

LAW REVIEW 17013¹

February 2017

Because of NDAA 2017, National Guard Technicians No Longer Receive Paid Military Leave under 5 U.S.C. 6323 while on AGR Duty

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

Update on Sam Wright

1.1.3.3—USERRA applies to National Guard service

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

2.0—Paid leave for government employees who are Reserve Component members

Q: I am a Major in the Army National Guard (ARNG) and a member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and related laws.

I especially liked your Law Review 15026 (March 2015), about how the United States Department of Justice (DOJ) successfully sued the Adjutant General of Missouri for violating USERRA, with respect to ARNG and Air National Guard (ANG) technicians who left their technician jobs to perform Active Guard and Reserve (AGR) duty. The Adjutant General forced these technicians to “resign” their technician positions before he would “permit” them to

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1600 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, 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 1400 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. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC.

leave those technician positions for AGR duty. DOJ contended and the court agreed that the Adjutant General's conduct violated USERRA.

I have been an ARNG technician since January 2010. In July 2015, I left my technician job to perform a three-year AGR tour. In July 2018, I expect to leave full-time AGR duty and return to my technician job, unless my AGR tour is extended.

Under section 6323 of title 5 of the United States Code, I am entitled to 15 days per fiscal year of paid military leave, and I have been utilizing that paid military leave during this AGR tour. When I left the technician job in July 2015, I used up the paid military leave that I had in the bank, and I received my civilian (technician) pay, in addition to my military pay, until the paid military leave balance was exhausted. On October 1, 2015 (the first day of Fiscal Year 2016), I received my 15 days of paid leave for the new fiscal year and used those days in October 2015. The same thing happened on October 1, 2016, the first day of Fiscal Year 2017.

Now, the Adjutant General of my state has informed me and other National Guard technicians that we will no longer receive this paid military leave under 5 U.S.C. 6323, because of section 513 of the National Defense Authorization Act (NDAA) for Fiscal Year 2017. Can you confirm that the Adjutant General's statement is correct?

Answer, bottom line up front: Yes, I can confirm that the purpose and effect of section 513 of the recently enacted NDAA for Fiscal Year 2017 is to deprive ARNG technicians and ANG technicians of paid military leave under section 6323 of title 5³ while they are on AGR duty. President Obama signed the 2017 NDAA⁴ on December 23, 2016. This change went into effect on that date. It is not retroactive.

Section 709 of title 32⁵ provides for the employment of "National Guard technicians" to provide full-time support for the ARNG and ANG. Until now, subsection (g) of section 709 has provided: "Sections 2168, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this chapter [a National Guard technician]." Section 513 of NDAA 2017 amends subsection (g) by making the existing subsection (g) paragraph (1) of subsection (g) and by adding a new paragraph (2), as follows:

In addition to the sections referred to in paragraph (1), section 6323(a)(1) of title 5 also does not apply to a person employed under this section [a National Guard technician] who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10).⁶

³ 5 U.S.C. 6323.

⁴ Public Law 114-328.

⁵ 32 U.S.C. 709.

⁶ 32 U.S.C. 709(g)(2), as added by section 513 of NDAA 2017.

Section 6323(a)(1) of title 5 provides:

- (1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.⁷

The recent amendment to section 709(g) means that folks like you (ARNG and ANG technicians) will no longer receive paid military leave under section 6323 while you are performing AGR duty. You will still receive paid military leave while performing annual training or other forms of full-time military duty, including voluntary or involuntary mobilizations for overseas contingency operations.

This recent amendment does not affect Mary Jones, an Army Reserve technician, or Bob Smith, an Air Force Reserve technician. They can still receive paid military leave under section 6323 while performing AGR duty.

This recent amendment does not affect Alice Williams, a traditional ARNG member who is employed (as a civilian) by the United States Department of Labor, or David Adams, a traditional ANG member who is employed (as a civilian) by the United States Department of Transportation. They can still receive paid military leave under section 6323 while performing National Guard AGR duty.

Explanation:

Our nation has seven Reserve Components (RC). The largest is the ARNG. The others, in descending order of size, are the Army Reserve, the ANG, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve and the Coast Guard Reserve. The number of personnel serving part-time in these components is almost equal to the number of personnel serving full-time in the Active Component of the armed forces. Thus, RC personnel account for almost half of our nation's total military personnel strength.

⁷ 5 U.S.C. 6323(a)(1).

RC personnel constitute a great deal for our nation economically, especially in a time of military budget stringency, because they are paid only for the days when they serve or train for the contingency of being called to serve. The cost to the taxpayer of a traditional Reservist or National Guard member is a small fraction of the cost of a full-time service member.

In each Reserve Component, part-timers account for 90-95 per cent of the personnel, but the Component needs a cadre of full-timers to perform certain essential functions, including recruiting, planning the training of the part-timers, and maintaining the aircraft and other equipment. Employing Reserve Technicians and National Guard Technicians has been the primary means of providing this full-time support in the four Army and Air Force Reserve Components.

As I have explained in Law Review 15026 (March 2015) and other articles, a technician has a hybrid military-civilian status. For example, Charles Cox is an ARNG technician. As a condition of employment, he is required to maintain his membership in one of the ARNG units that he supports. During drill weekends and annual training, Cox is there participating, in his military capacity, and if the unit is mobilized Cox may be mobilized along with it. But during the week Cox is a civilian employee and is engaged in critical full-time support functions, like equipment maintenance. If you were to observe Cox at work on a Wednesday morning, you probably would not realize that he is a technician and not an active duty service member. While at work, Cox wears his Army uniform and observes standard military courtesies, like saluting.

As I have explained in Law Review 16103 (October 2016) and other articles, the ARNG and ANG are hybrid state-federal organizations, while the other five Reserve Components are purely federal entities. When Abigail Morris joined the Missouri Army National Guard, she joined two overlapping but legally distinct entities. She joined the *Missouri* Army National Guard, which is the 21st Century equivalent of the Missouri State Militia. As such, she is subject to call-up by the Governor of Missouri for state emergencies like riots, floods, tornadoes, etc. She is also a member of the Army National Guard of *the United States*, which is one of the seven Reserve Components of the United States armed forces. As such, she is subject to call-up by the President, or she can volunteer, for federal military service, and she engages in periodic training to prepare for that contingency.

National Guard technicians employed under section 709 of title 32 are considered state employees for purposes of USERRA enforcement, and the Adjutant General of the state is their employer.⁸ For other purposes, National Guard technicians are considered federal civilian employees and have rights as federal civilian employees, except insofar as subsection (g) of section 709 of title 32 excludes them from such rights as federal civilian employees. Now, under

⁸ 38 U.S.C. 4303(4)(B).

the very recent amendment, National Guard technicians do not have the right to paid military leave under section 6323 of title 5 when they are away from their technician jobs for AGR duty. They still have the right to paid military leave when they are away from their technician jobs for other kinds of military duty.

Q: This is not fair! The Adjutant General of Missouri and other state Adjutants General tried to deprive National Guard technicians of paid military leave by forcing them to resign their technician jobs, as a condition of being “permitted” to go on AGR duty. That strategy failed because it was determined to violate USERRA. Now, the state Adjutants General have accomplished their goal by sneaking through an amendment to section 709 of title 32. This ought to be unconstitutional.

A: I agree with you that the result is unfair, but your belief and my belief that it is unfair does not make it unconstitutional. Because of the recent amendment, you and other National Guard technicians are no longer eligible for paid military leave under section 6323 of title 5 when you are away from your technician jobs for AGR duty.

I regret that my response could not be more favorable. Thank you for your service to our country in the Army National Guard.