

## LAW REVIEW<sup>1</sup> 20032

March 2020

### Enforcement Procedure for Federal Employee USERRA Complaints

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[About Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

**Q: I am a Corporal (E-4) in the Marine Corps Reserve and a member of the Reserve Organization of America (ROA).<sup>3</sup> I was employed by a federal department for 11 months,**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1900 "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, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1700 of the articles.

<sup>2</sup> 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](mailto:SWright@roa.org).

<sup>3</sup> 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

**from August 2018 until July 2019, when I was fired. During my federal employment, my supervisor gave me a hard time about my Marine Corps Reserve service and the absences from my civilian job that my service necessitated, although those absences were clearly protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have read with great interest several of your “Law Review” articles about USERRA.**

**The personnel director at the federal office where I worked told me that the decision to fire me was not reviewable because I had not completed the initial “probationary” period required of all new federal employees, but in Law Review 17009 (February 2017) you wrote that if I am claiming that the firing violated USERRA I can appeal to the Merit Systems Protection Board (MSPB) despite the fact that I did not complete the probationary period. Accordingly, I filed a formal, written USERRA complaint with the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS).**

**My USERRA complaint was investigated by a DOL-VETS employee here in the state where I live. He recently notified me, by mail, that he had completed his investigation and that he had found my complaint to be “without merit.” I think that the DOL-VETS investigation was cursory and that the investigator accepted at face value my supervisor’s denial that the decision to fire me was motivated by my Marine Corps Reserve service. Where do I go from here? What is my next step?**

**A:** First, you are correct that the fact that you were still in the initial probationary period, as a new federal employee, when you were fired does not insulate the employer’s action from review under USERRA. The Department of Labor (DOL) USERRA regulation provides:

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

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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

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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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.<sup>4</sup>

Second, the MSPB has jurisdiction to hear and adjudicate a claim that a federal executive agency has violated USERRA, under section 4324 of USERRA. That section provides:

**(a)**

**(1)** A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

**(2)**

**(A)** If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

**(B)** Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall—

**(i)** make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and

**(ii)** notify such person in writing of such decision.

**(b)** A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person—

**(1)** has chosen not to apply to the Secretary for assistance under section 4322(a);

**(2)** has received a notification from the Secretary under section 4322(e);

**(3)** has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

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<sup>4</sup> 20 C.F.R. 1002.41 (bold question in original). *See also* Law Review 17009 (February 2017).

**(4)** has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

**(c)**

**(1)** The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

**(2)** If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

**(3)** Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

**(4)** If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

**(d)**

**(1)** A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

**(2)** Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.<sup>5</sup>

The jurisdiction of the MSPB is not limited to cases involving persons who can otherwise appeal firings to the MSPB.

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<sup>5</sup> 38 U.S.C. 4324.

Third, the decision to fire you likely violated section 4311 of USERRA, which provides:

- (a)** A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
- (b)** An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
- (c)** An employer shall be considered to have engaged in actions prohibited—
  - (1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a *motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
  - (2)** under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
- (d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.<sup>6</sup>

To prevail in your section 4311 claim, you are not required to prove that the firing was motivated *solely* by your military service and obligation to perform service; you are only required to prove that your military service and obligations were a *motivating factor* in the employer's decision to fire you. If you prove motivating factor, the *burden of proof* shifts to the

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<sup>6</sup> 38 U.S.C. 4311 (emphasis supplied).

employer, to prove that it would have fired you anyway for lawful reasons unrelated to your service. You need not have an employer admission or a “smoking gun.”<sup>7</sup>

Fourth, now that DOL-VETS has found “no merit” and has notified you of the results of its investigation, you can request (in effect, insist upon) referral to the United States Office of Special Counsel (OSC). It is possible (although unlikely) that OSC will disagree with the DOL-VETS “no merit” determination and will agree to represent you (at no charge) in filing and pursuing a USERRA complaint against your former employer in the MSPB.<sup>8</sup>

If OSC decides not to represent you, it must notify you of that decision, in writing.<sup>9</sup> When you receive that notice, you can initiate your MSPB action against the employer.<sup>10</sup>

**Q: If I proceed with private counsel and prevail in the MSPB, can the MSPB order my employer (the federal agency that fired me) to pay my attorney fees?**

**A:** Yes. USERRA provides:

If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.<sup>11</sup>

Unfortunately, the United States Court of Appeals for the Federal Circuit<sup>12</sup> has held that there is no provision for awarding attorney fees for representation in the Federal Circuit, on appeals from the MSPB.<sup>13</sup>

**Q: Can I represent myself in a proceeding in the MSPB?**

**A:** Yes, but I do not recommend that you try to represent yourself. Abraham Lincoln said: “A man who represents himself has a fool for a client.”

