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Escalator Principle Applies to Army Physician

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Update on CAPT Sam Wright

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Q: I am a life member of the Reserve Officers Association (ROA), and I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am writing to request your assistance in asserting and enforcing my USERRA rights.

I earned a bachelor's degree in nuclear engineering and then worked for a few years for the Federal Government as a civilian employee. I resigned my federal civilian job to attend

[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.

medical school. In the early 1980s, right after completing medical school and an internship, I joined the Army Reserve (USAR) when I was 32 years old and served on active duty as an Army Medical Department (AMEDD) Captain for 4.7 years. After I left active duty, I continued to serve part-time in the Army Reserve for a few more years, but I left well short of retirement eligibility. I had a long and productive career as a board-certified civilian radiologist, and in 2010 I began working as a GS-15 Department of the Army (DA) civilian employee physician.

I then volunteered in 2013, at age 61, to return to active duty as an Army Medical Corps officer (physician). I was on active duty for just a few days short of five years, from 22 January 2013 to 31 December 2017. I have read and reread your Law Review 15116 (December 2015), and I think that it is clear beyond question that I meet the five USERRA conditions.

I left my civilian DA job to perform active duty and gave my DA civilian supervisors both oral and written notice, in late 2012, before I entered active duty in January of 2013. I served honorably and was honorably released from active duty a few weeks ago. I did not exceed the five-year limit with respect to my employer relationship with the Federal Government—the relationship that began in 2010. After I left active duty last month, I applied for reemployment in my civilian DA job almost immediately, and well within the 90-day deadline.

I have returned to work as a civilian DA physician, but I am receiving the same salary and have the same status that I was receiving and had five years ago, when I left my civilian DA job to go on active duty. I have read in several of your articles that the returning veteran who meets the five USERRA conditions is entitled, upon reemployment, to the seniority, status, and rate of pay that he or she would have received if he or she had remained continuously employed in the civilian job—the so-called "escalator principle." How does this principle apply to my situation?

A: First, I agree that it is clear beyond dispute that you have met the five USERRA conditions, including having made a timely application for reemployment. Because you meet the conditions, you are entitled to be reemployed:

> … in the position of employment in which the person [you] *would have been employed if the continuous employment of such person with the employer had not been interrupted by such service,* or a position of like seniority, status, and pay, the duties of which the person is qualified to perform.[3]

[3] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

Moreover, as a returning veteran who meets the five conditions you are entitled to the seniority and pension credit that you had at the time you left your job for military duty and the additional seniority and pension credit that you would have attained if you had remained in your civilian job during the entire time that you were away from the job for service.[4]

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. There have been 16 United States Supreme Court decisions under the VRRA and one (so far) under USERRA.[5] The Supreme Court enunciated the "escalator principle" in its first case interpreting the VRRA when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[6]

The escalator principle is codified in section 4313(a)(2)(A) of USERRA (quoted above) and in section 4316(a), which reads as follows:

> A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services *plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.*[7]

USERRA (enacted in 1994) essentially ratified and codified the escalator principle as it had developed under *Fishgold* and its progeny.[8] Under the escalator principle, as it has evolved, the returning veteran who meets the eligibility criteria for reemployment is entitled to be treated as if he or she had been continuously employed in the civilian job (instead of away from the job for military service) with respect to *perquisites of seniority.* A benefit must meet a two-part test to qualify as a perquisite of seniority:

a. A perquisite of seniority is something that was intended to be a *reward for length of service,* rather than a form of short-term compensation like salary or wages.

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[4] 38 U.S.C. 4316(a), 4318. I will discuss your civilian pension rights in a later article in this series.
[5] Please see Category 10.1 in our Law Review Subject Index for a detailed case note on each of these 17 cases.
[6] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The citation means that you can find this decision in Volume 328 of *United States Reports,* starting on page 275. The specific language quoted can be found at the bottom of page 284 and the top of page 285. I discuss *Fishgold* in detail in Law Review 0801 (January 2008).
[7] 38 U.S.C. 4316(a) (emphasis supplied).
[8] The "progeny" of *Fishgold* are the later Supreme Court and lower court decisions that cited, relied upon, and built upon the *Fishgold* precedent.

b. It must be *reasonably certain* (not necessarily absolutely certain) that the returning veteran would have received the benefit if he or she had remained continuously employed in the civilian job instead of away from the job for service.

