

LAW REVIEW¹ 25039

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If a Federal Supervisor or Personnel Official Willfully Violates the Veterans Preference Act, that Is a Prohibited Personnel Practice, And the Individual Can Be Removed from Federal Employment.

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

1.8—Relationship between USERRA and other laws/policies.

8.0—Veterans preference.

Q: I am a life member of the Reserve Organization of America (ROA) and a retired Army Reserve major. 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

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 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 samwright50@yahoo.com.

that are especially pertinent to those of us who are serving or have served our country in uniform.

While I was in college, I participated in the Army's Reserve Officers Training Corps (ROTC), and when I graduated in 1994, I was commissioned as a second lieutenant in the Army. I remained on active duty for six years. In May 2000, I left active duty and affiliated with the Army Reserve (USAR). In 2003, I was recalled to active duty, and I participated in the successful invasion of Iraq. I was wounded in action, and due to my injuries, I was medically retired from the Army with a substantial disability rating. I have paperwork from the Department of Veterans Affairs (VA) showing that I am entitled to a ten-point preference in federal civilian employment, under the Veterans Preference Act (VPA).

I was hired as a federal civilian employee in 2007, and I have worked for several federal departments. Since 2019, I have worked for the Department of Education (DOE). In his second term, President Trump seeks to downsize DOE and eventually to eliminate it. It is entirely possible that I will lose my job in a Reduction in Force (RIF).

The personnel director of the DOE component where I work (Let us call him Vidkun Quisling.) has made it clear that he detests service members and veterans and that he does not think that they deserve preference in hiring or in retention during a RIF. I think that Mr. Quisling has willfully flouted the VPA in his treatment of me and other service-connected disabled veterans.

I have heard that there is such a thing as a “Prohibited Personnel Practice” or “PPP” and that flouting the VPA is one of the PPPs. Is that true?

A: Yes. Section 2302(b) of title 5 of the United States Code enumerates 11 Prohibited Personnel Practices (PPPs), and Number 11 is as follows: “An agency official shall not take or fail to take, recommend, or approve a personnel action if the official knows that doing so would violate a veterans’ preference requirement.”

Q: I know a federal personnel official who willfully violated USERRA. He said that the “fascist war criminals” who have left their federal civilian jobs to perform service in the armed forces do not deserve to be reemployed by their federal agency employers, and he acted on this prejudiced viewpoint in several cases. Does that amount to a PPP?

A: No, but it should. In Law Review 15089 (October 2015), I proposed twenty amendments to USERRA and related laws. One of the amendments was to add “or the Uniformed Services Employment and Reemployment Rights Act” to the end of section 2302(b)(11) of title 5 of the United States Code.³ In that article, I explained the rationale for this proposal as follows:: “To promote USERRA compliance within the Federal Government, federal supervisors and personnel officials must be held accountable and must pay a price, from their own pockets, for willfully violating USERRA.”⁴

Q: How is section 2302(b) enforced?

³ See Law Review 15089, Proposal 12 pages 15-16.

⁴ Id. Eight of the proposals in this 2015 article have been enacted. We are still working on this one.

A: The United States Office of Special Counsel (OSC) enforces section 2302(b) by bringing enforcement actions against federal employees who have committed PPPs. Such actions are brought in the Merit Systems Protection Board (MSPB). If the MSPB finds, after conducting a hearing, that a federal employee has committed a PPP, the MSPB can impose substantial sanctions on the violator, up to and including removal from federal employment.

Q: What is the federal Veterans Preference Act (VPA)?

A: On its website, the United States Office of Personnel Management (OPM) states:

Veterans' Preference gives eligible veterans preference in appointment over many other applicants. Veterans' preference applies to all new appointments in the competitive service and many in the excepted service. Veterans' preference does not guarantee veterans a job and it does not apply to internal agency actions such as promotions, transfers, reassignments, and reinstatements.

Understanding how veterans' preference works can be a challenge. In accordance with title 5, United States Code, Section 2108 (5 USC 2108) veterans' preference eligibility can be based on dates of active-duty service, receipt of a campaign badge, receipt of a Purple Heart, or a service-connected disability. Please know that not all active-duty service qualifies for veterans' preference.

