

Enforcing USERRA against a Federal Agency Employer

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

1.1.1.8—USERRA applies to the Federal Government

1.4—USERRA enforcement

Q: I am a Captain in the Navy Reserve and a life member of the Reserve Organization of America (ROA).³ I have read with great interest many 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 2,000 “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 Spouses’ 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 90% of the articles, but we are always looking for “other than Sam” articles by other lawyers.

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 45 years, I have collaborated 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 <mailto:swright@roa.org>.

³ In 2018, members of the Reserve Officers Association amended the organization’s constitution and made enlisted personnel eligible for full membership, including voting and running for office. The organization adopted the “doing business as” name of “Reserve Organization of America” to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

I am the Commanding Officer of a major Navy Reserve unit. Over the years, I have utilized your “Law Review” articles to help me understand and exercise my rights in balancing my Navy Reserve career with my responsibilities to my civilian employer. I have also shared your articles with my colleagues and subordinates in the Navy Reserve.

I am a career federal civil service employee, working for a Cabinet-level department. My immediate supervisor has given me a hard time about my Navy Reserve service and the occasional absences from work that my service necessitates. She said that she would ensure that I am not promoted and that she will try to get me fired unless I stop “playing soldier” in the Navy Reserve.

I told my supervisor that my absences from work for Navy Reserve duty are protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA). She said: “USERRA does not apply to the Federal Government.” What do you say about that?

A: Your supervisor is wrong. USERRA applies with special force to the Federal Government as an employer. USERRA’s first section states: “It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.”⁴

The Senate Veterans’ Affairs Committee and House Veterans’ Affairs Committee have held multiple hearings about the failure of federal agencies to comply with USERRA, and in 2008 Congress amended USERRA, adding a requirement that federal human resources personnel get training on USERRA:

(a) Training required. The head of each Federal executive agency shall provide training for the human resources personnel of such agency on the following:

(1) The rights, benefits, and obligations of members of the uniformed services under this chapter.

(2) The application and administration of the requirements of this chapter by such agency with respect to such members.

(b) Consultation. The training provided under subsection (a) shall be developed and provided in consultation with the Director of the Office of Personnel Management.

(c) Frequency. The training under subsection (a) shall be provided with such frequency as the Director of the Office of Personnel Management shall specify in order to ensure that the human resources personnel of Federal executive agencies are kept fully and currently informed of the matters covered by the training.

⁴ 38 U.S.C. § 4301(b).

(d) Human resources personnel defined. In this section, the term “human resources personnel”, in the case of a Federal executive agency, means any personnel of the agency who are authorized to recommend, take, or approve any personnel action that is subject to the requirements of this chapter with respect to employees of the agency.⁵

Section 4324 of USERRA provides for enforcement of USERRA against federal executive agencies as employers:

(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

⁵ 38 U.S.C. § 4335.

(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 [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.

(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.⁶

⁶ 38 U.S.C. § 4324.

Q: Section 4324 refers to the “Special Counsel.” Who is the Special Counsel?

A: The Special Counsel is nominated by the President and must be confirmed by the Senate, for a five-year term. The Special Counsel heads up the Office of Special Counsel (OSC). The current Special Counsel is the Honorable Henry J. Kerner.

On its website, OSC describes itself as follows:

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA).

OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing.⁷

On its website, OSC has reported on its favorable resolution of the USERRA claim of a Navy veteran who was unlawfully denied reemployment by the Federal Aviation Administration (FAA):

The U.S. Office of Special Counsel (OSC) today announced a favorable settlement on behalf of a Navy Veteran wrongfully denied reinstatement as an Air Traffic Controller (ATC) with the Federal Aviation Administration (FAA). Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), all employers, including the federal government, must restore service members to their jobs promptly after they finish serving their country.

John McFerren was an ATC trainee with the FAA when he left for active duty in the U.S. Navy in March 2010. In January 2015, as his service was ending, he notified his former manager that he wished to return to the FAA and resume his career. After the manager told him she could not assist him, McFerren contacted the FAA's Human Resources, which incorrectly advised him he would have to apply for open positions like any new hire, despite the FAA's obligation to promptly reinstate him under USERRA. Based on that erroneous guidance, McFerren sent several applications to various FAA regions but was not offered a position for over a year. While he was onboarding to his new position, the FAA medically disqualified him, forcing him to work as an Uber driver and in other lower-paying jobs while he appealed his medical disqualification.

In April 2018, McFerren filed a USERRA complaint against the FAA with the U.S. Department of Labor's Veterans Employment and Training Service (VETS). VETS

⁷ U.S. OFFICE OF SPECIAL COUNCIL, ABOUT OSC (2023).

investigated his complaint, found it had merit, and referred it to OSC for enforcement. The FAA subsequently granted McFerren's medical appeal and assigned him to an ATC position in May 2019, but at a significantly lower salary level than he would have attained had he been properly reinstated four years earlier. He also lost out on substantial pay, benefits, and seniority due to the delay, setting his career back and costing him and his family significant income.

