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Voting in MLRB Elections while Mobilized

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

7.3—Voting in Non-Federal Elections

In Law Review 55, I addressed the question of voting in intra-union elections while mobilized. The particular election at issue there was a referendum as to whether the union members would approve “give backs” to the employer—these are concessions of contractual rights under a collective bargaining agreement that is already in effect and has not expired. The same considerations would apply to an internal union election of union officers. It would be nice if the union would permit mobilized members to vote in such elections, but no law requires the union to do this.

Jayson Spiegel, then the executive director of ROA, sent a letter to the union president, requesting that the union reconsider its position and permit mobilized members to vote. The union president sent Mr. Spiegel a polite response, saying that the union supports the military but that the union constitution does not permit mobilized members to vote in union elections.

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.

The union president suggested that if the member wanted to amend the union constitution, the member could start that process by getting his own local to endorse the proposed amendment. Yeah, right! This servicemember really has time for that while on active duty in Afghanistan.

Recently, I have learned of a similar but not identical situation. This new situation involves a union representation election. The National Labor Relations Act, which was originally enacted in 1935, provides for such elections when employees of a particular employer demonstrate a "showing of interest" in union representation. Upon such a showing, the National Labor Relations Board (NLRB) conducts an election among the affected employees. If a majority of the employees votes for representation by that union, the NLRB certifies the union as the exclusive bargaining representative for all the non-supervisory employees, including those who may have voted against union representation.

The situation involves a very small employer in western Pennsylvania. It has 14 non-supervisory employees, including two who have been mobilized and are in Iraq. The employer informed the NLRB representative of the two mobilized employees and suggested that some arrangement should be made to enable them to vote, but the NLRB representative explained that NLRB rules do not provide for absentee ballots in union representation elections.

The election was held in March 2005. Six employees voted for union representation, and five voted against. One ballot was challenged, and its validity has not yet been determined. The two mobilized employees had no opportunity to vote. If they had voted, their ballots certainly could have affected the outcome. I think that the NLRB should provide an opportunity for absentee voting in elections such as this.

* 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.

Update – April 2022

On July 28, 2020, the National Relations Board (NLRB) published a Notice of Proposed Rulemaking in the Federal Register.³ 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.⁴ This is a drastic shift for the NLRB prefers conducting

³*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>.

⁴Todd 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/>.

elections in person, usually at the employer's facility.⁵ While the change might not be permanent, one can hope that it pushes the NLRB to allow absentee ballots for employees on military leave going forward.

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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.

⁵*Id.*