USERRA's legislative history explains the concept of "reasonable certainty" as follows:

> The Committee [House Committee on Veterans' Affairs] intends to affirm the interpretation of "reasonable certainty" as "a high probability." *See Schilz v. City of Taylor, Michigan,* 825 F.2d 944, 946 (6th Cir. 1987), which has sometimes been expressed in percentages. *See Montgomery v. Southern Electric Steel Co.,* 410 F.2d 611, 613 (5th Cir. 1969) (90 percent success of probationary employees becoming permanent meets reasonable certainty test); *Pomrening v. United Air Lines, Inc.,* 448 F.2d 609, 615 (7th Cir. 1971) (86 percent pass rate of training class meets reasonable certainty test).[9]

Section 4331 of USERRA[10] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers.[11] DOL published proposed USERRA Regulations in the *Federal Register,* for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* in December 2005. The final regulations are published in Part 1002 of title 20 of the Code of Federal Regulations (C.F.R.), and the most pertinent sections are as follows:

> **What position is the employee entitled to upon reemployment?**
>
> As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service.

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[9] House Committee Report, April 28, 1993, H.R. Rep. No. 103-65, Part 1, reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 700 of the 2017 edition of the *Manual.*

[10] 38 U.S.C. 4331.

[11] The DOL USERRA Regulations do not, strictly speaking, apply to cases against federal agencies as employers, like your case. But USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b). Thus, the DOL USERRA Regulations are certainly applicable as a guide.

Depending upon the specific circumstances, the employer may have the option, or be required, to reemploy the employee in a position other than the escalator position.[12]

How is the specific reemployment position determined?

In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employer may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the employee's length of service, qualifications, and disability, if any. The reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.[13]

Does the reemployment position include elements such as seniority, status, and rate of pay?

(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement. The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the employee's service, and any changes that may have occurred during the period of service. In particular, the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.
(b) If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the

[12] 20 C.F.R. 1002.191 (bold question in original).
[13] 20 C.F.R. 1002.192 (bold question in original).

returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.[14]

Can the application of the escalator principle result in adverse consequences when the employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.[15]

What seniority rights does an employee have when reemployed following a period of uniformed service?

The employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. In determining entitlement to seniority and seniority-

[14] 20 C.F.R. 1002.193 (bold question in original).

[15] 20 C.F.R. 1002.194 (bold question and bold "Yes" in original). The federal employee who returns to work for a federal agency after military service and who meets the five USERRA conditions is exempt from the descending escalator. Such an employee is entitled, upon reemployment, to an active job that is at least as good as the job that he or she left, even if the evidence shows that he or she would have been downgraded or laid off if he or she had remained in the civilian job instead of leaving for military service. *See* 5 C.F.R. 353.209(a). I discuss this regulation in detail in Law Review 17028 (April 2017).

based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601-2654 (FMLA), if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.[16]

Does USERRA require the employer to use a seniority system?

No. USERRA does not require the employer to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.[17]

How does a person know whether a particular right or benefit is a seniority-based right or benefit?

A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:

- **(a)** Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;
- **(b)** Whether it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,
- **(c)** Whether it is the employer's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employer's actual custom or practice is different from what is written in the contract or handbook.[18]

[16] 20 C.F.R. 1002.210 (bold question in original).
[17] 20 C.F.R. 1002.211 (bold question in original).
[18] 20 C.F.R. 1002.212 (bold question in original).

How can the employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?