OSC negotiated with the FAA on McFerren's behalf, and it agreed to compensate him four years' of lost wages, fully restore his seniority and retirement credit, and raise his pay to reflect reinstatement in May 2015, following his honorable discharge from the Navy.

"OSC stands ready to enforce the employment rights of veterans and service members who, like Mr. McFerren, serve our country in uniform," **Special Counsel Henry J. Kerner** said. "This positive outcome demonstrates how USERRA ensures our servicemen and women get the respect they deserve when they return from service. We appreciate the FAA's willingness to make Mr. McFerren whole."

USERRA is a federal law, passed in 1994, that protects military service members and veterans from employment discrimination and allows them to regain their civilian jobs following periods of uniformed service. It applies to members of the Armed Forces, Reserves, and National Guard, among others, and covers both public and private employers. OSC, in conjunction with the U.S. Department of Labor, enforces USERRA claims involving federal government employers. The U.S. Department of Justice enforces USERRA claims involving private employers as well as state and local governments. More information about USERRA is available at:

<https://osc.gov/Services/Pages/USERRA.aspx>.⁸

Q: Section 4324 also mentions the Merit Systems Protection Board (MSPB). What is the MSPB?

A: On its website, the MSPB describes itself as follows:

The Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems. The Board was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454. The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: Office of Personnel Management (OPM), which manages the Federal work force; Federal Labor Relations Authority (FLRA), which oversees Federal labor-management relations; and, the Board.

⁸ *OSC Obtains Full Relief for Navy Veteran Denied Reinstatement*, U.S. OFFICE OF SPECIAL COUNSEL (Jan. 25, 2022), <https://osc.gov/News/Pages/21-04-Navy-Veteran-FAA-USERRA.aspx>.

The Board assumed the employee appeals function of the Civil Service Commission and was given new responsibilities to perform merit systems studies and to review the significant actions of OPM. The CSRA also created the Office of Special Counsel (OSC) which investigates allegations of prohibited personnel practices, prosecutes violators of civil service rules and regulations, and enforces the Hatch Act. Although originally established as an office of the Board, the OSC now functions independently as a prosecutor of cases before the Board. (In July 1989, the Office of Special Counsel became an independent Executive branch agency.)

For an explanation of your rights as a Federal employee, and for an in-depth review of the Board's jurisdiction and adjudication process, please review the MSPB publication, *An Introduction to the MSPB*.

The mission of the MSPB is to "Protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." MSPB's vision is "A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people." MSPB's organizational values are Excellence, Fairness, Timeliness, and Transparency. More about MSPB can be obtained from MSPB's Strategic Plan. MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. In addition, MSPB reviews the significant actions of the Office of Personnel Management (OPM) to assess the degree to which those actions may affect merit.⁹

Section 4324 of USERRA, enacted 10/13/1994, gave the MSPB new authority and responsibility, to adjudicate claims that federal executive agencies, acting as employers, have violated USERRA.

Q: I have heard that the MSPB was without a quorum and unable to adjudicate cases. Has that problem been resolved?

A: Yes, as of May 2021, the MSPB is back up to full strength, with three members nominated by President Biden and confirmed by the Senate.

Q: How can a USERRA case against a federal executive agency be initiated?

A: The process of initiating a USERRA case against a federal executive agency is similar to the process for initiating a USERRA case against a state or local government or private employer. A person who claims that his or her employer, former employer, or prospective employer has violated his or her USERRA rights can file a formal, written complaint against that employer

⁹ U.S. MERIT SYSTEMS PROTECTION BOARD, ABOUT MSPB (2023).

with the Veterans' Employment & Training Service of the United States Department of Labor (DOL-VETS).¹⁰

DOL-VETS will then investigate the complaint and, upon completing its investigation, will notify the complainant of the results of the investigation.¹¹ At that point, if the employer is a federal executive agency, the complainant may request that DOL-VETS refer the case file to OSC.¹²

If OSC is reasonably satisfied that the complainant is entitled to the benefits that he or she seeks, OSC may appear and act as attorney for the complainant in filing the case with the MSPB and in prosecuting the case.¹³ If OSC decides not to represent the complainant, it must notify the complainant of that decision, in writing, within 60 days after receiving the referral from DOL-VETS.¹⁴ At that point, upon receiving the notice of declination of the request for representation by OSC, the complainant may initiate the case in the MSPB with private counsel that he or she retains.¹⁵

Alternatively, the complainant can choose not to request that DOL-VETS refer the case file to the OSC, and the complainant can initiate the MSPB USERRA action with private counsel that he or she has retained.¹⁶ The complainant can also bypass DOL-VETS altogether and retain private counsel to initiate the MSPB USERRA case.¹⁷

Q: Is it possible for me to represent myself in filing and prosecuting an MSPB USERRA case?

