

LAW REVIEW 18025¹

March 2018

(First May update)

(Second May update)

OSC Acts To Enforce USERRA against the USPS

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

[\(Update on Sam Wright\)](#)

1.1.1.8—USERRA applies to the Federal Government

1.4—USERRA enforcement

Under section 4324(a)(2)(A) of the Uniformed Services Employment and Reemployment Rights Act (USERRA),³ the United States Office of Special Counsel (OSC) is responsible for enforcing USERRA against federal executive agencies as employers, by bringing actions, on behalf of service members and veterans, against those agencies, in the Merit Systems Protection Board (MSPB). Here is a recent OSC press release about an action it has taken against the United States Postal Service (USPS) for violating USERRA:

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 (VRRRA—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 VRRRA 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 VRRRA 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.

³ 38 U.S.C. 4324(a)(2)(A).

- **OSC Seeks Reemployment of Maine Postal Employee Removed from Job After Fulfilling Military Service**

FOR IMMEDIATE RELEASE

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WASHINGTON, D.C./March 14, 2018 – The U.S. Office of Special Counsel (OSC) today sought reinstatement of a United States Postal Service (USPS) employee who was removed from his job upon completing his military service. In a filing with the U.S. Merit Systems Protection Board (Board), OSC argues that the USPS's failure to reemploy John D. Patrie, a letter carrier in Auburn, Maine, upon fulfilling his duties in the Maine Air National Guard violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Via OSC's petition for corrective action, Mr. Patrie requested that the Board order USPS to comply with federal law, reinstate him retroactively, and compensate him for all lost wages and other benefits resulting from USPS's non-compliance.

According to the petition, Mr. Patrie served as both a letter carrier and service member for more than 14 years until his honorable discharge from the Maine Air National Guard in December 2015. After that, the petition states, the USPS refused to reinstate Mr. Patrie in his letter carrier position. As required by the statute, Mr. Patrie first took his claim to the U.S. Department of Labor (DOL), which investigated his claim and concluded that the USPS had violated USERRA. When the USPS refused DOL's request to reinstate Mr. Patrie, he sought OSC representation before the Board.

OSC's petition says Mr. Patrie met all of the requirements under USERRA to be eligible for prompt reemployment at the USPS. "Mr. Patrie sought to maintain his civilian employment relationship with the USPS as an 'unburned bridge' under USERRA that he could re-cross when he completed his military service," the petition states. "Indeed, the USPS treated Mr. Patrie as an employee throughout his military service and gave no indication that it no longer considered him an employee until after he exercised his reemployment rights under USERRA."

"The law is clear that military service and employment must be compatible," Special Counsel Henry J. Kerner said. "OSC will continue to pursue cases in which federal agencies fail to meet their obligations to employees who also serve in the military."

USERRA is a federal law, passed in 1994, that protects military service members and veterans from employment discrimination on the basis of their service and allows them to regain their civilian jobs following a period of uniformed service. It applies to members of the Armed Forces, Reserves, National Guard, and other "Uniformed Services" (including the National Disaster Medical System and the Commissioned Corps of the Public Health Service). USERRA applies to both public and private employers. OSC, in conjunction with the Department of Labor, investigates and enforces USERRA claims involving federal government employers. The

Departments of Labor and Justice handle USERRA claims involving private employers as well as state and local governments. More information on USERRA is available [here](#) or at <https://osc.gov/Pages/USERRA.aspx>.

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: The Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing, and to serve as a safe channel for allegations of wrongdoing. For more information, please visit our website at www.osc.gov.

FIRST UPDATE -MAY 2020

I am pleased to report that the Office of Special Counsel (OSC) was successful in its effort to compel the United States Postal Service (USPS) to comply with the Uniformed Services Employment and Reemployment Rights Act (USERRA) in the case of John D. Patrie, a member of the Maine Air National Guard. Please see the attached OSC press release.

As to the USPS argument that Patrie had “abandoned” his USPS job, although he had not exceeded the five-year limited imposed by section 4312(c) of USERRA (38 U.S.C. 4312(c)), I invite the reader’s attention to my Law Review 14005 (January 2014). The title of that article is “Abandonment Doctrine Rests on a Slender Reed.”

As I have explained in detail in Law 16043 (May 2016), there are nine exemptions from the five-year limit, under section 4312(c). That is, there are nine kinds of service that do not count toward exhausting an individual’s five-year limit. Patrie was called to the colors in September 2001, in the immediate aftermath of the terrorist attacks of 9/11/2001, the “date which will live in infamy” for our time. He was on active duty continuously for more than 14 years, until December 2015, but he did not exceed the five-year limit because most of his duty was exempt from the five-year limit under section 4312(c).