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<sup>7</sup> Please see Law Review 17016 (March 2017).

<sup>8</sup> 38 U.S.C. 4324(a)(2)(A).

<sup>9</sup> 38 U.S.C. 4324(a)(2)(B).

<sup>10</sup> 38 U.S.C. 4324(b)(4). Alternatively, you can take your case to the MSPB now, instead of requesting referral to OSC. 38 U.S.C. 4324(b)(3). You also could have bypassed DOL-VETS, taking your case directly to the MSPB without first filing a complaint with DOL-VETS. 38 U.S.C. 4324(b)(1).

<sup>11</sup> 38 U.S.C. 4324(c)(4).

<sup>12</sup> The Federal Circuit is the federal appellate court that sits in our nation’s capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the MSPB.

<sup>13</sup> *Erickson v. United States Postal Service*, 759 F.3d 1341 (Fed. Cir. 2014).

**Q: How will the MSPB hear and adjudicate my case?**

**A:** Your case will be heard initially by an Administrative Judge (AJ) of the MSPB. The AJ will conduct a hearing and make findings of fact and conclusions of law. The losing party at the AJ level (either the individual appellant or the agency) can appeal the AJ's decision to the MSPB itself, in Washington. If neither party appeals to the MSPB itself within 35 days, the decision of the AJ becomes the final decision of the MSPB.

**Q: If I lose at the MSPB, can I appeal to federal court?**

**A:** Yes. USERRA provides:

A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.<sup>14</sup>

If you lose at the MSPB level, you can appeal to the Federal Circuit. If the agency loses at the MSPB level, it cannot appeal.

**Q: In Law Review 19098 (October 2019) you wrote that the MSPB has been without a quorum since January 2017. Has that problem been resolved?**

**A:** No. That problem has only gotten worse. I invite your attention to the MSPB website, where the following set of "frequently asked questions" appears:

**1. How are the 3 Board members appointed?**

Board members are nominated by the President and confirmed by the Senate. The Chairman is separately nominated by the President and confirmed by the Senate. The Vice Chairman is designated by the President. The Board members serve 7-year staggered terms. See 5 U.S.C. §§ 1201 and 1202; 5 C.F.R. § 1200.2.

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 Grundmann 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.

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<sup>14</sup> 38 U.S.C. 4324(d)(1).

**2. What is the impact of a lack of quorum and Board members on MSPB operations?**

As to the executive leadership of the Board, MSPB General Counsel Tristan Leavitt has assumed the responsibilities for the executive and administrative functions vested in the Chairman in accordance with MSPB's continuity of operations plan.

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); 5 C.F.R. § 1200.3.

**3. Can administrative judges (AJs) issue initial decisions when there is a lack of Board quorum or Board members?**

Yes, AJs may and have continued to issue initial decisions since the lack of quorum began, pursuant to longstanding delegated authority. If neither party files a petition for review to the MSPB, the AJ's decision will become the final decision of the Board and may be appealed to an appropriate court or tribunal. See 5 U.S.C. § 7703. If either party files a petition for review to the MSPB, a Board decision cannot be issued until a quorum of at least two Board members is restored.

**4. Can the Board issue decisions on petitions for review without a quorum or Board members?**

Petitions for review received before January 7, 2017, and for which the voting process was not completed before the Board lost a quorum, cannot be issued until a quorum is restored. Petitions for review received after January 7, 2017, have been acknowledged by the Office of the Clerk of the Board and processed according to current Board procedures. However, the Board cannot issue decisions on these petitions until a quorum is restored. General information about the number of pending petitions for review since the lack of quorum began is available in the e-FOIA Reading Room of MSPB's website.

