

Enforcing USERRA against a Federal Agency Employer

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.4—USERRA enforcement

Law Review 19040, the immediately preceding article in this series, deals with the procedures for enforcing USERRA against a state, a political subdivision of a state (local government), or a private employer. This article deals with the somewhat different procedures for enforcing USERRA against a federal executive agency as employer.

A person who claims that an employer (federal, state, local, or private sector) has violated the person's USERRA rights is permitted to file a formal, written USERRA complaint with the Veterans' Employment 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 (VRRRA—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 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. You can reach me by e-mail at SWright@roa.org.

Training Service of the United States Department of Labor (DOL-VETS).³ DOL-VETS is required to investigate any such complaint, and if the agency determines, in its investigation, that the complaint has merit it is to make “reasonable efforts” to get the employer to come into compliance with USERRA.⁴

If the DOL-VETS investigation does not result in resolution of the complaint, the agency is required to notify the complainant of the results of its investigation and of the complainant’s options in the case.⁵ After receiving the notice from DOL-VETS, and if the employer is a federal executive agency, the complainant can request (in effect, insist upon) the referral of the case file to the United States Office of Special Counsel (OSC).⁶ If OSC is reasonably satisfied that the complainant is entitled to the benefits that he or she seeks, OSC may appear and act as attorney for the complainant in filing and prosecuting the case before the Merit Systems Protection Board (MSPB).⁷ If OSC decides not to represent the complainant, it must notify the complainant, in writing, of that decision within 60 days after receiving the referral from DOL-VETS.⁸

A person claiming that his or her USERRA rights have been violated by a federal executive agency can bypass DOL-VETS and file directly in the MSPB with private counsel that he or she retains.⁹ A person who has filed a formal USERRA complaint with DOL-VETS and who has been advised by that agency of the results of the investigation can then file directly in the MSPB instead of requesting referral to OSC.¹⁰ A person who requested referral to OSC and who thereafter was notified by OSC that it was denying the request for MSPB representation can then file directly with the MSPB.¹¹

A case in the MSPB starts before an Administrative Judge (AJ) of that agency.¹² The AJ conducts a hearing and makes findings of fact and conclusions of law. The losing party (either the individual complainant or the federal agency) can appeal the AJ’s decision to the MSPB itself. If the losing party fails to appeal within the time permitted (35 days), the AJ’s decision becomes the decision of the MSPB.

³ 38 U.S.C. 4322(a). You can file the claim on-line at the DOL-VETS website, www.dol.gov/VETS.

⁴ 38 U.S.C. 4322(d).

⁵ 38 U.S.C. 4322(e).

⁶ 38 U.S.C. 4324(a)(1).

⁷ 38 U.S.C. 4324(a)(2)(A).

⁸ 38 U.S.C. 4324(a)(2)(B).

⁹ 38 U.S.C. 4324(b)(1). The person can also bring the action himself or herself, without an attorney, but I do not advise that course of action. A man (or woman) who represents himself (or herself) has a fool for a client.

¹⁰ 38 U.S.C. 4324(b)(2) and (3).

¹¹ 38 U.S.C. 4324(b)(4).

¹² This applies to USERRA cases and all other MSPB cases. USERRA cases make up a small fraction of all MSPB cases.

If the individual complainant loses at the MSPB level, he or she can appeal to the United States Court of Appeals for the Federal Circuit.¹³ If the federal agency loses at the MSPB level, the MSPB decision is final and cannot be appealed to the Federal Circuit.¹⁴

If the MSPB finds that the federal agency has violated USERRA, the MSPB orders the agency to come into compliance and to compensate the individual for any loss of wages or benefits that he or she suffered because of the violation.¹⁵ If the successful USERRA complainant was represented by retained private counsel, rather than the OSC, the MSPB may, in its discretion, order the employer (federal agency) to pay reasonable attorney fees.¹⁶

Q: What is the MSPB?

A: The MSPB is a quasi-judicial agency in the Executive Branch of the Federal Government. It was created by the Civil Service Reform Act of 1978 (CSRA). That statute divided the former Civil Service Commission (CSC) into three successor agencies.

The Office of Personnel Management (OPM) inherited the CSC's headquarters building at 1901 E Street Northwest in Washington and most of the staff and resources and the functions as the personnel office for the Executive Branch. The MSPB inherited the adjudicatory functions of the former CSC. OSC inherited the investigatory and prosecutive functions. USERRA (enacted in 1994) did not create the MSPB, but section 4324 of USERRA gave the MSPB important new responsibilities and jurisdiction.

Q: In Law Review 18096 (September 2018), you wrote about the problems at the MSPB because of the lack of a quorum among the three members. Has that problem been resolved?

A: No, that problem has not been resolved. The MSPB's website states:

The Board currently has no sitting members. Prior to March 1, 2019, the Board operated for over two years without a quorum. Board members Anne M. Wagner and Susan Tsui Grundman left on March 1, 2015, and January 6, 2017, respectively. Board Member Mark A. Robbins, who served most recently as Vice Chairman of the Board, served as the sole Board member from January 7, 2017, through February 28, 2019, when his statutory term ended. ...

¹³ 38 U.S.C. 4324(d)(1). The Federal Circuit is a specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

¹⁴ *Ibid.*

¹⁵ 38 U.S.C. 4324(c)(2). The remedies that the MSPB can award to the successful complainant are less generous than the remedies that a federal district court can award to a successful USERRA plaintiff. For example, a federal court can order the defendant to pay liquidated damages (double damages) if the court finds that the defendant violated USERRA willfully. 38 U.S.C. 4323(d)(1)(C). Section 4324 does not provide for additional damages against a federal executive agency that violated USERRA willfully.

¹⁶ 38 U.S.C. 4324(c)(4).

As to the adjudicatory authorities of the Board, because there are no Board members, the Board is unable to issue final decisions on petitions for review. *See generally* 5 U.S.C. 1204(a) and 5 C.F.R. 1200.3.

Deciding a case requires a quorum of at least two duly appointed and confirmed Board members, and there has not been a quorum since January 7, 2017. All the petitions for review that were pending on that date, and all the new petitions for review that have been added since that date, are still pending, and the backlog amounts to more than 2,000 cases. When a quorum next exists, all the pending cases will likely have to be decided before any new cases can be addressed.

The MSPB consists of a Chairman and a Vice Chairman, who are to be of the President's political party, and a Member, who is to be of the other major party. President Trump nominated a Chairman, a Vice Chairman, and a Member. In February, the Senate Homeland Security and Government Affairs Committee approved the nomination of the Chairman and the Member, but the Vice Chairman nomination has been withdrawn. The President will need to make a new nomination for that position, but he has not yet done so. The full Senate probably will not vote on confirmation of the nominees until there is a full slate of three to be confirmed. We will keep the readers informed of developments in this nettlesome situation.

In the meantime, the AJs continue to hear and decide MSPB cases, including USERRA cases. The party who loses at the AJ level can appeal to the MSPB itself, within 35 days after the AJ's decision is announced. If neither party appeals to the MSPB itself within 35 days, the decision of the AJ becomes the final decision of the Board. If either party appeals to the MSPB, the case goes into deep limbo, probably for years.

If the individual complainant loses at the AJ level, he or she can wait 35 days for the AJ's decision to become final and then appeal to the Federal Circuit. If the complainant wins at the AJ level and the agency appeals, the case goes into deep limbo. Thus, in a way, it is better for the complainant to lose instead of win at the AJ level, until a quorum is restored.