

## LAW REVIEW<sup>1</sup> 21021

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### **Veterans' Preference in the Excepted Service**

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[About Sam Wright](#)

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***Patterson v. Department of the Interior, 424 F.3d 1151 (Fed. Cir. 2005), cert. denied, 547 U.S. 1071 (2006).***

### **Veterans' preference in federal civilian employment**

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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 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.

<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 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](mailto:SWright@roa.org).

The provisions in title 5 of the United States Code governing eligibility for veterans' preference in federal civilian employment are dense and confusing. Accordingly, let us parse them out carefully.

### **Who is entitled to the five-point veterans' preference?**

"A preference eligible [veteran] *who receives a passing grade in an examination for entrance into the competitive service* is entitled to additional points above his earned rating [score on the entrance exam], as follows:

- (1) A preference eligible under section 2108(3)(C)-(G) [service connected disabled veterans]—10 points;
- (2) A preference eligible under section 2108(3)(A)-(B)—5 points."<sup>3</sup>

Here is the text of subsections (A) and (B) of section 2108(3) of title 5 of the United States Code: "(A) a veteran as defined by paragraph (1)(A) of this section; (B) a veteran as defined by paragraph (1)(B), (C), or (D) of this section."<sup>4</sup> Section 2108(3)(A) refers to a veteran or service member who "served on active duty in the armed forces *during a war*, in a campaign or expedition for which a campaign badge has been awarded, or during the period beginning April 28, 1952, and ending July 1, 1955."<sup>5</sup>

### **Q: What does "during a war" mean for this purpose?**

**A:** The phrase "during a war" means: "For more than 180 consecutive days, other than for training, any part of which occurred during the period beginning September 11, 2001, and ending August 31, 2010, the last day of Operation Iraqi Freedom."<sup>6</sup>

### **Q: How does veterans' preference apply to jobs in the excepted service?**

**A:** The section quoted above (section 3309), by its terms, only applies to "A preference eligible [veteran] who receives a passing grade in an examination for entrance into the competitive service." When Congress enacted the Veterans' Preference Act (VPA) in 1944, the "competitive service" was the general rule and the "excepted service" was the exception. In the intervening

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<sup>3</sup> 5 U.S.C. 3309 (emphasis supplied). In this article, I will discuss the five-point preference. I will discuss the ten-point preference for disabled veterans in a subsequent article.

<sup>4</sup> 5 U.S.C. 2108(3)(A) and (B).

<sup>5</sup> 5 U.S.C. 2108 (emphasis supplied).

<sup>6</sup> See <https://www.fedshirevets.gov/job-seekers/veterans-preference/#5point>. There are other date ranges, but this is the most recent.

decades, the exception has almost swallowed the general rule. Today, all attorney positions and most other federal positions are in the “excepted service.”

“The nominating or appointing authority shall select for appointment to each vacancy in the excepted service in the executive branch and in the government of the District of Columbia from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of this title [title 5]. This section does not apply to an appointment required by Congress to be confirmed by or made with the advice and consent of the Senate.”<sup>7</sup>

Section 3320 means that federal agencies hiring for the excepted service must comply with the veterans’ preference requirements that apply to the competitive service. In the competitive service, there is no entrance examination, and applicants do not receive numerical scores.

**Q: If there is no examination and no numerical score for applicants, how is an agency supposed to provide preference to eligible veterans?**

**A:** The Office of Personnel Management (OPM) regulation requires federal executive agencies to “follow the principle of veteran preference as far as administratively feasible.”<sup>8</sup> Federal agencies are required to treat preference-eligible veteran status as a “positive factor” when making hiring decisions in the excepted service. But it is unclear how anyone is to know that the individual veteran did in fact receive a preference in this scenario.

#### **Facts of the *Patterson* case**

Guy C. Patterson is an attorney and a veteran. The court decision does not identify the service in which he served or his dates of service. We can only assume that his dates met the “during a war” rule and that he was entitled to the five-point preference.

Patterson applied for an attorney position at the Department of the Interior (DOI) but was not selected. The candidate who was selected was not a veteran. DOI insisted that it had treated Patterson’s veteran status as a “positive factor” in the selection process, but it refused to provide detailed information as to how the successful candidate was more qualified than Patterson.

After exhausting his remedies through the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS), Patterson brought an action in the Merit Systems Protection Board (MSPB), contending that OPM’s “as far as administratively feasible”

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<sup>7</sup> 5 U.S.C. 3320.

<sup>8</sup> 5 C.F.R. 302.101(c).

rule was insufficient to ensure that federal agencies provided preference to eligible veterans like Patterson. The MSPB rejected Patterson's claim, and he appealed to the United States Court of Appeals for the Federal Circuit. In the cited case, a three-judge panel of the Federal Circuit unanimously rejected Patterson's claim. The Federal Circuit denied Patterson's request for rehearing en banc, and the Supreme Court denied certiorari.<sup>9</sup> This case is over.

**Patterson also alleged that DOI violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

Patterson also claimed that DOI violated section 4311 of USERRA by selecting the non-veteran over Patterson for the vacancy. Section 4311(a) makes it unlawful for an employer (federal, state, local, or private sector) to deny a person *initial employment* (among other things) because of the person's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform future service.<sup>10</sup>

The MSPB held that it did not have jurisdiction to hear Patterson's USERRA claim because Patterson did not provide evidence showing that Patterson's status as a veteran was a motivating factor in DOI's decision to hire the other candidate instead of Patterson. The Federal Circuit held that the MSPB erred when it held that it did not have jurisdiction to adjudicate Patterson's USERRA claim. The MSPB had jurisdiction under section 4324 of USERRA.<sup>11</sup> The court held that the MSPB should have considered Patterson's USERRA claim on the merits and rejected it because Patterson did not meet his burden to prove, by a preponderance of the evidence, that his past service in a uniformed service was a motivating factor in DOI's decision not to select him for the vacancy, in accordance with section 4311(c)(1) of USERRA.<sup>12</sup>

**Q: How is the federal Veterans' Preference Act (VPA) different from the Uniformed Services Employment and Reemployment Rights Act (USERRA)? How are these laws related?**

**A:** The VPA only applies to the Federal Government. USERRA applies to the Federal Government, the states, the political subdivisions of states (counties, cities, school districts, etc.), and private employers, regardless of size.

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<sup>9</sup> The final step in the federal appellate process is to apply to the Supreme Court for certiorari (discretionary review). The Supreme Court denies certiorari in 99% of the cases where it is sought. To grant certiorari, four or more of the nine Justices must vote for certiorari at a conference to consider certiorari petitions. The denial of certiorari does not necessarily mean that the Supreme Court agrees with the Court of Appeals decision, but it means that the Court does not believe that the case is important enough to merit the attention of our nation's highest court, and it means that the Court of Appeals decision is final.

<sup>10</sup> 38 U.S.C. 4311(a).

<sup>11</sup> 38 U.S.C. 4324.

<sup>12</sup> 38 U.S.C. 4311(c)(1).

Section 4311 of USERRA makes it unlawful for an employer (federal, state, local, or private sector) to discriminate against those who are serving or have served our country in uniform. Section 4311 does not require an employer to give preference to veterans.

The two laws were enacted at different times and have different purposes. They are related only in the sense that an attorney representing a service member or veteran who unsuccessfully applied for a federal job should consider both laws.

**Q: Does the federal VPA apply to state and local governments as employers?**

**A:** No, but more than 40 states require veterans' preference at the state level. Those state laws apply to employment by the states themselves, and some of those state laws also apply to political subdivisions of the state. Some of those state laws are more generous than the federal VPA.

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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.

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