

National Guard Technicians Are Precluded from Receiving Paid Military Leave while Performing “Active Guard and Reserve Duty” But Not while Performing Other Kinds of Military Service

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

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

1.1.1.7—USERRA applies to state and local governments

1.1.3.3—USERRA applies to National Guard service

1.8—Relationship between USERRA and other laws/policies

2.0—Paid military leave for government employees

Q: I am a Master Sergeant (E-7) in the Air National Guard (ANG) and a member of the Reserve Officers Association (ROA).³ I am also an ANG technician, meaning that I have a hybrid military-civilian status and a hybrid federal-state status. I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights

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.

³ In 2013, ROA members amended the ROA Constitution to make NCOs eligible for full membership in the organization, including voting and running for office.

Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.

I am particularly interested in Law Review 17013 (February 2017), about the recent amendment to section 709(g) of title 32 of the United States Code to exclude National Guard technicians like me from eligibility for *paid* military leave under section 6323 of title 5 *while performing Active Guard and Reserve (AGR) duty*.

It is my understanding, from reading your Law Review 17013, that National Guard technicians like me are precluded from receiving paid military leave *only while performing Active Guard and Reserve duty*, not while performing other kinds of military duty. The Personnel Officer for the Adjutant General of my state insists that technicians are not entitled to paid military leave when they are on any kind of military duty. Is the Personnel Officer correct?

Answer, bottom line up front

The Personnel Officer is wrong. National Guard technicians are entitled to paid military leave when on any form of military duty other than Active Guard and Reserve duty.

Explanation

Section 709(g) of title 32 of the United States Code now provides as follows:

- (1) Except as provided in subsection (f), sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.
- (2) In addition to the sections referred to in paragraph (1), *section 6323(a)(1) of title 5 also does not apply to a person employed under this section who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10)*.⁴

The definitions section of title 10 of the Code defines the term "active Guard and Reserve duty" as follows:

- (A) The term "active Guard and Reserve duty" means active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, *or full-time National Guard duty* performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more *for the purpose of organizing, administering, recruiting, instructing, or training the reserve components*.
- (B) Such term does not include the following:
 - (i) Duty performed as a member of the Reserve Forces Policy Board provided for under section 10301 of this title.
 - (ii) Duty performed as a property and fiscal officer under section 708 of title 32.

⁴ 32 U.S.C. 709(g) (emphasis supplied). The italicized words were added about a year ago.

- (iii) Duty performed for the purpose of interdiction and counter-drug activities for which funds have been provided under section 112 of title 32.
- (iv) Duty performed as a general or flag officer.
- (v) Service as a State director of the Selective Service System under section 10(b)(2) of the Military Selective Service Act (50 U.S.C. 3809(b)(2)).⁵

The definition of “active Guard and Reserve duty” includes the term “full-time National Guard duty.” That term is also defined in the title 10 definitions section, as follows:

The term “full-time National Guard duty” means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia *under section 316, 502, 503, 504, or 505 of title 32* for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.⁶

Section 709(g)(2) of title 32 provides that a National Guard technician who is performing “active Guard and Reserve duty” including “full-time National Guard duty” is not eligible to receive benefits under section 6323(a)(1) of title 5 of the United States Code. That subsection provides as follows:

(1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.⁷

A National Guard technician who is performing “active Guard and Reserve duty” (including “full-time National Guard duty”) does not receive the 15 days of paid military leave per year, under section 6323(a)(1) of title 5. A National Guard technician who is performing voluntary or involuntary duty under title 10 of the United States Code that does not involve organizing,

⁵ 10 U.S.C. 101(d)(6) (emphasis supplied).

⁶ 10 U.S.C. 101(d)(5) (emphasis supplied).

⁷ 5 U.S.C. 6323(a)(1).

training, etc. the Reserve Components⁸ is entitled to receive paid military leave under section 6323 of title 5.

Over a period of almost a millennium, courts in Great Britain and the United States and other common law countries have developed *rules of construction*—these are rules the courts use when construing statutes, contracts, wills, and other legal documents. One of the most important rules is *expressio unius est exclusio alterius*. This legal maxim has been defined as follows: “Expression of one thing is the exclusion of another ... Mention of one thing implies exclusion of another. ... When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.”⁹

Let us apply the *expressio unius* maxim to the interpretation of section 709(g)(2). A National Guard technician who is performing “active Guard and Reserve duty” is excluded from receiving paid military leave under section 6323 of title 5. The logical interpretation is that National Guard technicians who are performing other forms of military duty are not precluded from receiving paid military leave.

Q: I am currently on a long-term active duty period under title 32 of the United States Code. My current duty can be characterized as “full-time National Guard duty” and thus as “active Guard and Reserve duty.” My title 32 duty is occasionally interrupted by short periods of title 10 duty. For example, I was recently on a 17-day period of title 10 duty and was deployed to a distant location to perform duty unrelated to the title 32 duty I normally perform.

I applied to my state Adjutant General for paid military leave for this period of title 10 duty, and the personnel officer denied my request. Do you think that I am eligible for paid military leave during a short period of title 10 duty that interrupts a longer period of title 32 duty?

A: Yes, you are eligible for paid military leave under 5 U.S.C. 6323 whenever you are on an eligible period of title 10 duty, even a short period of title 10 duty that interrupts a longer period of ineligible title 32 duty.

⁸ Our nation has seven Reserve Components. In order of size they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard of the United States, the Army Reserve, and the Army National Guard of the United States. The Air National Guard and Army National Guard have a hybrid federal-state status, while the other five Reserve Components are purely federal entities.

⁹ *Black's Law Dictionary, Revised Fourth Edition*, page 692 (internal citations omitted).