

What Is a Prohibited Personnel Practice (PPP)? My Federal Supervisor Has Willfully Violated USERRA. Is that a PPP?

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

1.1.1.8—USERRA applies to the Federal Government

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

9.0--Miscellaneous

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>.

Q: I am a Sergeant in the Army Reserve³ and a member of the Reserve Organization of America (ROA).⁴ I have read with great interest many 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.

On the civilian side, I am a GS-11 employee of a federal executive agency. My direct supervisor is a GS-15, and he is an older man already past the normal retirement age but unwilling to retire. He constantly reminds me that he was drafted in 1969 and hated every day of his two years of Army service. He has told me many times that he hates the Army still today and that he cannot understand why I enlisted voluntarily and why I affiliated with the Army Reserve after leaving active duty. When I was up for a civilian promotion recently, my supervisor bad-mouthing me to the selection board, and I was not promoted. My supervisor told me that he can “guarantee” that I will never be promoted in my civilian job until I quit the Army Reserve.

I have filed a formal, written USERRA complaint against my federal agency, with the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS), and I am confident that the denial of promotion will be found to be a USERRA violation and will be corrected, but I think that my supervisor should also be held accountable for violating USERRA and that I and other reservists who are federal employees should be protected from this kind of anti-military animus.

At my federal workplace, in the break room, there is an Office of Personnel Management (OPM) poster about “Prohibited Personnel Practices” (PPPs). What is a PPP? Does my supervisor’s willful USERRA violation amount to a PPP?

A: Under section 2302 of Title 5 of the United States Code, there are 14 prohibited personnel practices.⁵ PPP Number 11 makes it unlawful to “knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans’ preference requirement”⁶ or to “knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans’ preference requirement.”⁷ Section 2302(e)

³ The factual set-up for this article is hypothetical but realistic.

⁴ Anyone who is serving or has served in any one of the eight uniformed services of the United States, in the Active Component or the Reserve Component, is eligible for full membership in ROA, and that includes enlisted personnel as well as officers. In 2018, ROA members amended the Constitution of the Reserve Officers Association to make enlisted personnel, as well as officers, eligible for membership, and ROA adopted the “doing business as” name of Reserve Organization of America to emphasize that the organization represents enlisted members as well as officers in our nation’s eight Reserve Components.

⁵ 5 U.S.C. § 2302(b).

⁶ 5 U.S.C. § 2302(b)(11)(A).

⁷ 5 U.S.C. § 2302(b)(11)(B).

defines the term “veterans’ preference requirement” and USERRA is not one of the laws included in that definition.⁸

H.R. *** would add “or the Uniformed Services Employment and Reemployment Rights Act” to section 2302(b)(11)(A) and section 2302(b)(11)(B). This would make it a PPP for a federal employee to violate USERRA willfully. Thus, a federal employee (typically a supervisor or personnel official) who willfully violates USERRA would be subject to discipline (reprimand, suspension without pay, or removal from federal service for repeated or egregious violations) for violating USERRA. This will give supervisors and personnel officials a powerful incentive to comply with this essential federal statute.⁹

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.

⁸ 5 U.S.C. § 2302(e).

⁹ The United States Office of Special Counsel (OSC) enforces the prohibition on PPPs by bringing proceedings against violators in the Merit Systems Protection Board (MSPB).

If you are now serving or have ever served in any one of our nation's eight¹⁰ 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 20002¹¹

¹⁰ Congress recently established the United States Space Force as the 8th uniformed service.

¹¹ You can also contribute on-line at www.roa.org.