

## LAW REVIEW<sup>1</sup> 20048

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### Do NOAA Corps Officers and PHS Corps Officers Have Rights as Service Members and Veterans?

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

1.1.3.4—USERRA applies to PHS personnel

1.1.3.5—USERRA does not apply to NOAA personnel

1.8—Relationship between USERRA and other laws/policies

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4.3—SCRA right to a continuance and protection against default judgment

5.1—Division of military benefits upon divorce

8.0—Veterans' preference

11.0—Veterans' claims

12.0—Military criminal justice

**Q: I am an Ensign in the commissioned corps of the National Oceanic & Atmospheric Administration (NOAA) and a member of the Reserve Organization of America (ROA).<sup>3</sup> I have**

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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 2000 "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.

<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) of all seven uniformed services eligible for membership and adopted a new

**read 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 who serve our country in uniform.**

**I understand that the NOAA commissioned corps is a “uniformed service” but I am not sure exactly what that means in practice. I wear a uniform while on duty, and my NOAA uniform looks a lot like a Navy uniform. Do I have the same rights and obligations as an Ensign in the Navy? When I complete my NOAA service, do I have rights as a veteran?**

**Answer, bottom line up front**

Some of the laws that apply to the Navy, Marine Corps, Army, Air Force, and Coast Guard apply to the NOAA Corps and the commissioned corps of the Public Health Service (PHS), but most of those laws do not apply to NOAA and PHS personnel. Our nation has five armed forces<sup>4</sup> and seven uniformed services. The seven uniformed services include the five (5) armed forces plus the NOAA corps and the PHS corps.<sup>5</sup>

If a law as enacted by Congress applies to the “uniformed services,” NOAA and the PHS are covered. If the law applies to the “armed forces” NOAA and PHS are excluded. It all turns on the words enacted by Congress. In this article, I will discuss six important federal statutes and how they apply, if at all, to NOAA officers and PHS officers.<sup>6</sup>

### **The Uniformed Services Employment and Reemployment Rights Act (USERRA)**

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA<sup>8</sup> and President Bill Clinton signed it into law on 10/13/1994. USERRA was a long-overdue rewrite of and replacement for the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940.

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“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 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.

<sup>4</sup>Army, Navy, Marine Corps, Air Force, and Coast Guard. 10 U.S.C. 101(a)(4).

<sup>5</sup>10 U.S.C. 101(a)(5).

<sup>6</sup>The NOAA corps and the PHS corps do not have enlisted personnel, only officers.

<sup>7</sup>Public Law 103-353, 108 Stat. 3149. USERRA is codified in title 38 of the United States Code, at sections 4301-4335 (38 U.S.C. 4301-4335).

USERRA applies to almost all employers in our country, including the Federal Government, the states, the political subdivisions of states (counties, cities, school districts, etc.), and private employers, regardless of size. A person who leaves a civilian job for voluntary or involuntary “service in the uniformed services” as defined by USERRA has the right (upon release from the period of service) to prompt reinstatement in the position of employment that he or she would have attained if continuously employed or another position for which he or she is qualified that is of like seniority, status, and pay. The person must have given the employer prior oral or written notice,<sup>8</sup> unless giving such notice was precluded by military necessity or otherwise impossible or unreasonable.<sup>9</sup> The person’s cumulative period or periods of uniformed service relating to the employer relationship with that employer must not have exceeded five years, but there are nine kinds of service that do not count in the computation of the person’s five-year limit.<sup>10</sup> The person must have been released from the period of service without having received a disqualifying bad discharge from the uniformed service.<sup>11</sup> After release from the period of service, the person must have made a timely application for reemployment.<sup>12</sup> A person who meets these conditions is entitled to be treated *as if he or she had remained continuously employed in the civilian job for seniority and pension purposes upon reemployment.*<sup>13</sup>

Section 4311(a) of USERRA makes it unlawful for an employer (federal, state, local, or private sector) to discriminate in employment based on membership in a uniformed service, application to join a uniformed service, performance of uniformed service, having performed uniformed service in the past, or application or obligation to perform uniformed service in the future.<sup>14</sup> Section 4311(b) makes it unlawful for an employer to retaliate against a person for having exercised a right under USERRA, taking an action to enforce USERRA protections for any person, or testifying or otherwise participating in a USERRA investigation or proceeding.<sup>15</sup>

Section 4303 of USERRA defines 16 terms used in this law. The term “uniformed services” is defined as follows:

The term “uniformed services” means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, System members of the National Urban Search and Rescue Response System during a period of appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief

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<sup>8</sup>38 U.S.C. 4312(a)(1).

