

## PHS Officers Are Protected by USERRA, But PHS Officers Are Not Entitled to Paid Military Leave under 5 U.S.C. § 6323.

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

### 1.1.1.8—USERRA applies to the Federal Government

### 1.1.3.4—USERRA applies to PHS service.

### 1.1.3.5—USERRA applies to NOAA service.

### 1.2—USERRA forbids discrimination.

### 1.4—USERRA enforcement

### 1.8—Relationship between USERRA and other laws/policies

### 2.0—Paid leave for government employees who are Reserve Component personnel

**Q: I am a Lieutenant in the newly established Reserve Component of the Public Health Service (PHS) commissioned corps and a life member of the Reserve Organization of America (ROA).<sup>3</sup>**

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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 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.

<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 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>.

<sup>3</sup> 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

**I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

**On the civilian side, I am a GS-12 for a federal executive agency. I need time off (at least without pay) from my civilian job to perform training and service in the Reserve Component of PHS. My civilian supervisor, a GS-15, told me that USERRA only applies to the armed forces, and the PHS commissioned corps is not an armed force, so I do not have the right to military leave. She further told me that if I miss work for PHS duty I will be fired. Is my supervisor correct?**

**Answer, bottom line up front**

Your supervisor is conflating the right to unpaid but job-protected military leave under USERRA with the right to *paid military leave* under section 6323 of title 5 of the United States Code.<sup>4</sup> You are not entitled to paid military leave under section 6323, but you are protected by USERRA.

**You are protected by USERRA.**

The commissioned corps of PHS is a “uniformed service” as defined by the definitions section of Title 10 of the United States Code.<sup>5</sup> The commissioned corps of PHS is also a uniformed service as defined by USERRA. Section 4303 of USERRA<sup>6</sup> defines 17 terms used in this law, and the term “uniformed services” is defined as follows:

The term “uniformed services” means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, *the Commissioned Corps of the Public Health Service, the commissioned officer corps of the National Oceanic and Atmospheric Administration, System members of the National Urban Search and Rescue Response System during a period of appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, intermittent personnel who are appointed into Federal Emergency Management Agency service under section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5149(b)(1)) or to train for such service, and any other category of persons designated by*

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<sup>4</sup> “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.

<sup>5</sup> 5 U.S.C. § 6323.

<sup>5</sup> See 10 U.S.C. § 101(a)(4).

<sup>6</sup> 38 U.S.C. § 4303.

the President in time of war or national emergency.<sup>7</sup>

USERRA defines the term “service in the uniformed services” as follows:

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act, State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, a period for which a person is absent from a position of employment due to an appointment into service in the Federal Emergency Management Agency as intermittent personnel under section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.<sup>8</sup>

A person who leaves a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA is entitled to prompt reinstatement in the position that he or she would have attained if continuously employed, with accrued seniority and pension credit as if he or she had remained continuously employed if he or she meets the following additional conditions:

- a. Must have given the pre-service employer prior oral or written notice.<sup>9</sup>
- b. Must not have exceeded the cumulative five-year period of uniformed service, relating to the employer relationship for which the person seeks reemployment.<sup>10</sup>

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<sup>7</sup> 38 U.S.C. § 4303(17) (emphasis supplied).

<sup>8</sup> 38 U.S.C. § 4303(13).

<sup>9</sup> 38 U.S.C. § 4312(a)(1).

<sup>10</sup> 38 U.S.C. § 4312(c). As is explained in Law Review 16043 (May 2016), there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not toward exhausting an individual’s five-year limit.

- c. Must have been released from the period of service without having received a disqualifying bad discharge from the service.<sup>11</sup>
- d. Must have made a timely application for reemployment with the pre-service employer.<sup>12</sup>

A person who leaves a civilian job for voluntary or involuntary service in the PHS commissioned corps, including but not limited to service in the Reserve Component of the PHS commissioned corps, and who meets the other criteria enumerated above, is entitled to reemployment under USERRA. In this respect, service in the commissioned corps of PHS is no different from service in the Army or any other service.

It is unlawful for an employer (federal, state, local, or private sector) to deny a person initial employment, retention in employment, promotion, or any benefit of employment on the basis of the person's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform uniformed service.<sup>13</sup> This protection applies to PHS officers and persons applying to join the PHS commissioned corps just as it applies to the Army or any other service.

**Q: My sister recently left a civilian job to join the commissioned corps of the National Oceanic & Atmospheric Administration (NOAA). Will she have the right to reemployment when she leaves NOAA service?**

**A:** Yes. If she meets the USERRA eligibility criteria discussed above, your sister will have the right to reemployment.<sup>14</sup>

**PHS officers are not entitled to paid military leave under the provisions of 5 U.S.C. § 6323.**

Section 6323 provides:

Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in

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<sup>11</sup> 38 U.S.C. § 4304.

<sup>12</sup> After a period of service of 181 days or more, the returning service member or veteran has 90 days to apply to for reemployment. See 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>13</sup> 38 U.S.C. § 4311(a).

<sup>14</sup> See 38 U.S.C. § 4303(17). The definition of "uniformed services" specifically includes the commissioned corps of NOAA. This has not always been the case. As originally enacted in 1994, USERRA's definition of "uniformed services" included the PHS commissioned corps but not the NOAA commissioned corps. The exclusion of NOAA was finally corrected in December 2016. See Law Review 15002 (January 2015) and the update dated July 2021.

section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502–505 of title 32 *as a Reserve of the armed forces or member of the National Guard*. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.<sup>15</sup>

By the explicit terms of section 6323(a)(1), the right of federal civilian employees to *paid* military leave is limited to “a Reserve of the armed forces or member of the National Guard.” The PHS commissioned corps is a “uniformed service” but not an “armed force.”<sup>16</sup> Under section 6323 as currently written, PHS Reserve officers like you are not entitled to paid military leave.

**Q: What would it take to make me and other PHS Reserve officers who are federal employees eligible for paid military leave?**

**A:** That would require a statutory amendment to section 6323.

**Please join or support ROA**

This article is one of 2,000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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

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<sup>15</sup> 5 U.S.C. § 6323(a)(1) (emphasis supplied).

<sup>16</sup> 10 U.S.C. §§ 101(a)(4) and (5).

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 eight<sup>17</sup> 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](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 Organization of America  
1 Constitution Ave. NE  
Washington, DC 20002<sup>18</sup>

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<sup>17</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

<sup>18</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).