**5. Can the Board issue decisions on requests to withdraw petitions for review?**

Yes. Pursuant to the May 11, 2018 Policy Regarding Clerk's Authority to Grant Requests to Withdraw Petitions for Review, and the Board's 2011 Manual on Organization Functions and Delegations of Authority, the Clerk of the Board may exercise its delegated adjudicatory authority to "grant a withdrawal of a petition for review when requested by a petitioner."

**6. How are appellants advised of their administrative appellate review or judicial options during the period in which there are no sitting Board members?**

A party's administrative and/or judicial appeal rights will continue to be listed at the end of every initial decision. If the appellant, the agency, or both file a petition for review, it will be acknowledged and processed by the Board, as explained above. The petition for review filing deadlines will not be tolled (i.e., stopped) during any lack of quorum. This means that parties to a case who wish to file a petition for review must do so within 35 days of issuance of the initial decision, as required by the Board's adjudicatory regulations at 5 C.F.R. § 1201.114. However, the Board cannot issue a decision until a quorum is restored by the nomination and confirmation of at least two Board members.

If neither party to a case files a petition for review, the AJ's initial decision will become the final decision of the Board. An appellant may choose to exercise his or her review rights, which may include an appeal to the U.S. Court of Appeals for the Federal Circuit, U.S. District Court, an appropriate circuit court of appeal, or the Equal Employment Opportunity Commission, depending on the type of appeal and claims raised. See 5 U.S.C. § 7703.

The parties are informed of the current Board lack of quorum and members in initial decisions, and in acknowledgment notices issued by the Office of the Clerk of the Board, if either or both parties file a petition for review with the Board.

**7. When does the Board anticipate having a quorum restored?**

While it is not possible to determine exactly when the quorum will be restored, two nominations (to serve as Chairman and Member of the Board) are pending before the Senate. As explained in #1 above, after the President nominates Board members, they must be confirmed by the Senate before they can be sworn in as Board members.

**8. Has the Board previously experienced a lack of quorum?**

Yes. The Board was briefly without a quorum in 2003.

**9. Has the Board previously experienced a lack of any sitting members?**

No.

**10. How will the parties know when a quorum is present?**

We will post information on the MSPB website, issue a press release, and place an announcement on Twitter. We may communicate this information in other ways, as appropriate.

**11. Is there a point of contact for other questions?**

For further information, please contact the Office of the Clerk of the Board via email to [mspb@mspb.gov](mailto:mspb@mspb.gov) or via phone at 202-653-7200. Additional information about the Board's organizational structure can be found on the website at [www.mspb.gov](http://www.mspb.gov), in its agency plans and annual reports, and in its current "Organization Functions and Delegations of Authority."

**Q: What can I do to expedite the reestablishment of a quorum on the MSPB?**

**A:** President Trump has nominated Dennis Dean Kirk to be the Chairman of the MSPB, B. Chad Bungard to be Vice Chairman, and Julia Akins Clark to be the other Member. Please write to your two United States Senators and implore them to schedule a confirmation vote for these three nominees and to vote to confirm them. Ask your friends and relatives to do likewise. Readers: Please communicate with your United States Senators on this important issue.

**Q: What is the backlog of cases at the MSPB awaiting the reestablishment of a quorum of members?**

**A:** More than 3000 cases are pending and cannot be decided until the MSPB has at least two members confirmed by the Senate. When the MSPB has at least two confirmed members, it will presumably address the cases in the backlog before addressing new appeals.

**Q: If I lose at the AJ level, can I bypass the Board and appeal directly to the Federal Circuit?**

**A:** Yes. You can wait 35 days for the AJ's decision to become the final decision of the MSPB, and then you can appeal to the Federal Circuit. But if you win at the AJ level, it is likely that the agency will appeal to the MSPB, and in that situation your case will go into "deep limbo" until the MSPB has a quorum and has managed to work its way through the backlog.

**Please join or support ROA**

This article is one of 1900-plus "Law Review" articles available at [www.roa.org/lawcenter](http://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](http://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:

Reserve Officers Association  
1 Constitution Ave. NE  
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