

The MSPB Has Ground to a Halt

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

[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

Q: I am a Major in the Army Reserve 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). I was particularly interested in Law Reviews 16012, 16013, and 16014 (March 2016), about the application of USERRA to federal executive agencies as employers.

I am a GS-13 federal employee, and I have been continuously harassed by my direct supervisor and his supervisor about my Army Reserve duties and the days that I have been away from my civilian job because of those duties. Recently, I applied for a promotion, from GS-13 to GS-14. I was one of four internal applicants for the position, and I was interviewed.

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1500 “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 (ROA) initiated this column in 1997. I am the author of more than 1300 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 USERRA and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 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.

The other three applicants, including the one who was selected, have never served our country in uniform. During the interview, I was asked many questions about my Army Reserve service, including questions about the likelihood that I might be mobilized and about whether I would be willing to quit the Army Reserve if I were selected for the promotion.

As you suggested in Law Review 16012, I filed an appeal with the Merit Systems Protection Board (MSPB). I represented myself, and I am not a lawyer, while the agency was represented by an attorney. Nonetheless, I prevailed in the hearing conducted by an Administrative Judge (AJ) of the MSPB. As you suggested in Law Review 16014, I established that my Army Reserve service was a motivating factor in the agency's decision to select Joe Smith instead of me for the promotion opportunity. I showed that during the interview I was asked about my Army Reserve service. Asking me about my service was sufficient to establish that my service was a motivating factor in selecting Smith instead of me. If my service had been irrelevant, I would not have been asked about it.

The AJ shifted the burden of proof to the agency—to prove that I would not have been selected for this promotion opportunity even if I had not been a member of the Army Reserve. The AJ held that the agency did not show that Smith was better qualified than me and thus did not prove that I would not have been promoted anyway. The AJ ruled for me and ordered the agency to promote me to GS-14 and to compensate me for the pay that I have lost in the months since I was denied the promotion.

The agency appealed to the MSPB itself. I have been told that my case will go into limbo for months, and maybe years, because the MSPB lacks a quorum. Is that true?

A: Unfortunately, that is true. The MSPB has been down to just one member since January 2017, just prior to the inauguration of President Trump. It takes at least two members to decide an appeal. All appeals to the MSPB are in limbo until the President appoints and the Senate confirms at least one additional member. When there is a quorum, there is a large backlog of cases to decide. All those cases come before your case in the queue.

The MSPB has a Chairman, a Vice Chairman, and a Member. The Chairman and Vice Chairman must be a member of the same political party as the President, and the Member must be member of the other major political party. Each of the three must be appointed by the President and confirmed by the Senate. Under President Obama, all three positions were filled. The Vice Chairman left office in 2015, at the end of his term. The Chairman left office in January, a week before the inauguration of President Trump. The Republican Member, appointed by President Obama and confirmed by the Senate, is still in office, but his term expires early next year.

President Trump has made no nominations for the MSPB, and I have seen no discussion or speculation about names of persons who might be under consideration. I call upon the President to make nominations expeditiously, and I call upon the Senate to act swiftly to confirm those who are nominated. I also call upon the Congress to enact legislation authorizing persons who have been appointed and confirmed to the MSPB in the past, and whose terms have expired, to return to the Board on an acting basis when necessary because of a vacancy or a recusal.

It is not just MSPB USERRA cases that are in limbo because of the MSPB's lack of a quorum. Any federal employee who has completed his or her initial probationary period can appeal to the MSPB when he or she is fired or suspended without pay for 15 days or more. The MSPB also plays a critical role in adjudicating cases of alleged prohibited personnel practices by federal supervisors. Perhaps the most important role of the MSPB is to protect federal employees who are fired, suspended, or demoted because they have "blown the whistle" on wrongdoing in federal agencies.