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Applying USERRA to the National Guard Technician

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Update on Sam Wright

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Q: I am a volunteer ombudsman for the Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR). For many years, I have read and

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 1500 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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 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.

utilized your excellent "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In Law Review 18110 (December 2018), you responded to an Air National Guard (ANG) technician who reported that, in her state, the Adjutant General (TAG) has decided to deemphasize the use of National Guard technicians in favor of inviting well-qualified traditional ANG and Army National Guard (ARNG) members to go on full-time National Guard duty in the Active Guard and Reserve (AGR) program and to use AGR personnel instead of technicians to meet the need for Full-time Support (FTS) of Guard units. The TAG of my state is proceeding in a similar manner, and I believe that this reflects a nationwide decision by the National Guard Bureau.

In my state, as in the state you addressed in Law Review 18110, Air National Guard technician billets are being converted to AGR billets, and the technicians in those billets are being offered the opportunity to go on active duty (initially for three years) in the AGR program, in order to do essentially the same jobs that they have been doing, but in a different status (full-time military service rather than part-time military service combined with full-time civilian technician service), as you described in detail in Law Review 18110. As you can appreciate, this change in policy about how to fill the FTS need is causing great concern among the affected technicians.

Let us consider the hypothetical but realistic Joe Smith. Joe served on regular active duty for four years, as a junior enlisted airman, then four years as a traditional ANG member. For the last ten years, Joe has been an ANG technician. Now, Joe's technician billet is being abolished, and the TAG has offered Joe the opportunity to go on full-time AGR duty for an initial period of three years.

Joe serves on active duty full-time for three years and then, for whatever reason, he does not reenlist or is not offered the opportunity to reenlist in the AGR program. Does USERRA give Joe the right to return to his technician job in 2022 when he completes the three-year AGR tour? In Law Review 18110, you wrote that the answer to this question is "probably not" because Joe's "escalator" has descended. USERRA does not protect the service member from a bad thing (like a reduction in force) that clearly would have happened anyway even if the person had not left the civilian job to serve in the military.

I invite your attention to your Law Review 16009 (February 2016). The title of that article is "USERRA Rights of the Wounded National Guard Technician." You wrote about section 4314(d) of USERRA. You wrote that if the TAG of a state finds it "impossible or unreasonable" to reemploy a National Guard technician returning from full-time active duty the TAG should make that determination in writing and send it to the United States Office of Personnel Management (OPM), and then OPM is responsible for ensuring that the returning service

member is offered an equivalent civilian position in the Executive Branch of the Federal Government. Would that approach work here?

A: Thank you for your kind words about our "Law Review" articles, and, yes, I think that section 4314(d) would work here. That section provides: "If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel Management, *be ensured an offer of employment in an alternative position* in a Federal executive agency on the basis described in subsection (b)."[3]

When a person leaves a National Guard technician position to serve on full-time active duty, including but not limited to AGR active duty, and then leaves the period of full-time active duty and meets the five USERRA conditions for reemployment,[4] the TAG of the state must ensure that the returning service member is promptly and correctly reinstated to the technician position, in accordance with USERRA. If the TAG finds that it is "impossible or unreasonable" to reemploy that technician, for whatever reason, the TAG is required to make that determination in writing and send it to the federal OPM. OPM will then be responsible for ensuring that the individual is offered an appropriate federal position.

I want to reiterate what I wrote in Law Review 16009:

> I urge the Chief of the National Guard Bureau (NGB) to educate the 54 state and territorial TAGs about their obligations under USERRA with respect to National Guard technicians who leave their technician positions for voluntary or involuntary active duty. As the civilian employer of the National Guard technicians, the TAG must be the very model of model employers, with respect to compliance with USERRA. If the TAG fails to comply with USERRA with respect to National Guard technicians, how can the TAG persuade the store owner in your state to accommodate the inconvenience caused by military training and service performed by National Guard members?

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[3] 38 U.S.C. 4314(d) (emphasis supplied).

[4] As I have described in detail in Law Review 15116 (December 2015) and many other articles, a person must leave a civilian position of employment (federal, state, local, or private sector) to perform service in the uniformed services as defined by USERRA and must give the employer prior oral or written notice. The person must not exceed the five-year limit on the duration of the period or periods of uniformed service relate to that employer relationship. There are nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit. Please see Law Review 16043 (May 2016). The person must be released from the period of service without having received a disqualifying bad discharge from the military. After release from the period of service, the person must have made a timely application for reemployment.