

LAW REVIEW¹ 17030

April 2017

Is a National Guard Member on Active Duty Eligible To Vote in an NLRB Union Representation Election at her Civilian Workplace?

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

1.1.1.8—USERRA applies to the Federal Government

1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees

1.3.2.10—Furlough or leave of absence clause

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

7.3—Voting in Non-Federal Elections

The Benefis Health System of Montana employs about 700 registered nurses. The nurses are not currently represented by a union. Benefis is the largest non-union health care system in the state.

Many of the nurses signed cards asking the employer to recognize the Montana Nurses Association (MNA) as their exclusive bargaining representative. The employer refused to

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 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. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

recognize the union, perhaps because it was uncertain that the union really does have majority support in the workforce.

The MNA then took those cards to the National Labor Relations Board (NLRB), and that federal agency conducted an election on April 5-6, 2017. If 50% plus one of the employees voting in an NLRB election vote for representation by a specific union, the NLRB certifies that union as the exclusive bargaining representative, and the employer then has a legal obligation to bargain with the union and not bargain with individual employees in the bargaining unit.

Of the nurses in the bargaining unit, one is a member of the Montana Air National Guard and is currently on active duty for several months, at an Air Force Base within the state. She sought to vote in the NLRB election. In preparation for the election, the NLRB asked Benefis for a list of the nurses in the bargaining unit. The Air National Guard nurse was upset when she learned that her name was not on the list.

It is up to the NLRB, not the employer, to determine who is eligible to vote in the election that the NLRB is conducting. While the NLRB generally must rely on information provided by the employer, the NLRB has the authority and responsibility to obtain additional information and to make its own determination. In a letter to the General Counsel of the NLRB, I asked that agency to allow this Air National Guard nurse to vote in the election.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides:

- (b)(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—
 - *(A) deemed to be on furlough or leave of absence while performing such service; and*
 - *(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.*³

The NLRB generally permits voting in union representation elections by employees who are away from work for other forms of leave (like Family Medical Leave Act leave) on the day of a union representation election conducted by the NLRB. This Air National Guard nurse should have been deemed to be on a leave of absence from her civilian job and should have been permitted to vote.

This Montana situation is reminiscent of a Pennsylvania situation that I addressed in Law Review 179 (June 2005), although this time the bargaining unit is much larger, and the service member is not asking for an absentee ballot.

³38 U.S.C. 4316(b)(1) (emphasis supplied).

The 2005 Pennsylvania election involved a bargaining unit of 14 employees, including two who were reservists who had been called to active duty and were serving in Iraq at the time of the NLRB election. Of course, it was not feasible for them to take leave from their military units in combat and travel all the way to Pennsylvania to vote. When the NLRB asked the employer for the list of employees, he included the names of these two mobilized service members, and he suggested that they should be given the opportunity to vote by absentee ballot, because their service to our country precluded them from voting in person.

The NLRB's position was and still is "we don't do absentee ballots in representation elections." The two mobilized service members were on the list of eligible voters, but of course they were not able to get to the polling site on the day of the election. Of the 12 employees who voted, six voted for the union and five voted against, and there was one challenged ballot. If the two mobilized employees had been given the opportunity to participate, their votes certainly could have changed the outcome.

More than a decade ago, I asked the NLRB to change its policy and to provide for absentee ballots for employees who are away from their civilian jobs for military service, but the NLRB was unwilling to consider changing its policy. I also tried to get several members of Congress interested in this issue, but without success. I have renewed my effort by writing to the General Counsel of the NLRB on March 31, 2017. I am attaching a copy of that letter at the bottom of this article.

The Air National Guard nurse in Montana did not need an absentee ballot because she is serving on active duty within the state and could drive to the polling place on the day of the election. She did appear in person and sought to vote. She was permitted to cast a "challenged ballot" on a separate paper ballot. The election was not so close that one vote could change the outcome, so her ballot has not been removed from the sealed envelope, and no determination as to her eligibility has been made. It is likely that her ballot will remain uncounted.

We will keep the readers informed of future developments in this case and on this issue. If the NLRB General Counsel responds to my March 31 letter, we will publish his response in this column.

Here is the letter that I sent to the General Counsel of the NLRB:

Honorable Richard F. Griffin, Jr.

General Counsel
National Labor Relations Board
1015 Half St. SE
Washington, DC 20570-0001

Re: Let recalled National Guard member vote in NLRB election Dear Mr. Griffin:

Please consider this letter as an *amicus* brief on an important legal issue that your regional office will need to decide in the next few days.

The Benefis Health System of Montana employs 844 registered nurses and 58 advanced practice nurses. The nurses are not currently represented by a union. Benefis is the largest non-union health care system in the state.

Many of the nurses, perhaps a majority, want union representation. They have signed cards asking the employer to recognize a specific union as their exclusive bargaining representative. The employer refused to recognize the union. The nurses who seek union representation then took those cards to the NLRB, and your agency will conduct an election on April 5-6.

Of the 902 nurses in the bargaining unit, one (let's call her Mary Jones) is a member of the Montana Air National Guard and is currently on active duty for several months, within the state. She wants to vote in the NLRB election.

In preparation for the upcoming election, the NLRB asked Benefis for a list of the nurses in the bargaining unit. Ms. Jones was upset when she learned that her name was not on the list.

It is up to the NLRB, not the employer, to determine who is eligible to vote in the election that the NLRB is conducting. While the NLRB generally must rely on information provided by the employer, the NLRB has the authority and responsibility to obtain additional information and to make its own determination. I call upon the NLRB to allow Ms. Jones to vote in the election.

