

LAW REVIEW¹ 20059

June 2020

The USPS and USERRA

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

[About Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.1.3.3—USERRA applies to National Guard service

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Q: I am a Sergeant Major (E-9) in the Army National Guard and a member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader’s attention to 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 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 1800 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 44 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 38 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.

³ 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 Reserve, the Marine

On the civilian side, I work for the United States Postal Service (USPS) as a letter carrier. I recently read on the Internet a piece saying: “The United States Postal Service employs 633,188 workers, making it the third largest civilian employer in the United States, behind the Federal Government and Walmart.”⁴ I always thought that the USPS was part of the Federal Government. What gives?

A: The USPS is part of the Federal Government, and the Wikipedia article you cited is wrong to imply otherwise. But the USPS is unique and for some legal purposes USPS is treated more like a private employer than a federal agency.

“There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.”⁵ The USPS came into being in 1971, replacing the United States Post Office Department, a cabinet-level department of the Federal Government. Until 1971, postal employees were unambiguously federal employees, and the Postmaster General was a member of the Cabinet.

Most USPS employees are unionized. There are several postal unions, but the two major ones are the American Postal Workers Union (APWU) and the National Association of Letter Carriers (NALC), of which you are probably a member. The National Labor Relations Act (NLRA)⁶ and the National Labor Relations Board (NLRB) govern the relationship between USPS management, USPS employees, and unions for USPS employees. USPS employees have more expansive collective bargaining rights than other federal employees. They do not have the right to strike, but they can (through their unions) force USPS management into binding interest arbitration, which is often more effective for employees than striking.

But for most legal purposes, *including USERRA enforcement*, the USPS is treated like other federal agencies in the Executive Branch. Section 4303 of USERRA⁷ defines 16 terms used in this law. The term “Federal executive agency” is defined as follows:

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.

⁴ See https://en.wikipedia.org/wiki/United_States_Postal_Service/.

⁵ 39 U.S.C. 201, enacted by Public Law 91-375, 84 Stat. 720 (Aug. 12, 1970).

⁶ Congress enacted the NLRA in 1935. It governs labor relations in the private sector generally, except for the railroad and airline industries, which are governed by the Railway Labor Act (RLA), enacted in 1925. The Civil Service Reform Act of 1978 (CSRA) codified in federal law the provisions governing labor relations involving federal employees (except USPS employees) and federal sector unions (like the American Federation of Government Employees and the National Treasury Employees Union) and federal agencies as employers.

⁷ 38 U.S.C. 4303.

The term “Federal executive agency” *includes the United States Postal Service, the Postal Rate Commission [Postal Regulatory Commission], any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5 [5 USCS § 105]) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5 [5 USCS § 2302(a)(2)(C)(ii)], and any military department (as that term is defined in section 102 of title 5 [5 USCS § 102]) with respect to the civilian employees of that department.*⁸

A person who is claiming that his or her USERRA rights were violated by a federal executive agency⁹ (including the USPS) can enforce USERRA against that agency by bring an action against the agency in the Merit Systems Protection Board (MSPB), under section 4324 of USERRA, which provides:

(a)

(1) A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) [38 USCS § 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 [5 USCS § 1211].

(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);

⁸ 38 U.S.C. 4303(5) (emphasis supplied).

⁹ This includes current federal employees, former employees who were fired or denied reemployment, and unsuccessful applicants for federal civilian employment.

- (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
- (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 [38 USCS §§ 4301 et seq.] 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 [38 USCS §§ 4301 et seq.] 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 [5 USCS § 7703].

(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.¹⁰

¹⁰ 38 U.S.C. 4324.

Like MSPB cases generally, MSPB USERRA cases begin before an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. Either party (the aggrieved employee or the federal agency) can appeal to the MSPB itself, in Washington.

The MSPB has three members, each of whom is nominated by the President and must be confirmed by the Senate. The Chairman and Vice Chairman must belong to the President's political party, and the other Member must belong to the other major political party. The Members serve staggered five-year terms. When a Member's term expires, if no replacement has been nominated and confirmed, the Member can continue to serve during an overtime period that can last up to one year.

Unfortunately, the MSPB has been without a quorum (at least two Members) since January 2017, and it has been without any members since March 2019. The Vice Chairman appointed by President Obama left office in 2015. The Chairman appointed by President Obama left office on 1/13/2017, one week before President Trump was inaugurated, thus depriving the MSPB of a quorum. The term of the other Member appointed by President Obama expired in March 2018, and his one-year overtime period expired in March 2019.

President Trump has nominated Dennis Dean Kirk to be Chairman, B. Chad Bungard to be Vice Chairman, and Julia Akins Clark to be the other Member. When the Senate failed to act on these nominations during the 115th Congress (2017-18), the President renominated the same three persons at the start of the 116th Congress. Readers, please contact your United States Senators. Ask them to call for a vote on these three nominations and ask them to vote for each nominee.

The individual appellant, but not the agency, can appeal a final MSPB decision to the United States Court of Appeals for the Federal Circuit.¹¹ If the individual loses at the AJ level, he or she can wait 35 days for the AJ's decision to become the final decision of the MSPB and then appeal to the Federal Circuit. But if the individual wins at the AJ level, the agency can appeal to the MSPB itself, thus putting the case into limbo for years, in the MSPB backlog, which currently exceeds 3,000 cases.¹²

Q: Throughout my simultaneous careers in the USPS and the Army National Guard, I have faced continual opposition and harassment from my USPS supervisors over my National Guard duties and the absences from work that those duties necessitated, although those absences were clearly protected by USERRA. How does the USPS rank among employers with respect to USERRA compliance?

¹¹ The Federal Circuit is a specialized federal appellate court, established in 1982, that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

¹² Please see Law Review 18025 (March 2018), second May 2020 update.

A: The USPS is among the very worst employers with respect to complying with USERRA. Please see Law Review 20031 (March 2020) and Law Review 18025 (March 2018).

Please join or support ROA

This article is one of 2000-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, 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:

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