A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the employee from gaining the right or benefit.[19]

I am informed that during the period of almost five years that you were away from your civilian job for active duty your civilian colleagues received several "automatic" pay raises, including a pay raise in the fall of 2017 that the Surgeon General of the Army approved for all Army civilian radiologists.[20] If you had not been on active duty in the fall of 2017, you would have received that pay raise, with reasonable certainty (and probably absolute certainty). Thus, you are clearly entitled to that pay raise upon your reemployment.

The escalator principle also applies to "merit" pay raises that you would have received, with reasonable certainty, if you had been continuously employed. Labeling the pay raise "merit" does not preclude you from being entitled to it upon reemployment. In determining whether you would have received the pay raise with reasonable certainty, but for your absence from the civilian job for active duty, it is necessary to review what happened to your civilian colleagues (other radiologists) who remained in their civilian jobs while you were on active duty. It is also necessary to review your own work record before, during, and after your active duty period, to determine whether it is "reasonably certain" that you would have received the pay raise.

In 2011, the United States District Court for the District of Puerto Rico held that USERRA's escalator principle only applies to "automatic" pay raises and promotions, like pay raises and promotions that are governed solely by "time in employment" under a collective bargaining agreement between the employer and the union that represents the employees.[21] The plaintiff

[19] 20 C.F.R. 1002.213 (bold question in original).
[20] Each year, the Surgeon General obtains data about the rate of pay of radiologists and other medical specialists and determines the amount of the pay raise necessary to make the pay rate of these Army civilian physicians comparable to the pay received by physicians in the same medical specialty in the general economy.
[21] *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 2011 U.S. Dist. LEXIS 121841 (D.P.R. October 21, 2011).

(Rivera-Melendez) appealed to the 1st Circuit.[22] The 1st Circuit forcefully rejected and reversed this district court holding.[23] It is clear that the escalator principle is not limited to automatic promotions and pay raises.

Q: I have had lengthy conversations with the personnel director of the military medical treatment facility where I am employed, and she has not been helpful—indeed, she seems outright hostile to me and my USERRA claims and ill-informed about USERRA. I have told her about pay raises and promotions that other DA civilian physicians received during my active duty period—I obtained that information from various sources, but mostly from conversations with my colleagues on the staff of this facility. She has refused to confirm what I have said about the pay raises these fellow employees received, saying that to discuss their personnel records would violate their privacy rights. How am I to prove my case if I cannot obtain and utilize information about what happened to my colleagues during the time that I was away from work for service?

A: Protecting the privacy of your colleagues is a reasonable concern, but that does not mean that you must accept at face value the personnel director's assertions about what happened to other employees and what would have happened to you if you had remained continuously employed. If necessary, you can bring an action in the Merit Systems Protection Board (MSPB) to enforce your USERRA rights.[24] You can use the MSPB discovery process to obtain the documents and information that you need to prove your case. The assigned MSPB Administrative Judge (AJ) may review documents *in camera* (in the privacy of his or her office) to determine what is relevant to your case and what inferences to draw.

Q: Major I.B. Ignorant, the Staff Judge Advocate of the military hospital where I work, has said that USERRA only applies to state and local governments and private employers, not to the Federal Government. What do you say about that?

A: *Major Ignorant could not be more wrong*. USERRA applies to the Federal Government with special force. USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."[25]

This "model employer" expectation should apply especially to the Department of Defense (DOD) and the services, because they are the principal beneficiaries of USERRA. I have written:

> I think that it is unconscionable that the Air Force, as a civilian employer, flouts USERRA. As I explained in Law Review 16055 (June 2016) and Law Review 16036 (April 2016),

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[22] The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.
[23] *Riviera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49 (1st Cir. 2013).
[24] In several paragraphs below in this article, I will discuss the USERRA enforcement mechanism with respect to federal executive agencies as employers.
[25] 38 U.S.C. 4301(b).

