

Protection of Civilian Jobs of Puerto Rico National Guard Members

By Captain Samuel F. Wright, JAGC, USN (Ret.)¹

Today's National Guard traces its origins to 1636, when the Massachusetts Bay Colony established the Massachusetts militia to defend the colony against attacks by the Pequot Indians. Other colonies and later states established similar militias. Each state has enacted provisions to protect members of the Army National Guard and the Air National Guard when they are on state active duty, called by the Governor of the state for state emergencies like fires, floods, riots, etc. Puerto Rico, the Virgin Islands, and Guam also have commonwealth or territorial National Guard organizations and have laws that protect National Guard members when they are away from their civilian jobs for commonwealth or territorial National Guard service.

Under federal legislation enacted very early in the 20th Century, state militia forces have been given major federal assistance in pay, training, and equipment and have been given federal status as part of the Army National Guard of the United States, one of the seven Reserve Components of the United States Armed Forces.² After World War II, when the Air Force became a separate service rather than part of the Army, Congress created the Air National Guard of the United States as a similar hybrid state-federal military service.

Joe Smith is a Sergeant in the Army National Guard of the Commonwealth of Puerto Rico. Like National Guard members in the 50 states, Joe is subject to call-up by the President (or he can volunteer) for federal active duty, and he engages in periodic training to prepare for such a contingency. A federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA)³ protects Joe from discrimination by civilian employers (federal, state, territorial, commonwealth, local, or private sector) with respect to initial employment, retention in employment, promotions, and benefits of employment based on his membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service. USERRA also gives Joe the right to reemployment in his civilian job if he leaves that job (for a period of hours, days, weeks, months, or years) for voluntary or involuntary service in the uniformed services.

¹ Captain Wright is the Director of the Service Members Law Center (SMLC) at the Reserve Officers Association (ROA). He can be reached by telephone at (800) 809-9448, ext. 730. His e-mail is SWright@roa.org.

² The other six Reserve Components are the Army Reserve, the Air National Guard of the United States, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. The Army National Guard and Air National Guard have this hybrid state-federal status, while the other five Reserve Components are purely federal entities.

³ USERRA is codified in title 38 of the United States Code, at sections 4301-4335 (38 U.S.C. 4301-4335).

USERRA gives Joe the right to reemployment in his civilian job after a period of voluntary or involuntary service under title 10 or title 32 of the United States Code. USERRA does not protect Joe's job when he is called to *commonwealth* military service by the Governor of the Commonwealth of Puerto Rico, under commonwealth authority, paid with commonwealth funds, for a commonwealth emergency like a hurricane, fire, or riot. If Joe is to have the right to reinstatement in his civilian job after a period of commonwealth active duty, it must be by commonwealth law. Puerto Rico's code has five sections that are pertinent.

These sections are in Title 25 of the Laws of Puerto Rico Annotated. First, let us refer to section 2002, the definitions section:

- (a) *Military Forces of Puerto Rico*. – Means the Militias of Puerto Rico, to wit, the National Guard of Puerto Rico and any other military force organized under the laws of the Commonwealth of Puerto Rico.

Laws of Puerto Rico Annotated, Title 25, section 2002(a) (italicized heading in original).

The term "Military Forces of Puerto Rico" is used in each of the substantive sections quoted below. This definitions section makes clear that the protections of Title 25 only apply to members of the *Puerto Rico* Army National Guard or Air National Guard. Members of the National Guard of one of the 50 states or another U.S. territory (like the nearby U.S. Virgin Islands) who happen to have civilian jobs in Puerto Rico are not protected by these provisions.

Leaves of absence to government employees

All officers and employees of the Government of Puerto Rico or its political subdivisions, agencies and public corporations, who are members of the *Military Forces of Puerto Rico*, shall be entitled to a military leave of absence up to a maximum of thirty (30) day a year to be absent from their respective [civilian] posts without the loss of pay, time or efficiency rating during the period in which they were rendering military services as part of their annual training or in military schools, when so ordered or authorized under the provisions of the laws of the United States of America *or the Commonwealth of Puerto Rico*. Provided, That when said Federal *or Commonwealth* Active Military Service is in excess of thirty (30) days, such member of *the Military Forces of Puerto Rico* may complete such period of annual training or military school chargeable to any leave with pay accrued or any leave without pay to which he is entitled.

Laws of Puerto Rico Annotated, Title 25, section 2082 (emphasis by italics supplied, bold heading in original).