<sup>9</sup>38 U.S.C. 4312(b).

<sup>10</sup>38 U.S.C. 4312(c). Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting a person’s five-year limit.

<sup>11</sup>38 U.S.C. 4304.

<sup>12</sup>After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>13</sup>38 U.S.C. 4316(a), 4318.

<sup>14</sup>38 U.S.C. 4311(a). Please see Law Review 17016 (March 2017) for a detailed discussion of section 4311.

<sup>15</sup>38 U.S.C. 4311(b).

and Emergency Assistance Act, and any other category of persons designated by the President in time of war or national emergency.<sup>16</sup>

USERRA's definition of "uniformed services" includes the PHS commissioned corps but not the NOAA commissioned corps. When a statute defines a term, that definition (not the dictionary definition or the definition found elsewhere in the United States Code) controls for purposes of that statute. Thus, USERRA applies to the PHS corps but not the NOAA corps. Please see Law Review 15002 (January 2015) for a detailed discussion of how it came to pass that USERRA covers the PHS corps but not the NOAA corps.

### **Servicemembers Civil Relief Act (SCRA)**

As Colonel Mark E. Sullivan explained in detail in Law Review 116 (March 2004), on 12/19/2003 President George W. Bush signed into law the SCRA, as a long-overdue update and rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after our country entered World War I. The SCRA provides important protections for those who serve our country in uniform, including:

- a. Postponement of civil court and administrative proceedings when military duties prevent the service member from attending and presenting his or her side, and protection against default judgment if the service member is unaware of the proceeding or unable to file a timely answer because of service.
- b. For a service member entering active duty, reducing the interest rate on pre-serviceloans and obligations to 6%.
- c. Barring the eviction of the service member's family if the call to service prevents the service member from paying the full rent.
- d. Giving the service member entering active duty the right to terminate a residential or vehicle lease.
- e. Allowing a service member on active duty to retain his or her domicile at the time of entry on active duty and protecting the service member from state income taxation by the state where he or she physically resides but is not domiciled.

The SCRA applies to a "servicemember" who is performing "military service." The SCRA defines "servicemember" as: "The term 'servicemember' means a member of the uniformed services, as that term is defined in section 101(a)(5) of title 10 of the United States Code."<sup>17</sup> Both the PHS corps and the NOAA corps are "uniformed services" as that term is defined in 10 U.S.C. 101(a)(5).

The SCRA's definition of "military service" includes: "in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic & Atmospheric

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<sup>16</sup>Please see the "Update: The Uniformed Services Employment and Reemployment Rights Act (USERRA) at the end of the article for an update in the law regarding NOAA commissioned officers.

<sup>17</sup>38 U.S.C. 4303(16).

<sup>18</sup>50 U.S.C. 3911(1).

Administration, active service.”<sup>18</sup> Thus, PHS officers and NOAA officers have SCRA rights when they are performing active service.

### **The Uniformed Services Former Spouse Protection Act (USFSPA)**

Just 39 years ago, the United States Supreme Court held that the states were forbidden to treat disposable military retired pay as property and to divide it in divorce actions.<sup>19</sup> Acting with amazing alacrity, Congress overruled *McCarty* the next year, by enacting the Uniformed Services Former Spouse Protection Act (USFSPA).<sup>20</sup> This federal law *permits but does not require* the states to treat military retired pay (including retired pay that may be received in the future) as property to be divided between the spouses in marital dissolution proceedings. All 50 states, the District of Columbia, Guam, and the U.S. Virgin Islands divide military retired pay in divorce proceedings. Among the 54 U.S. jurisdictions, only the Commonwealth of Puerto Rico does not divide military retired pay. But the specific rules for dividing retired pay are a matter of state law and vary considerably among the states.