Ms. Jones does not need an absentee ballot, because she is serving on active duty in the State of Montana. She plans to drive to the polling site on the day of the election and to vote, or at least to attempt to vote. I hope that the NLRB will rule that she is eligible and will permit her to vote.

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 - (A) *deemed to be on furlough or leave of absence while performing such service; and*
 - (B) *entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.*

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union representation election conducted by the NLRB. Ms. Jones should be deemed to be on a leave of absence from her civilian job and should be permitted to vote.

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I am enclosing a *draft* of Law Review 17030, to be added to our website on or about April 15. Before I submit the article for publication, I hope to be able to add a note to the effect that the NLRB permitted Ms. Jones to vote.

I am also enclosing a copy of Law Review 179 (June 2005), for your convenience. That article is about a situation that arose in Pennsylvania in 2005, in a very small bargaining unit. There were only 14 employees in the unit, and two of them were reservists who had been called to active duty and who were serving in Iraq at the time of the NLRB election. When the NLRB asked the employer for a list of employees, he provided the list and identified these two employees and suggested that the NLRB should give them the chance to vote by absentee ballot. The NLRB's position was (and still is) "we don't do absentee ballots in representation elections."

When the election was held, there were six votes for the union and five votes against the union, with one challenged ballot. The two mobilized reservists were disenfranchised because they were unable to get leave from a military unit in combat and travel from Iraq to Pennsylvania to vote. If they had been given the opportunity to vote, their two votes certainly could have affected the outcome.

I urge the NLRB to reconsider the "we don't do absentee ballots" policy and provide for the opportunity to vote by mail or by secure electronic means to National Guard and Reserve service members who are away from work pursuant to our nation's call. In the great majority of cases, these Reserve and National Guard service members will be returning to work at the civilian companies they left when called to serve, and USERRA gives them the right to reemployment. They are affected by the outcome of the representation election, just as much as their work colleagues who are not serving in uniform. These service members should not be disenfranchised by the circumstances of their service.

I am also enclosing a copy of Law Review 10025 (April 2010) and Law Review 15080 (September 2015). In Law Review 10025, I discuss the relationship between the National Labor Relations Act and the Railway Labor Act and USERRA. In Law Review 15080, I suggest that the important NLRB precedent *Browning-Ferris Industries*, 362 NLRB 186 (2015) could point the way to stronger enforcement of USERRA in the context of "rent a staff" companies.

Finally, I am enclosing a copy of Law Review 108 (January 2004). I do not say so in the article, but the federal agency employer involved in that case was the NLRB. A new NLRB employee, in his initial year of federal civilian employment, was fired. Representing himself, he filed a case in

the Merit System Protection Board (MSPB), claiming that the firing was motivated by his service in a Reserve Component of the armed forces. He proved, to the satisfaction of the MSPB Administrative Judge, that the NLRB was motivated by his service in deciding to fire him and that the firing violated USERRA.

The NLRB attorney who represented the NLRB in the MSPB had the temerity to argue that the MSPB lacked jurisdiction to remedy the violation because the NLRB employee in question was “probationary” and “at will.” If I work for Daddy Warbucks Industries (DWI), and if DWI fires me because I am among the handful of employees who are trying to persuade other employees to support a union organizing effort, the NLRB General Counsel would not, I respectfully submit, have any patience with the argument that the NLRB lacks the authority to remedy the violation because I am “probationary” or “at will.”

As an agency that is charged with enforcing an important employee protection law, the NLRB must be especially punctilious in complying with employee protection laws (including USERRA) in its relationship with its own employees. Moreover, the NLRB General Counsel must not take litigation positions in the MSPB or the Federal Labor Relations Authority (FLRA) that are fundamentally inconsistent with the positions that the General Counsel routinely takes in arguing before the NLRB, the federal appellate courts, and the Supreme Court.

I hope that this information is useful to you. If you have questions, please call me on my cell phone, which is (202) 210-4194.

Very respectfully,

Samuel F. Wright Enclosures (as stated)

Update – April 2022⁴

On July 28, 2020, the National Relations Board (NLRB) published a Notice of Proposed Rulemaking in the Federal Register.⁵ One of the amendments would provide for absentee ballots for employees who are on military leave. While the amendment has not yet been made, it looks like it could be coming soon considering the adjustments the NLRB has made due to Covid-19 pandemic. Since the pandemic began in March 2020, unions and employers have adjusted to mail ballot NLRB elections.⁶ This is a drastic shift for the NLRB prefers conducting elections in person, usually at the employer’s facility.⁷ While the change might not be

⁴Update by Second Lieutenant Lauren Walker, USMC.

⁵*NLRB Issues Proposal on Employee Privacy and Absentee Ballots for Workers on Military Leave*, ASSOCIATED BUILDERS AND CONTRACTORS (Wed., Aug. 5, 2020 12:52 P.M.), <https://www.abc.org/News-Media/Newsline/entryid/18020/nlrb-issues-proposal-on-employee-privacy-and-absentee-ballots-for-workers-on-military-leave>.

⁶Todd Dawson & Carlos Torrejon, *A Brave, New World? Recent NLRB Rulings Concerning Mail Ballot Elections May Be The Beginning Of A New Era In Board Elections*, JDSUPRA (Aug. 17, 2021), <https://www.jdsupra.com/legalnews/a-brave-new-world-recent-nlrb-rulings-3796742/>.

⁷*Id.*

permanent, one can hope that it pushes the NLRB to provide absentee ballots for employees on military leave going forward.

Please join or support ROA

This article is one of 1800-plus “Law Review” articles available at <https://www.roa.org/page/lawcenter>. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002