

LAW REVIEW¹ 19037

April 2019

Army Command's Civilian Personnel Office Needs To Be Retrained on USERRA

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

[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.3.2.6—Health insurance continuation and reinstatement

1.8—Relationship between USERRA and other laws/policies

Q: I am a Master Sergeant (E-8) in the Army Reserve and a life member of the Reserve Organization of America (ROA).³ On the civilian side, I am a civil service employee of an Army

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. You can reach me by e-mail at SWright@roa.org.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost

command—let's call it the United States Army Caissons Command (USACC). I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve in the Reserve Components of the armed forces.

I am particularly interested in your Law Review 19018 (February 2019). In that article, you wrote that it is permissible for a federal employee who has been away from his or her federal civilian job for an extended period of active duty to return to the civilian job while on terminal leave at the end of active duty period and to receive both the military salary and the civilian salary while on terminal leave. You cited and quoted section 5534a of title 5 of the United States Code in support of your statement.

What you wrote in Law Review 19018 is directly relevant to my situation. I was recently away from my Army civilian job for active duty for exactly two years, from March 2017 until March 2019. While on active duty, I used very little of the leave that I earned from the Army. For the last three weeks of my active duty period, I was on terminal leave and was back at my civilian job. The civilian personnel office was aware that I was on terminal leave but did not object to my returning to work until after the fact. I worked three weeks (1.5 pay periods) while on terminal leave, but I have not been paid for that work. I provided the personnel office a copy of your Law Review 19018, but they refused to read it.

In several other ways the personnel office has violated USERRA. I would appreciate it if ROA could bring this matter to the personal attention of the USACC Commander.

Pursuant to this service member's request, ROA Executive Director Major General (Retired) Jeffrey Phillips sent a letter to the Commander of this command. This is the letter. For purposes of publication, we have changed the name of the service member and the name and address of the Command and the Commander.

Major General George McLellan, USA
Commander
United States Army Caissons Command
1234 Concord Ave.
Boston, MA 01234

equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

Dear General McLellan:

As executive director of the Reserve Officers Association, doing business as the Reserve Organization of America (ROA), I'm writing on behalf of one of our members, Master Sgt. Nathan Hale, USAR, a civilian employee of USACC. Master Sergeant Hale has complained that the USACC civilian personnel office has been unprofessional and unresponsive, has denied him clear legal entitlements, and has made statements of law that are incorrect. I appreciate the opportunity to bring this issue to your personal attention.

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (Public Law 103-353) and President Clinton signed it into law on October 13, 1994, as a revision of the Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940.

I invite your attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about USERRA and other laws that protect those who serve our country in uniform. You will also find a detailed subject index, to facilitate finding articles about specific topics.

ROA established this resource in 1997. ROA member Capt. Samuel F. Wright, JAGC, USN (Ret.), an expert on service member employment rights, is the author of most of these articles, most of which address USERRA and related laws. While an attorney for the U.S. Department of Labor from 1982 to 1992, Captain Wright helped draft the proposed VRRA rewrite that President Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that President Clinton signed in 1994 was 85 percent the same as the Webman-Wright draft.

USERRA's first section expresses in 38 U.S.C. 4301(b), the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." The federal government is indeed expected to be a model employer, *but we have seen that agencies of our government, including the U.S. Army, all too often flout this essential law.* How then do we get the corporate chieftain or small business owner to comply?

In this regard, I further invite your attention to our Law Review 18014 (January 2018). For your convenience, I enclose a copy of that article.

USERRA's final section requires each federal executive agency, including the Department of the Army, to train federal civilian personnel officials in the rights and benefits of service members and veterans under USERRA, and the obligations of federal agencies as employers (38 U.S.C. 4335). It appears that among USACC's civilian personnel staff, knowledge of this material may be deficient.

To the case at hand: Nathan Hale was away from his civilian USACC job for two years, from March 2017 to March 2019, for active duty in the Army Reserve. When he left his civilian position to go on active duty, USACC should have put him in a "Leave Without Pay Uniformed Service" (LWOP-US) status and should have given him an SF-50 form showing that change in

status. Hale requested such an SF-50 several times, but your personnel office failed to act on his request.

At about the time he left his civilian job to go on active duty, Hale requested and obtained a loan from his Thrift Savings Plan account. As a soldier on active duty, Hale was entitled to an exemption from the obligation to pay back the TSP loan, during his active duty service, while in an LWOP-US status.