> Congress has stated its expectation that the Federal Government should be a model employer in carrying out the provisions of USERRA. An armed force, when acting as a civilian employer, should be triply the model employer. How do we get the restaurant owner in Dayton to comply with USERRA when she learns that the Air Force, at nearby Wright-Patterson Air Force Base, flouts this law?[26]

I have also written:

> Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military, recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.
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> Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).
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> Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is definitely a compelling government interest in the enforcement of USERRA.[27]

I also invite the reader's attention to USERRA's final section:

> **(a)** Training required. The head of each Federal executive agency shall provide training for the human resources personnel of such agency on the following:

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[26] Law Review 16064 (July 2016). In that article, I discussed the case of *Hayden v. Department of the Air Force,* 812 F.3d 1351 (Fed. Cir. 2016).

[27] Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.

> **(1)** The rights, benefits, and obligations of members of the uniformed services under this chapter.
> **(2)** The application and administration of the requirements of this chapter by such agency with respect to such members.
> **(b)** Consultation. The training provided under subsection (a) shall be developed and provided in consultation with the Director of the Office of Personnel Management.
> **(c)** Frequency. The training under subsection (a) shall be provided with such frequency as the Director of the Office of Personnel Management shall specify in order to ensure that the human resources personnel of Federal executive agencies are kept fully and currently informed of the matters covered by the training.
> **(d)** Human resources personnel defined. In this section, the term "human resources personnel", in the case of a Federal executive agency, means any personnel of the agency who are authorized to recommend, take, or approve any personnel action that is subject to the requirements of this chapter with respect to employees of the agency.[28]

Here is the 2008 legislative history of section 4335:

> Section 304 of the Committee [Senate Committee on Veterans' Affairs] bill would require human resources personnel employed by Federal executive agencies to receive training regarding USERRA.
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> Background. USERRA, which is codified in chapter 43 of title 38, United States Code, protects the public and private sector civilian job rights of veterans and members of the Armed Forces, including National Guard and Reserve members. USERRA also prohibits employer discrimination due to military obligations and provides reemployment rights to returning servicemembers.
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> In October 2007, the Committee conducted an oversight hearing regarding USERRA. According to testimony provided at that hearing, when Federal executive agencies violate USERRA, it is often due to a lack of knowledge or understanding about the law. In fact, The Honorable Charles Ciccolella, Assistant Secretary for Veterans' Employment and Training, U.S. Department of Labor, testified that "about half the USERRA cases that we do in the Federal government is where the Federal hiring manager just doesn't understand the law or the [Office of Personnel Management] regulations that spell out how to implement the law."
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> Committee Bill. Section 304 of the Committee bill would amend chapter 43 of title 38 to add a new section 4335, which would require the head of each Federal executive

[28] 38 U.S.C. 4335. This section was added to USERRA by Public Law 110-389, Title III, section 313(a), October 10, 2008, 122 Stat. 4166.

> agency to provide training for human resources personnel on the rights, benefits, and obligations of members of the Armed Forces under USERRA and the administration of USERRA by Federal executive agencies. It would require that the training be developed and provided in consultation with the Office of Personnel Management. The training would be provided as often as specified by the Director of the Office of Personnel Management in order to ensure that the human resources personnel are kept fully and currently informed about USERRA.[29]

Although section 4335 was enacted almost a decade ago, OPM, DA, and other federal agencies have not taken this training requirement seriously.

Q: How do I enforce my USERRA rights?

A: Under section 4324 of USERRA,[30] a person who claims that a federal executive agency has violated the person's USERRA rights can file an appeal with the Merit Systems Protection Board (MSPB). The MSPB has the authority to adjudicate the claim and to award relief (including money damages for lost pay) if the MSPB finds that USERRA was violated.

MSPB cases (including USERRA cases) begin in front of an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law, and orders relief if appropriate. The AJ's decision becomes the decision of the MSPB if neither party files a timely appeal to the MSPB itself.

If the individual appellant loses at the MSPB level, he or she can appeal to the United States Court of Appeals for the Federal Circuit.[31] If the federal agency, as appellee, loses at the MSPB level, the agency is not permitted to appeal to the Federal Circuit.[32]

Q: Who will represent me in a USERRA case before the MSPB?