The USFSPA applies to retired pay received under section 1406 or 1407 of title 10, as well as section 12731 (Reserve Component retirement). Section 1406 applies to the “retired pay or retainer pay of any person who first became *a member of a uniformed service* before September 8, 1980.”<sup>21</sup> Section 1407 applies to the “retired pay or retainer pay of any person entitled to that pay who first became *a member of a uniformed service* after September 7, 1980.”<sup>22</sup> The term “uniformed services” is defined in section 101(a)(5) of title 10<sup>23</sup> and that definition includes the PHS commissioned corps and the NOAA commissioned corps. Thus, the USFSPA applies to commissioned officers of the PHS and NOAA, just as it applies to officers and enlisted personnel of the Army, Navy, Marine Corps, Air Force, and Coast Guard.

### **Veterans Preference Act (VPA)**

The Veterans’ Preference Act of 1944<sup>24</sup> gives preference rights in securing federal civilian jobs to “those ex-service men and women who have served on active duty in *any branch of the armed forces*.” The NOAA commissioned corps and the PHS commissioned corps are not branches of the armed forces, as that term is defined in 10 U.S.C. 101(a)(4), so persons who have served in the PHS corps or the NOAA corps are not eligible for veterans’ preference in federal employment.

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<sup>19</sup>50 U.S.C. 3911(2)(B).

<sup>20</sup>*McCarty v. McCarty*, 453 U.S. 210 (1981). The citation means that you can find this decision in Volume 453 of *United States Reports*, starting on page 210.

<sup>21</sup>Act of September 8, 1982, Public Law 97-252, 96 Stat. 730, codified at 10 U.S.C. 1408.

<sup>22</sup>10 U.S.C. 1406.

<sup>23</sup>10 U.S.C. 1407.

<sup>24</sup>10 U.S.C. 101(a)(5).

<sup>25</sup>Public Law 78-359, 58 Stat. 387.

More than 40 states have state laws mandating preference for veterans in securing jobs with state agencies and local governments. Most of those state laws do not apply to PHS and NOAA personnel.

### **Uniform Code of Military Justice (UCMJ)**

In 1950, Congress enacted the UCMJ<sup>26</sup> to replace previous military codes for the Army (which included the Air Force), the Navy and Marine Corps, and the Coast Guard. The UCMJ applies to members of all five-armed forces.

The UCMJ also applies to “Members of the National Oceanic and Atmospheric Administration, the Public Health Service, and other organizations *when assigned to and serving with the armed forces*”.<sup>27</sup> Some PHS officers are assigned to and serve with the Coast Guard, to provide medical and dental care to Coast Guard personnel. The UCMJ applies to those PHS officers, but it does not apply to other PHS and NOAA officers.

### **Benefits administered by the VA**

Correction: I wrote in this article that persons who are serving or have served in the NOAA Corps or PHS Corps do not qualify for veterans' benefits administered by the Department of Veterans Affairs (VA). I have learned that what I wrote was not correct and *PHS and NOAA veterans do qualify for those benefits. I will address this issue in detail in Law Review 20062 (July 2020)*.

**Update - March 9, 2022**

### **The Uniformed Services Employment and Reemployment Rights Act (USERRA)**

Update: Section 4303 of USERRA defines 16 terms used in this law. The term “uniformed services” is defined as follows:

The term “uniformed services” means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, the commissioned officer corps of the *National Oceanic and Atmospheric Administration*, System members of the National urban Search and Rescue Response System during period of appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and any other category of persons designated by the President in time of war or national emergency.<sup>28</sup>

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<sup>26</sup>10 U.S.C. 801-946.

<sup>27</sup>U.S.C. 802(8) (emphasis supplied).

<sup>28</sup>38 U.S.C. § 4303 (emphasis supplied).

The change came in at the end of the 116<sup>th</sup> Congress (2019-20).<sup>29</sup> Therefore, USERRA's definition of "uniformed services" includes the PHS corps and the NOAA commissioned corps.<sup>30</sup>

### **Please join or support ROA**

This article is one of 2000-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, 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  
Washington, DC, 20002

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<sup>29</sup>See Kathryn Piscitelli & Sam Wright, Congress Expands USERRA Coverage, ROA Law Review 21002 (Jan. 2021).

<sup>30</sup>Update by Second Lieutenant Lauren Walker, USMC.