In August 2018, TSP notified Master Sergeant Hale by letter that he would default on his loan and it would convert to an early withdrawal with penalties. Hale promptly called TSP; a TSP representative informed him that his agency, USACC, needed to execute a TSP-41 on his behalf and forward his SF-50, showing he is in a non-paid status. Hale alerted the USACC personnel section on what needed to be done. USACC did not publish the SF-50 showing Hale in LWOP-US status until October 2018, backdated to March 2017. The form not having arrived in time, Hale defaulted on the loan at the end of September 2018. Your personnel office continues to refuse to this day to engage in this matter; they will not respond to emails. Thus, your personnel office's failure to issue an SF-50, as required, deprived Hale of a valuable benefit with significant financial ramifications.

When Hale left his job to go on active duty, he specifically requested, in writing and orally, that his federal employee health insurance coverage be suspended while he was on active duty. As a soldier on active duty, he did not need civilian health insurance coverage because he had TRICARE coverage. USACC's failure to suspend his civilian health insurance coverage, despite his request, cost him thousands of dollars in health insurance premiums.

As a fellow general officer, I am confident that this is not how you want your soldiers and your civilian team mates to be treated by their government, in this case the agency you command.

Under section 4317(a) of USERRA, 38 U.S.C. 4317(a), a person who leaves a civilian job (federal, state, local, or private sector) to serve on active duty in the military *may elect* to continue the health insurance coverage that he or she has through the civilian employer, but in that circumstance the employer is permitted to charge the person the full premium for the insurance coverage, including the part that the employer normally pays in the case of active employees, plus another two percent for administrative costs. Except in the most unusual circumstances, not present here, continuing the civilian health insurance coverage while on active duty makes no sense.

The default choice, if the employee has not requested continuation of the health insurance coverage, is that the coverage should not be continued, but Hale did not rely on the default choice—he specifically requested that his civilian health insurance coverage be discontinued.

I invite your attention to Law Review 1107 (January 2011), and enclose a copy of that article.

While Hale was on active duty for two years, he built up a leave balance of several weeks, and for the last several weeks of his two-year active duty period he was on terminal leave. He asked

to return to his civilian job during the terminal leave period, but your personnel officer told him that federal law forbids a person from receiving a federal civilian salary and military active duty pay for the same pay period. *That statement was flat wrong.*

Title 5 of the United States Code specifically permits a person to start a new federal civilian job or return to a federal civilian job while on terminal leave at the end of a period of active duty. Here is the pertinent section:

“A member of a uniformed service who has performed active service and who is on terminal leave pending separation from, *or release from active duty in*, that service under honorable conditions may accept a civilian office or position in the Government of the United States, its territories or possessions, or the government of the District of Columbia, and *he is entitled to receive the pay of that office or position in addition to pay and allowances from the uniformed service* for the unexpired portion of the terminal leave. Such a member also is entitled to accrue annual leave with pay in the manner specified in section 6303(a) of this title for a retired member of a uniformed service.” 5 U.S.C. 5534a (emphasis supplied).

This section could not be clearer. Master Sergeant Hale was deprived of several thousand dollars of salary because of your personnel officer’s failure to comply with federal law. Hale has missed two paychecks to include time and attendance after the contested dates.

What is worse, Hale returned to his civilian USACC job while he was on terminal leave, *but he has not been paid for this work*; USACC thus wrongfully deprived him of the pay that he earned while on active duty in a terminal leave status.

At issue here is not only that injustice is being done those who wear our uniform, but that in the process we weaken our readiness: without a law like USERRA, it is apparent to me – and I am sure you as well – that recruitment and retention in our armed services would be much more difficult.

General McLellan, I urge you to take a personal interest in this matter, direct the personnel office to fix this injustice immediately, and ensure that USACC, as a civilian employer, scrupulously complies with USERRA for all USACC employees who serve in our reserve components, or who leave USACC civilian jobs to enlist in our armed services.

Please also arrange for the training in USERRA of USACC’s civilian personnel officers, judge advocates, and civil service attorneys. I realize that the law has its complexities, and ROA would be pleased to make Captain Wright available to help in this training.

Respectfully,

Jeffrey E. Phillips
Maj. Gen., U.S. Army (Ret.)
Executive Director