

## LAW REVIEW<sup>1</sup> 21039

July 2021

### Can I Earn the Five-Point Veterans' Preference by Volunteering for Active Duty?

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

1.2—USERRA forbids discrimination

1.8—Relationship between USERRA and other laws/policies

8.0—Veterans' preference

**Q: I am a Second Lieutenant in the Air Force Reserve (USAFR) and a member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest several of your "Law Review"**

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<sup>1</sup>I invite the reader's attention to <https://www.roa.org/page/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.

<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 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

**articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve in the Reserve Components (RC) of the armed forces.**

**For months, I have been applying for Federal civilian jobs, so far without success. The commanding officer of my USAFR unit told me that I could qualify for a five-point veterans' preference in Federal civilian employment by serving on active duty for more than 180 continuous days, and he suggested that I volunteer for an active duty opportunity in order to qualify myself for this preference. Is what he told me correct?**

**Answer, bottom line up front:**

No, what he told you is no longer correct. To earn the five-point veterans' preference, you must have served on active duty during a "war" period. There are several "war" periods for veterans' preference purposes, but the most recent "war" period ended on 8/31/2010. If a person's active duty period began after 8/31/2010, the person is not entitled to the five-point preference unless the person served the active duty period, or at least part of it, in a campaign or expedition for which a campaign medal has been authorized.

### **Explanation**

Under the Veterans' Preference Act of 1944, a person who "served on active duty as defined by section 101(21) of title 38 at any time in the armed forces for a period of more than 180 consecutive days any part of which occurred during the period beginning on September 11, 2001, and ending on the date prescribed by Presidential proclamation or by law as the last date of Operation Iraqi Freedom" is entitled to the five-point preference.<sup>4</sup> President Barack Obama declared the end of Operation Iraqi Freedom on August 31, 2010.<sup>5</sup>

**Q: Does that mean that a person who served in a place of actual combat, like Afghanistan, does not receive the five-point veterans' preference?**

**A:** No, it does not mean that. A person who served on active duty outside any "war" period (like after 8/31/2010) receives the five-point preference only if he or she served "in a campaign or expedition for which a campaign medal has been authorized. Any Armed Forces Expeditionary

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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>5 U.S.C. §2108(1)(D).

<sup>5</sup>See *Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq*, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (Aug. 21, 2010, 8:00 P.M. EDT), <https://obamawhitehouse.archives.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq>.

Medal or campaign badge, including El Salvador, Lebanon, Grenada, Panama, Southwest Asia, Somalia, and Haiti, qualifies for preference.”<sup>6</sup>

**Q: When I enlisted in the USAFR, the recruiter told me that if I were called to active duty or volunteered to go on active duty for at least 181 days I would qualify for veterans’ preference in Federal civilian employment, and that was a big part of my decision to enlist. I think that the recruiter’s promise is binding on the Federal Government. What do you say about that?**

**A:** Unfortunately, the Supreme Court has held that the Federal Government is not bound by bad advice or incorrect information provided by Federal officials or employees.<sup>7</sup>

In this article, like most of the “Law Review” articles, we are discussing *what the law is, not what we want it to be*. For more than 16 years, ROA has urged Congress “to update and reform the Veterans Preference Act (VPA) in order to make veterans preference more than an empty promise.”<sup>8</sup>

We believe that all those who enlist in the armed forces (Active Component or Reserve Component) and serve honorably should receive a preference in Federal hiring decisions, and we are working every day to push for the fulfillment of this ROA resolution and all ROA resolutions. We also believe that the standard for qualification for veterans’ preference should be 181 *cumulative* days of active duty, not 181 *continuous* days, as the law now reads. But for now, in advising Reserve Component personnel we must deal with the law as it is, not as we want it to be.

**Q: What is the relationship between the VPA and USERRA? Does USERRA give me the right to a preference in hiring for Federal civilian positions?**

**A:** The VPA applies only to the Federal Government as a civilian employer.<sup>9</sup> USERRA applies to almost all employers in this country, including the Federal Government, the States, the political subdivisions of States (local governments), and private employers, regardless of size. USERRA is a floor and not a ceiling on the rights of service members and veterans. USERRA provides:

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or

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<sup>6</sup>See *Policy, Data, Oversight Veterans Services*, OPM. Gov <https://www.opm.gov/policy-data-oversight/veterans-services/vet-guide-for-hr-professionals/> (last visited June 20, 2021).

<sup>7</sup>See *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). I discuss this issue in detail in Law Review 20019 (February 2020).

<sup>8</sup>ROA Resolution 19-34. This resolution was adopted on 6/12/2004 and renewed on 6/30/2007, 2/10/2010, 9/14/2016, and 9/29/2019. You can find all the current ROA resolutions on our website, [www.roa.org](http://www.roa.org), under “Advocacy.”

<sup>9</sup>More than 40 States have State laws providing for preferences to veterans in hiring for State and local government jobs. A discussion of State veterans’ preference laws is beyond the scope of this article.

other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

**(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.<sup>10</sup>

Section 4311 of USERRA makes it unlawful for an employer (Federal, State, local, or private sector) to discriminate in initial employment, retention of employment, promotion, or benefit of employment on the basis of an applicant's or employee's membership in a uniformed service, application to join a uniformed service, past or present performance of uniformed service, or application or obligation to perform service.<sup>11</sup> But to say that discrimination is unlawful is not to say that a preference must be given.

It is unlawful for a Federal agency (or any other employer) to discriminate against you based on your USAFR service and obligations.<sup>12</sup> But that is not to say that a Federal agency must, under USERRA, give you preference in hiring.

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

This article is one of 1800-plus “Law Review” articles available at <https://www.roa.org/page/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

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<sup>10</sup>38 U.S.C. § 4302.

<sup>11</sup>*Id.* § 4311.

<sup>12</sup>*Id.*

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