

## LAW REVIEW 18027<sup>1</sup>

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### The USPS Is a “Federal Executive Agency” for Purposes of USERRA

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

1.1.1.8—USERRA applies to the Federal Government

1.4—USERRA enforcement

**Q: In Law Review 18025 (March 2018), you wrote about a recent legal action initiated by the United States Office of Special Counsel (OSC), against the United States Postal Service (USPS), in the Merit Systems Protection Board (MSPB), to enforce the Uniformed Services Employment and Reemployment Rights Act (USERRA). I thought that the USPS was treated as a private employer. Why was this case filed in the MSPB rather than in federal district court?**

**Answer, bottom line up front**

It is not correct to say that the USPS is a private employer. The USPS is a federal “independent establishment.”<sup>3</sup>

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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](mailto:SWright@roa.org).

<sup>3</sup> “There is established as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.” 39 U.S.C. 201.

The USPS and its employees are subject to some but not all the laws that apply generally to federal agencies and their employees. This can get complicated, but for USERRA purposes it is simple. The USPS is a “federal executive agency” for USERRA purposes and is subject to MSPB enforcement actions under USERRA.

## **Explanation**

From the Administration of President George Washington until the Administration of President Richard Nixon, the Postmaster General was a member of the President’s Cabinet and the United States Post Office Department (USPOD) was a Cabinet-level department of the Executive Branch, just like the Department of Commerce or the Department of the Interior. On August 12, 1970, President Nixon signed into law the Postal Reorganization Act of 1970.<sup>4</sup> In accordance with that statute, the USPOD became the USPS on July 1, 1971.

Section 4303 of USERRA<sup>5</sup> defines 16 terms used in this law, including the term “Federal executive agency.” That term is defined as follows:

*The term “Federal executive agency” includes the United States Postal Service, the Postal Rate Commission [Postal Regulatory Commission], any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5, and any military department (as that term is defined in section 102 of title 5) with respect to the civilian employees of that department.<sup>6</sup>*

Section 4324 of USERRA sets forth the enforcement mechanism with respect to federal executive agencies as employers. That section reads as follows:

§ 4324. Enforcement of rights with respect to Federal executive agencies  
(a)(1) A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.  
(2)(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear

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<sup>4</sup> Public Law 91-375, 84 Stat. 719.

<sup>5</sup> 38 U.S.C. 4303.

<sup>6</sup> 38 U.S.C. 4303(5) (emphasis supplied).

on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall-- (i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and (ii) notify such person in writing of such decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

- (1) has chosen not to apply to the Secretary for assistance under section 4322(a);
- (2) has received a notification from the Secretary under section 4322(e);
- (3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or
- (4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.<sup>7</sup>

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<sup>7</sup> 38 U.S.C. 4324. Regarding USERRA's enforcement mechanism concerning federal executive agencies as employers, please see Law Review 18018 (February 2018) and Law Review 17076 (August 2017).