SECOND UPDATE- MAY 2020

It has come to my attention that the United States Postal Service (USPS) has not complied with the Administrative Judge’s (AJ) award of interim relief. Mr. Patrie has not been reinstated, and neither has he received any back pay or other relief. The USPS denies that the Merit Systems Protection Board (MSPB) has the power to award interim relief.

It may be years before the MSPB gets around to hearing and deciding this case. As I have explained in Law Review 19098 (October 2019) and several other articles, the MSPB has been without a quorum (at least two members) since January 2017 and has been without any members at all since March 2019.

The MSPB is to have three members. The Chairman and Vice Chairman are to be of the President's political party, and the other Member must be of the other major political party. Each member must be appointed by the President and confirmed by the Senate, for staggered five-year terms. When a member's term expires and no replacement has been nominated and confirmed, the member can remain in office for an overtime period lasting up to one additional year.

In 2015, the Vice Chairman appointed by President Obama left office. On 1/13/2017, one week before President Obama was inaugurated, the Chairman appointed by President Obama left office when her term and her overtime period expired. That left the Member, the Republican appointed under President Obama. His term expired in March 2018 and his overtime period expired in March 2019.

There have been no MSPB members for more than a year, but the agency's work goes on. Cases are heard by Administrative Judges (AJs) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. Either party (the individual or the federal agency) can appeal to the MSPB itself, within 35 days after the AJ's decision. The individual but not the agency can appeal the MSPB's decision to the United States Court of Appeals for the Federal Circuit.

President Trump has nominated Dennis Dean Kirk to be Chairman, B. Chad Bungard to be Vice Chairman, and Julia Akins Clark to be Member. Those nominations have been pending for more than two years, but the Senate has not acted. Readers: Please contact your United States Senators and ask them to demand that a vote be held on these three nominations and ask them to support each nominee.

Until the MSPB has at least two confirmed members, nothing can be done to address the backlog of more than 2,500 pending cases. Patriotic service members like Mr. Patrie have waited too long for justice. The Senate must act *now*.

Left Navigation

OSC WINS DECISION FOR NATIONAL GUARDSMAN DENIED REINSTATEMENT BY POSTAL SERVICE

4/25/2019

USERRA

The U.S. Office of Special Counsel (OSC) today announced that it won a legal ruling forcing the U.S. Postal Service (USPS) to reinstate a National Guardsman in his civilian job following his post-9/11 military service. Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), employers must restore service members to their jobs after they finish serving if they meet certain basic requirements.

John D. Patrie was working as a letter carrier at the Auburn, Maine post office when he was called to duty by the Maine Air National Guard immediately following the September 11, 2001, terrorist attacks. Until his honorable discharge in December 2015, Mr. Patrie served almost continuously on active duty in direct support of the Global War on Terrorism. During that time, he regularly provided copies of his orders to USPS, maintained his employment benefits, and expressed his desire to return to his postal job once his service ended. After Mr. Patrie notified USPS that he wished to return to his position in January 2016, USPS told him that it would not reinstate him because he had “abandoned” his civilian employment, even though he met all the law’s requirements.

After USPS denied him reinstatement, Mr. Patrie filed a complaint with the U.S. Department of Labor (DOL), whose investigation concluded that USPS violated USERRA. However, after USPS still refused to reinstate Mr. Patrie, DOL referred the matter to OSC for possible enforcement before the U.S. Merit Systems Protection Board (Board), which adjudicates employment claims against the federal government. OSC represented Mr. Patrie as his attorney and filed a petition for corrective action with the Board, which held an evidentiary hearing and found in his favor. In its initial decision, the Board ordered USPS to reinstate Mr. Patrie to his position retroactive to January 2016 and provide him with all associated back pay and benefits.

“We are very pleased to have won this victory not just for Mr. Patrie but for service members everywhere,” **Special Counsel Henry J. Kerner** said. “Our country must honor its commitments to those who serve in uniform and defend our freedoms.”

USERRA is a federal law, passed in 1994, that protects military service members and veterans from employment discrimination and allows them to regain their civilian jobs following periods of uniformed service. It applies to members of the Armed Forces, Reserves, and National Guard, among others, and covers both public and private employers. OSC, in conjunction with DOL, enforces USERRA claims involving federal government employers. The Department of Justice enforces USERRA claims involving private employers as well as state and local governments.



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