LAW REVIEW 18010[1]
January 2018

Can I Use Veterans' Preference To Avoid a Layoff in a RIF?

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Update on CAPT Sam Wright

8.0—Veterans' preference

Q: I am a retired Army Reserve Colonel and a life 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 other laws that are especially pertinent to those who serve our country in uniform. I am particularly interested in Law Reviews 18008 and 18009, the two most recent articles in the series, about how the federal Veterans' Preference Act (VPA) applies to people like me who have served for a career in a Reserve Component (RC) of the armed forces and who seek or hold federal civilian jobs.

I was born in May 1951, and I graduated from high school in May 1969. I went to college and graduated in May 1973. While in college, I participated in the Army's Reserve Officers Training Corps (ROTC). When I graduated, I was simultaneously commissioned a Second Lieutenant. I remained on active duty for ten years, until May 1983, when I was released from

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "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 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 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.

active duty as a Captain. I affiliated with the Army Reserve shortly after I left active duty. I also took a federal civilian job shortly after I left active duty in 1983.

In the last 35 years, I have moved up steadily in my Army Reserve career and my federal civilian career. I was recalled to active duty in 1990-91 (for service in Saudi Arabia, Kuwait, and Iraq), in 1997-98 (for service in former Yugoslavia), and in 2001-2 (for INCONUS service in the immediate aftermath of the terrorist attacks of 9/11/2001). I was promoted to Colonel in December 1995. In May 2003, 30 years after I was commissioned a Second Lieutenant, I reached my Mandatory Removal Date (30 years of commissioned service). I transferred to the Inactive Status List (colloquially called "gray area retiree") until May 2011, when I reached my 60th birthday and started drawing my Army Reserve retirement money.

While on my final active duty period, I suffered a serious injury in the line of duty, and I received a 50% disability rating when I retired in May 2003. As a disabled veteran, I believe that I am entitled to ten-point veterans' preference.

I am eligible to retire from my federal civilian job, but I am not ready to retire. I want to continue working for a few more years.

The federal agency where I work is reorganizing and downsizing. It is likely that there will be a Reduction in Force (RIF) in the coming months. Am I eligible to use my ten-point veterans' preference to protect me from being laid off in the event of a RIF?

A: Possibly. The VPA does provide some protection to certain preference-eligible veterans in forestalling layoff when a federal agency downsizes or reorganizes, but the VPA protections in this situation are much more limited and restricted than the VPA provisions that apply to getting hired by the Federal Government in the first place.

Most but not all federal statutes grant rulemaking authority to federal executive agencies, to clarify and expand upon the words enacted by Congress. Validly adopted regulations have the same legal force and effect as federal statutes, unless a court finds that the regulations are contrary to the intent of Congress when it enacted the relevant statute. Regarding federal civilian personnel matters, Congress has granted broad rulemaking authority to the United States Office of Personnel Management (OPM).

The VPA provisions for veterans' preference in the RIF situation can be found in sections 3501 and 3502 of title 5 of the United States Code (U.S.C.) and in section 351.501 of title 5 of the Code of Federal Regulations (C.F.R.). The C.F.R. provision is as follows:

(a) Competing employees shall be classified on a retention register on the basis of their tenure of employment, *veteran preference*, length of service, and performance in descending order as follows:

- **(1)** By tenure group I, group II, group III; and
- **(2)** Within each group by *veteran preference subgroup* AD, subgroup A, subgroup B; and
- **(3)** Within each subgroup by years of service as augmented by credit for performance under § 351.504, beginning with the earliest service date.

(b) Groups are defined as follows:

- **(1)** Group I includes each career employee who is not serving a probationary period. (A supervisory or managerial employee serving a probationary period required by subpart I of part 315 of this title is in group I if the employee is otherwise eligible to be included in this group.) The following employees are in group I as soon as the employee completes any required probationary period for initial appointment:
  - **(i)** An employee for whom substantial evidence exists of eligibility to immediately acquire status and career tenure, and whose case is pending final resolution by OPM (including cases under Executive Order 10826 to correct certain administrative errors);
  - **(ii)** An employee who acquires competitive status and satisfies the service requirement for career tenure when the employee's position is brought into the competitive service;
  - **(iii)** An administrative law judge;
  - **(iv)** An employee appointed under 5 U.S.C. 3104, which provides for the employment of specially qualified scientific or professional personnel, or a similar authority; and
  - **(v)** An employee who acquires status under 5 U.S.C. 3304(c) on transfer to the competitive service from the legislative or judicial branches of the Federal Government.
- **(2)** Group II includes each career-conditional employee, and each employee serving a probationary period under subpart H of part 315 of this chapter. (A supervisory or managerial employee serving a probationary period required by subpart I of part 315 of this title is in group II if the employee has not completed a probationary period under subpart H of part 315 of this title.) Group II also includes an employee when substantial evidence exists of the employee's eligibility to immediately acquire status and career-conditional tenure, and the employee's case is pending final resolution by OPM (including cases under Executive Order 10826 to correct certain administrative errors).
- **(3)** Group III includes all employees serving under indefinite appointments, temporary appointments pending establishment of a register, status quo appointments, term appointments, and any other nonstatus nontemporary appointments which meet the definition of provisional appointments contained in §§ 316.401 and 316.403 of this chapter.

(c) Subgroups are defined as follows:

- **(1)** *Subgroup AD includes each preference eligible employee who has a compensable service-connected disability of 30 percent or more.*
- **(2)** *Subgroup A includes each preference eligible employee not included in subgroup AD.*
- **(3)** Subgroup B includes each nonpreference eligible employee.

(d) *A retired member of a uniformed service is considered a preference eligible under this part only if the member meets at least one of the conditions of the following paragraphs (d)(1), (2), or (3) of this section, except as limited by paragraph (d)(4) or (d)(5):*

- ***(1)** The employee's military retirement is based on disability that either:*
  - ***(i)** Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or*
  - ***(ii)** Was caused by an instrumentality of war incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code.*
- ***(2)** The employee's retired pay from a uniformed service is not based upon 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training.*
- **(3)** The employee has been continuously employed in a position covered by this part since November 30, 1964, without a break in service of more than 30 days.
- **(4)** *An employee retired at the rank of major or above (or equivalent) is considered a preference eligible under this part if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code, and meets one of the conditions covered in paragraph (d)(1), (2), or (3) of this section.*
- **(5)** *An employee who is eligible for retired pay under chapter 67 of title 10, United States Code, [Reserve Component Retirement] and who retired at the rank of major or above (or equivalent) is considered a preference eligible under this part at age 60, only if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code.*[3]

To have the right to the ten-point veterans' preference in *hiring,* although you are receiving the RC retirement (after your 60th birthday) in the grade of O-4 or above, you only need to show that you have a service-connected disability—that is a disability that you sustained in the line of duty while on active duty. To have the right to the ten-point veterans' preference in the RIF scenario, you must meet a much more stringent test. You must show that your disability "resulted from injury or disease received in the line of duty *as a direct result of armed conflict*"[4] or that your disability "*was caused by an instrumentality of war incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code."*[5]

For example, Mary Jones was on active duty when she was badly injured and disabled in a vehicle accident on a Saturday afternoon. Mary was driving her own vehicle and was performing a personal errand unrelated to her military duties. The accident and the resulting injuries and disability are "in the line of duty" so long a Mary was not in an unauthorized absence situation at the time and so long as the accident and injuries were not the result of Mary's own misconduct (like driving while intoxicated). In this scenario, a person like Mary is entitled to the ten-point veterans' preference *in hiring* but not in forestalling a layoff in case of a RIF.

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[3] 5 C.F.R. 351.501 (emphasis supplied).
[4] 5 C.F.R. 351.501(d)(1)(i).
[5] 5 C.F.R. 351.501(d)(1)(ii).

Q: The "direct result of armed conflict" rule seems clear enough. What does the "instrumentality of war" rule mean?

A: Let me answer that by offering a concrete example. Bob Jones and Connie Cox are both active duty soldiers participating, in the line of duty, in live-fire rifle training at a firing range. Because of the negligence (or worse) of Jones, Cox is shot and seriously injured and suffers a service-connected disability. A military rifle is an "instrumentality of war." Cox suffered her disability due to an instrumentality of war. If the incident occurred during a time of war, and we are currently in a time of war for VPA purposes, Cox is entitled to the ten-point veterans' preference in the RIF scenario as well as the hiring scenario.

The result would be different if Jones and Cox had been participating, along with other soldiers, in a march and if Jones had negligently pushed Cox down the slope of a hill. The slope of a hill is not an "instrumentality of war."