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Delaware Law Protecting National Guard Members On State Active Duty

By Kyle E. Helmick¹

Delaware has enacted a provision that protects National Guard members on state active duty, and the provision includes an enforcement mechanism. Here is the entire text of the provision:

(a) If *any* employer fails to comply with any provisions of federal or state law relating to employment rights of reservists or National Guard members, the employee may elect to bring an action at law for damages for such noncompliance or such other relief as is appropriate in the Superior Court of Delaware.
(b) *Any* National Guard member who is called to state active duty shall be entitled to the same rights, privileges, and protections with respect to such member's employment as such member would have had if called for military training under federal law protecting reservists and National Guard members.

Delaware Code Annotated title 20, section 905 (West) (emphasis supplied).

This section appears to apply to private employers in Delaware and also to the State of Delaware and its political subdivisions (counties, cities, school districts, etc.). *But see Janowski v. Division of State Police, Department of Safety and Homeland Security, State of Delaware*, 981 A.2d 1166 (Delaware Supreme Court 2009).²

It appears that title 20, section 905 is not limited to members of the *Delaware* Army National Guard and Air National Guard. There are members of other-state National Guard units (especially neighboring states like Maryland and Pennsylvania) who have civilian jobs in Delaware. Title 20, section 905 can be reasonably read to protect the civilian jobs of such persons when they are called to state active duty by their home-state Governors.

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² In *Janowski*, the Delaware Supreme Court held that a state police officer claiming that his reemployment rights were violated by the State Police, as his civilian employer, could not maintain an action against the State Police in state court, because of the sovereign immunity of a state agency. The Supreme Court held that a waiver of sovereign immunity must be clear and unambiguous, and that the Delaware statute did not meet this high standard. Captain Samuel F. Wright, JAGC, USN (Ret.), the Director of the Service Members Law Center, has discussed *Janowski* in detail in Law Review 1149 (June 2011). We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,100 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated the column in 1997, and ROA adds new articles each week, including 169 new articles in 2013.