A: A person who claims that any employer (federal, state, local, or private sector) has violated the person's USERRA rights can file a written complaint with DOL's Veterans' Employment and

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[29] S. Rep. 110-449, 2008 WL 4149915, 2008 U.S.C.C.A.N. 1722 (legislative history). This report is reprinted in Appendix B-7 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on page 877-78 of the 2017 edition of the *Manual.*

[30] 38 U.S.C. 4324.

[31] 38 U.S.C. 4324(d)(1).

[32] Id.

Training Service (DOL-VETS).[33] DOL-VETS is required to investigate the complaint.[34] The agency has subpoena authority for such investigations.[35]

Upon completing its investigation, DOL-VETS is required to notify the complainant of the results and of the complainant's options in seeking relief.[36] At that point, the complainant can request (in effect, insist upon) referral of the case file to the United States Office of Special Counsel (OSC).[37] If the complainant requests referral, and if OSC is reasonably satisfied that the complainant is entitled to the USERRA benefits that he or she seeks, OSC will represent the complainant in pursuing the case before the MSPB, at no cost to the complainant.[38]

Instead of requesting referral to OSC, the complainant can initiate his or her own MSPB action with private counsel that the complainant retains.[39] If the complainant requested referral to OSC and OSC declined the request for representation, the complainant can initiate his or her own MSPB action.[40] It is also possible to bypass DOL-VETS altogether and initiate an MSPB action without first filing a written complaint with DOL-VETS.[41]

If the individual proceeds with private counsel and prevails, the MSPB may, in its discretion, order the agency to pay the individual's attorney fees, expert witness fees, and other litigation expenses.[42] The individual can also represent himself or herself—I do not recommend that course of action. Abraham Lincoln said, "A man who represents himself has a fool for a client."

Q: In Law Review 17076 (August 2017), you wrote that the MSPB has effectively ground to a halt for the lack of a quorum to decide cases. Has that problem been solved?

A: Unfortunately, that problem has not been solved.

The MSPB is a quasi-judicial federal executive agency that adjudicates claims involving federal executive agencies, as employers, and federal civilian employees, former federal employees, and applicants for federal civilian employment. The MSPB was created by the Civil Service Reform Act of 1978 (CSRA).[43]

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[33] 38 U.S.C. 4322(a)(2).
[34] 38 U.S.C. 4322(d).
[35] 38 U.S.C. 4326.
[36] 38 U.S.C. 4322(e).
[37] 38 U.S.C. 4324(a)(1). If the complaint is against a state or local government or private employer, instead of a federal executive agency, DOL-VETS refers the case to the United States Attorney General. 38 U.S.C. 4323(a)(1).
[38] 38 U.S.C. 4324(a)(2)(A).
[39] 38 U.S.C. 4324(b)(3).
[40] 38 U.S.C. 4324(b)(4).
[41] 38 U.S.C. 4324(b)(1).
[42] 38 U.S.C. 4324(c)(4).
[43] Public Law 95-454, 92 Stat. 1111. The CSRA is codified in scattered sections of Title 5 of the United States Code.

The MSPB has three members—a Chairman, a Vice Chairman, and a Member. The Chairman and Vice Chairman must be of the same political party as the President, and the Member must be of the other major political party. Each of the three is appointed by the President with Senate confirmation, for a term of varying duration.

The MSPB is currently down to one Member, Mark A. Robbins, who was appointed by President Obama and confirmed by the Senate in 2012, as the Republican Member. The Chairman and the Vice Chairman, appointed by President Obama, have departed after their terms expired. The MSPB needs a quorum of at least two members to act on cases.

On January 23, 2017, just three days after he was inaugurated, President Trump designated Mark A. Robbins as the Vice Chairman, and that designation gives Robbins certain authority to act for the MSPB, but not to decide cases. I call upon the President to act promptly in making nominations for the two MSPB vacancies, and for the Robbins position as well, because his term expires in March 2018.