Leaves of absence to employees of private enterprises

All officers and employees of private enterprise who are members of the *Military Forces of Puerto Rico* shall be entitled to leaves of absence from their respective posts or employment without loss of time or efficiency rating during the period they were engaged in military service

as part of their annual period of training *or to comply with any call for Commonwealth Active Military Service made to members of the Military Forces of Puerto Rico.*

Laws of Puerto Rico Annotated, Title 25, section 2083 (emphasis by italics supplied, bold heading in original).

Failure to report for duty; preventing or discriminating against for duty; penalties

(b)Any employer who prevents, obstructs or does not allow a member of the *Military Forces of Puerto Rico* to be absent from his respective office or employment in order to report to military duty as part of his military training *or in compliance with a call to Commonwealth Active Military Service*, or who dismisses or in any way discriminates against an employee by reason of his absences in the performance of any military duty as above mentioned or by reason of being a member of the *Military Forces of Puerto Rico* shall be guilty of a felony and upon conviction shall be punished by a fine not to exceed five thousand dollars (\$5,000) or by imprisonment for not more than three (3) years, or both penalties, in the discretion of the court.

(c)Any employer who in violation of the provisions of subsection (b) of this section dismisses or discriminates against any of his employees shall be bound to reinstate said employee in his employment or office without any loss of pay whatsoever, retroactive to the date of dismissal, and/or reinstate him in all his rights, privileges and/or benefits, all retroactive to the date of dismissal or discrimination, as the case may be.

The right of an employee so dismissed or discriminated against to demand from his employer fulfillment of the obligation imposed by this subsection shall last for six (6) months reckoning from the date of dismissal or discrimination.

Laws of Puerto Rico Annotated, Title 25, section 2084 (emphasis by italics supplied, bold heading in original) (subsection a omitted as not pertinent to this article).

Loss of employment; penalty

Any employer who by himself, or through connivance with another person, deprives a member of the *Military Forces of Puerto Rico* from his employment or obstructs or impairs said member from obtaining such employment because of the fact of his belonging to such organization or who dissuades him from enlisting in the *Military Forces of Puerto Rico* under threat of bodily injury or another form of intimidation, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than five hundred dollars (\$500) or imprisonment in jail not to exceed six (6) months, or both penalties, in the discretion of the court.

Laws of Puerto Rico Annotated, Title 25, section 2089 (emphasis by italics supplied, bold heading in original).

Examples

Bob Jones is a Sergeant in the United States Army Reserve (USAR). He lives in Puerto Rico and works for the Department of Transportation of the Commonwealth of Puerto Rico (PRDOT). From time to time, he needs time off from his civilian job for inactive duty training (drills), annual training, and voluntary or involuntary active duty in the USAR. Bob's civilian supervisor at the PRDOT insists that Bob has no right to be absent from his civilian job for this military service because the USAR is not part of the *Military Forces of Puerto Rico* as defined by Puerto Rico law.

It is true that Bob has no rights under Puerto Rico law, but that fact is largely irrelevant because he has a job-protected right to be absent from his civilian job for USAR military training and service under the federal law, USERRA.

Mary Adams is a Lieutenant Colonel in the Puerto Rico Army National Guard and a civilian employee of the Department of Justice of the Commonwealth of Puerto Rico (PRDOJ). Mary is selected to attend and does attend the in-residence one-year course at the Army War College in Carlisle, Pennsylvania. After exhausting her 30 days of paid military leave under Title 25, section 2082 she then exhausts her 30 days of accrued annual leave through her civilian job at the PRDOJ. The civilian employer then insists that she return to work, still ten months short of completing the Army War College course.

Under USERRA, Mary has a job-protected right to be absent from her civilian job to attend this Army War College course, and the Puerto Rico law is essentially irrelevant. Under section 4316(d) of USERRA⁴ Mary has the right but not the obligation to use, during her period of service, any vacation, annual leave, or other leave. If she chooses not to use her other leave in this way, or if she has exhausted her other leave, she still has the right to time off without pay under USERRA.

Josephine Weissmuller is a Captain in the Army National Guard of the United States Virgin Islands (USVI), but she works in Puerto Rico for a major hotel. Under USERRA, she has a job-protected right to be absent from her hotel job for inactive duty training, annual training, and voluntary or involuntary active duty under title 10 or title 32 of the United States Code. If Josephine is called to *territorial* active duty by the Governor of the USVI, she has no legal right to reinstatement at the hotel following that USVI military service.

The USVI law does not apply in Puerto Rico. The Puerto Rico law, by its terms, only protects members of the Puerto Rico Army National Guard or Air National Guard. USERRA does not apply to state, territorial, or commonwealth military service. Josephine has fallen through the crack and is unemployed.

We want both Puerto Rico and the USVI to amend their laws to expand the protection to include National Guard members of other states, territories, and commonwealths.

⁴ 38 U.S.C. 4316(d).