

You Can Have the Right to Reemployment in more than one Job

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

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Q: I am a Major in the Army Reserve³ and a member of the Reserve Organization of America.⁴ I was called to active duty for one year, from July 2017 until July 2018. I have read with great

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 (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. 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 The facts in this article come from a real situation, but I have exercised a lot of "poetic license" on the details.

⁴ 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

interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

On the civilian side, I have worked for a decade for a small, rural school district as a teacher, coach, and more recently administrator. When I was called to active duty in the summer of 2017, I was the Assistant Principal of the district’s only high school, with a salary of \$40,000 per year, and the coach of the high school’s football team, for an additional \$20,000 per year.

I met the five USERRA conditions for reemployment for both jobs. I left my civilian jobs in July 2017 to perform service in the uniformed services, and I gave ample prior oral and written notice. My 2017-18 active duty period was involuntary, so it does not count toward the five-year limit under USERRA, but even if the period counts toward the limit, I am nowhere near the limit. I served honorably and was released from active duty in July 2018 without a disqualifying bad discharge from the Army. I applied for reemployment at the school district headquarters as soon as I got home, well within the 90-day limit and well before the start of the 2018-19 school year.

I was reemployed as the Assistant Principal, at the same \$40,000 annual salary that I had been earning before I was called to the colors. I was not reemployed as the football coach. Accordingly, my salary for the 2018-19 school year was only 2/3 of what I earned for the 2016-17 school year, before I was called to active duty in July 2017. Have my USERRA rights been violated?

A: Yes. USERRA applies to part-time as well as full-time employment. The pertinent section of the Department of Labor (DOL) USERRA regulation is as follows:

Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?

USERRA rights are not diminished because an employee holds a temporary, *part-time*, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment

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 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.

would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.⁵

Whether we think of the coaching job as part of your whole job with the school district, or whether we think of it as a separate part-time job, you were entitled to reemployment as the football coach as well as the Assistant Principal. We cannot turn back the hands of time and give you the opportunity to coach the 2018 football team, but we can get a federal court to order the school district to compensate you for the \$20,000 (or perhaps more) that you lost because you were unlawfully deprived of that opportunity.

There may have been a separate violation in that your salary as Assistant Principal (\$40,000) was the same for the 2018-19 school year as it had been for the 2016-17 school year, before you were called to the colors. If other administrators and teachers at this school district received pay raises during the time that you were away from work for service, you are entitled to a pay raise upon your reemployment. The pertinent section of the DOL USERRA regulation is as follows:

Does the reemployment position include elements such as seniority, status, and rate of pay?

- (a) Yes. The reemployment position includes the seniority, status, and *rate of pay* that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement. The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the employee's service, and any changes that may have occurred during the period of service. In particular, the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.⁶

Q: Shortly after the start of the 2018-19 school year, I filed a formal written USERRA complaint against the school district with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). An investigator for that agency investigated my complaint and found it to have merit, and so advised me in December 2018. The investigator told me that I could request referral of my file to the United States

⁵ 20 C.F.R. 1002.41 (bold question in original, emphasis by italics supplied).

⁶ 20 C.F.R. 1002.193(a) (bold question in original, emphasis by italics supplied).

Department of Justice (DOJ), and I requested referral. DOL-VETS promptly referred my case to DOJ, with a recommendation that DOJ represent me in suing the school district.

About three months later, I received a form letter denial of representation from DOJ. The letter says nothing about the rationale for declining my request for representation. I have contacted DOJ, individually and through my United States Representative. DOJ adamantly refuses to explain its rationale. Do they not agree with the DOL-VETS legal theory? Do they disagree about the facts? Are they just too busy? I don't know, and DOJ won't tell me.

DOJ also told the school district that it had declined my request for representation. In the local news media, the school district has claimed that DOJ's declination of representation means that DOJ found my case to have no merit, and that this has emboldened them to fight me tooth and nail. What do you think about this?

A: I am not surprised that DOJ will not tell you why it declined your request for representation. That has been DOJ's policy for decades. I suggest that you give up on trying to get an explanation from DOJ, because you won't get an explanation and even if you got an explanation it would not help you.

The school district's claim that the DOJ declination means that your case is without merit is nonsensical. The declination will not be considered by the court when you sue. There are any number of reasons, unrelated to the merits, why DOJ may have refused to represent you.

Please join or support ROA

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 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.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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