Only veterans discharged or released from active duty in the armed forces under honorable conditions are eligible for veterans'

preference. This means you must have been discharged under an honorable or general discharge. Under the VOW (Veterans Opportunity to Work) to Hire Heroes Act of 2011, an individual who has reason to believe s/he will be entitled to veterans' preference upon discharge may apply for a position in advance of the discharge, and receive consideration as a preference eligible, if the service member is able to provide a certification that s/he is expected to be discharged or released from active duty under honorable conditions not later than 120 days from the date of the certification; the circumstances of the discharge are verified at the time of actual appointment.

If you are a "retired member of the armed forces" you are not included in the definition of preference eligible unless you are a disabled veteran OR you retired below the rank of major or its equivalent.

There are basically three types of preference eligibility, sole survivorship (0-point preference eligible), non-disabled (5-point preference eligible) and disabled (10-point preference eligible).⁵

Q: Who is entitled to the 10-point veterans' preference?

A: On its website, the United States Office of Personnel Management (OPM) states:

"You are a 10-point preference eligible if you served at any time, and you:

1. have a service-connected disability, OR

⁵ <https://www.opm.gov/fedshirevets/veteran-job-seekers/vets/>.

2. received a Purple Heart.”⁶

Q: How does the VPA apply to the Reduction-in-Force (RIF) situation?

A: On its website, the United States Office of Personnel Management (OPM) states:

Layoffs in the Federal Government are called reduction in force (RIF) actions. The RIF regulations determine whether an employee may keep his or her present position, and if not, whether the employee has a right to a different position. Certain veterans have advantages over non-veterans in a RIF. Generally, determination of veterans’ preference eligibility during a RIF are made following the rules governing preference in federal appointments except that military retirees must meet an additional condition to be considered a preference eligible for RIF purposes.

Once you have determined whether you qualify for veterans’ preference for RIF purposes, review your SF-50 to verify that the qualification is annotated in Block 26. Contact your agency’s Personnel or Human Resources office for additional information about your eligibility.⁷

Q: If the OSC believes that my VPA rights have been violated, can the OSC bring an action in the MSPB to enforce my rights?

A: Unfortunately, no. Under the law, as written, the OSC has no role in making federal agencies (as employers) comply with the VPA or in

⁶ <https://www.opm.gov/fedshirevets/veteran-job-seekers/vets/>.

⁷ <https://www.opm.gov/fedshirevets/current-veteran-employees/veterans-preference/>.

obtaining relief for federal employees or applicants whose VPA rights have been violated by a federal agency. In Law Review 25040, the next article in this “Law Review” series, I will discuss in detail the VPA enforcement mechanism.

The purpose of the OSC action is to punish the supervisor or personnel official for knowingly violating the VPA, to deter others from violating this law.

Q: What is the difference between the VPA and USERRA?

A: USERRA gives an individual the right to leave a civilian job (federal, state, local, or private sector) to perform service in the uniformed services and to return to the civilian job after completing a period of uniformed service, and to be treated as if he or she had been continuously employed during the period of service, for seniority and pension purposes. USERRA also makes it unlawful for an employer to discriminate in hiring or retention against those who are serving or have served in the uniformed services or who have an obligation to serve in the future. The VPA gives some of those who have served a leg up in hiring or in surviving a RIF. USERRA applies to almost all employers, while the VPA only applies to the Executive Branch of the Federal Government.

In some cases, the same conduct could violate both statutes.

Please join or support ROA.

This article is one of 2,300-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 the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).⁸

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, who had commanded American troops in the recently concluded “Great War.” 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 adequate national security. For more than 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, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state

⁸ See <https://crsreports.congress.gov/product/pdf/IF/IF10540>. These are the authorized figures as of 9/30/2022.

legislators and 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.

If you are now serving or have ever served in any one of our nation's eight⁹ uniformed services, you are eligible for membership in ROA,¹⁰ 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 <https://www.roa.org/page/memberoptions> 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
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⁹ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁰ Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

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