A: Yes, but I do not advise that you try to do that.¹⁸ Abraham Lincoln said: A man who represents himself has a fool for a client.¹⁹

Q: If I retain private counsel to represent me in the MSPB, and if I prevail, can the MSPB order the federal agency to pay my attorney fees?

A: Yes.²⁰

¹⁰ 38 U.S.C. § 4322(a).

¹¹ 38 U.S.C. §§ 4322(d),(e).

¹² 38 U.S.C. § 4324(a)(1). .

¹³ 38 U.S.C. § 4324(a)(2)(A).

¹⁴ 38 U.S.C. § 4324(a)(2)(B).

¹⁵ 38 U.S.C. § 4324(b)(4).

¹⁶ 38 U.S.C. § 4324(b)(3).

¹⁷ 38 U.S.C. § 4324(b)(1).

¹⁸ *But see Santos v. National Aeronautics & Space Administration*, 990 F. 3d 1355 (Fed. Cir. 2021). In that case, Navy Reserve Commander Fernando Santos, a member of ROA, represented himself at the Federal Circuit, appealing from an unfavorable MSPB decision, and prevailed. I discuss that case in detail in Law Review 21027 (April 2021).

¹⁹ Actually, it is unclear whether Abraham Lincoln ever said this or whether he was the first to say such a thing. See <https://quoteinvestigator.com/2019/07/30/lawyer/>.

²⁰ See 38 U.S.C. § 4324(c)(4).

Q: Once my MSPB USERRA case has been initiated, either by OSC or by a lawyer that I retain, how does the case proceed?

A: Like any MSPB case, an MSPB USERRA case starts before an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. After the AJ announces his or her findings and conclusions, either party (you, the complainant, or the federal agency, the defendant) can appeal to the MSPB itself. The deadline for appealing to the MSPB is 35 days after the announcement of the AJ's decision. If neither party appeals, the decision of the AJ becomes the final decision of the MSPB.²¹

Before the AJ's hearing, there is an opportunity for both parties to conduct discovery—to submit interrogatories to the other party, to demand the production of documents and other evidence, to conduct depositions, etc. The MSPB discovery process is very expedited. Your lawyer needs to be prepared to move quickly after filing your case.

Q: If I lose at the MSPB level, can I appeal that decision?

A: Yes. You can appeal the unfavorable MSPB decision to the United States Court of Appeals for the Federal Circuit.²²

Q: If I prevail at the MSPB level, can the agency appeal to the Federal Circuit?

A: No.²³

Q: Can ROA represent me before the MSPB or the Federal Circuit or intervene in my case?

A: No. ROA is not a law firm, and we do not have the authority to represent individuals in courts or administrative bodies like the MSPB, nor do we have the authority to intervene in such cases. We can file an *amicus curiae* ("friend of the court") brief in an appellate court, and we do that several times per year, occasionally even in the United States Supreme Court.²⁴

²¹ The complainant can wait 35 days for the AJ's decision to become the final MSPB decision, and the complainant can then appeal to the Federal Circuit.

²² See 38 U.S.C. § 4324(d)(1). The Federal Circuit is the 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.

²³ *Id.*

²⁴ See Law Review 22072 (November 2022).

If you want us to consider filing an amicus brief, you need to have your lawyer contact us sooner, not later. Once your lawyer files his or her appellate brief an amicus brief in support of your position must be filed within one week after your brief.²⁵

Q: Are there other sources of definitive information about how to enforce USERRA against the Federal Government as an employer?

A: Yes. As I explained in detail in Law Review 16044 (May 2016), the definitive reference book on USERRA is *The USERRA Manual*, by Kathryn Piscitelli and Edward Still.²⁶ I invite your attention to Chapter 9 of that book for a detailed discussion of enforcing USERRA against federal agencies as employers.

Please join or support ROA

This article is one of 2,000-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. We add new articles each month.

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing. 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members 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.

²⁵ FED. R. APP. P. 29(a)(6).

²⁶ *The USERRA Manual* is available from and published by the Thomson Reuters publishing company. The book is updated annually. For more information, visit the Thomson Reuters website at <https://tinyurl.com/nha5sztm>, or contact Thomson Reuters at 1-888-728-7677.

If you are now serving or have ever served in any one of our nation's eight²⁷ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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 Organization of America
1 Constitution Ave. NE
Washington, DC 20002²⁸

²⁷ Congress recently established the United States Space Force as the 8th uniformed service.

²⁸ You can also contribute on-line at www.roa.org.