161, March 2005:**

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