

LAW REVIEW¹ 19061

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National Guard Technicians Are Sometimes Treated Unjustly

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

[Update on Sam Wright](#)

1.1.3.3—National Guard service

1.8—Relationship between USERRA and other laws/policies

9.0—Miscellaneous

Association of Civilian Technicians, Inc. v. United States, 603 F.3d 989 (D.C. Cir. 2010).

The Association of Civilian Technicians, the labor union for National Guard technicians in Puerto Rico (PR), brought this lawsuit on behalf of several of its members who were effectively fired for what appear to have been unjust reasons. As I explained in detail in Law Reviews 19056 and 19057 (June 2019), the Army National Guard (ARNG) and Air National Guard (ANG) have a complicated hybrid federal-state status. As I explained in Law Reviews 19049 and 19054 (June

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1800 "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 1600 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 43 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.

2019), National Guard technicians also have a hybrid federal-state status and an equally complicated hybrid civilian-military status. They are considered state employees, and the Adjutant General³ is their employer for purposes of enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA), but for other purposes (including entitlement to paid military leave under section 6323 of title 5 of the United States Code) they are federal employees.

The individual plaintiffs (not named in the decision) were required as a condition of their technician employment to be members of the PR ARNG. Hurricane George struck PR, and the PR ARNG was called to duty by the Governor of PR. The individuals were accused of unauthorized absence, which they vehemently denied. The Adjutant General of PR administratively separated them from the PR ARNG, and they were transferred to the United States Army Reserve (USAR), a purely federal reserve component. Because they had been removed from the PR ARNG, they were effectively fired from their technician jobs, because technicians must be members of the state or territorial National Guard that they support.

U.S. Army Regulation 135-178 on administrative discharges required, for service members like these individuals, that they be given written notice of their right to contest their proposed discharges through an administrative board. The individuals were not given notice, and no administrative hearings were conducted before they were discharged.

The individual ARNG members appealed their discharges to the Army Board for Correction of Military Records ("the Board") requesting that their National Guard records be corrected to show they were never discharged, and they were not absent without leave when PRARNG was activated after Hurricane George. The Board found that the discharges violated federal regulations, which required both notice of a right to a hearing or appearance before an administrative board prior to discharge for persons with over six years of service, and the approval of the discharge by the Chief of the National Guard Bureau in the Department of Defense for any soldiers with over eighteen but less than twenty years of service.

Concluding the discharges were therefore erroneous and unjust, but that it lacked authority to order the reinstatement of National Guard members to the PRARNG, the Board recommended that the Adjutant General of Puerto Rico amend the discharge orders, reinstate the individuals with all pay, allowances, and retirement points, and correct PRARNG records to show they were not discharged. The Board ordered the correction of U.S. Army Reserve records to reflect the proper amount of service in PRARNG, assuming no discharge. PRARNG declined to reinstate the individuals. They thus remained in the U.S. Army Reserve following their discharges from the

³ The Adjutant General is the head of the ARNG and ANG of the state. He or she is a state official and is generally appointed by the Governor.

PRARNG but automatically lost their civilian technician jobs because they were no longer members of PRARNG.

On behalf of the affected individuals, their union sued the United States in the United States District Court for the District of Puerto Rico. The District Judge granted the United States' motion for summary judgment, and the union appealed to the United States Court of Appeals for the District of Columbia Circuit. The case was heard by a three-judge panel of that appellate court, which held:

The United States' interpretation of its enforcement powers is consistent with the [statutory] text read in light of the Militia Clause of the United States Constitution and the statutory scheme and represents a reasoned judgment of its relationship with the states' National Guard. Accordingly, we affirm the grant of summary judgment to the United States.⁴

Reading this decision, I am left with the definite impression that an injustice was done and that these individuals had no remedy because they fell through the crack of their hybrid federal-state status.

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This article is one of 1800-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their

⁴ *Association of Civilian Technicians, Inc.*, 603 F.3d at 990.

dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

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Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002