

The California State Guard Maritime Component Is Not a “Uniformed Service” for USERRA Purposes, and USERRA Does Not Protect Absence From a Civilian Job for Duty in that Component.

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

1.1.3.3—USERRA applies to National Guard service

Q: I was commissioned an Ensign in the Navy in 2000, after graduating from college and participating in the Naval Reserve Officers Training Corps (NROTC). I served on active duty for 20 years and retired as a Lieutenant Commander in 2020. Shortly after I retired, I became a Federal civilian employee, in California.

I have been asked to join the California State Guard Maritime Component (CSGMC). If I join that organization, will the Uniformed Services Employment and Reemployment Rights Act

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 (VRRRA—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 VRRRA 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 VRRRA 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>.

(USERRA) give me the right to paid or unpaid leave from my Federal civilian job for CSGMC duty?

Answer, bottom line up front

No. The CSGMC is not a “uniformed service” as defined by USERRA. Federal law does not give you the right to be absent, even without pay, from your civilian job to perform CSGMC duty.

Explanation

Until the start of World War II, the United States Army was tiny. A military operation of any size required the President to mobilize militia forces from the States. This was the pattern followed for the War of 1812, the Mexican American War, the Civil War, and the Spanish American War. Mobilization problems for the Spanish American War demonstrated the need for a better organized and trained militia.

As the 19th Century turned to the 20th, Congress correctly anticipated that the new century would bring major new responsibilities for our country as an emerging world power. One of the results of that understanding was the enactment of the Militia Act of 1903, also known as the “Dick Act.”³ The law was named for Senator Charles W.F. Dick, a major general in the Ohio Militia and Chairman of the Senate Committee on the Militia.

The Dick Act gave Federal funding and Federal assistance to the organized militia forces of the various States. Federal funding for the militia during the first 13 years after the enactment of the Dick Act exceeded Federal funding during the century before enactment. The Dick Act required National Guard members to attend 24 drills and five days of annual training per year and for the first time provided for Federal pay for annual training. National Guard units were subject to inspection by Regular Army officers and were required to meet certain standards. When the United States entered World War I in April 1917, National Guard members and units were much better prepared for service than the State Militia soldiers who were called up for service in the Spanish American War less than a generation earlier.⁴

The Dick Act created the dual-enlistment system that is utilized to this day. Let us discuss the hypothetical but realistic Joe Smith, who enlisted in the California Army National Guard⁵ in 2019. He took two enlistment oaths, one to California and one to the United States. He joined

³ Militia Act of 1903, 32 Stat. 775. You can find an article about this important law at the end of this article.

⁴ The famous “Rainbow Division” of World War I was created by consolidating National Guard units from 26 states and the District of Columbia. At the end of this article, I have attached a link to an article about the Rainbow Division.

⁵ The same is true of the California Air National Guard.

two overlapping but legally distinct entities, the California Army National Guard (modern-day equivalent of the California Militia) and the Army National Guard of the United States.⁶

In his Federal (ARNGUS) status, Smith is subject to call-up by the President for involuntary duty under Title 10 of the United States Code, or he can volunteer for such service. USERRA gives Smith the right to an unpaid but job-protected leave-of-absence from his civilian job (Federal, State, local, or private sector) when he is away from that job for voluntary or involuntary service or training.

In his California Army National Guard status, Smith performs Federally sponsored inactive duty training (drills), annual training, and “full-time National Guard duty” and of course must be away from his civilian job for that duty. USERRA also protects his civilian job while he is on that duty.

In his California Army National Guard status, Smith is also subject to be called up for State Active Duty—called by the Governor, under State authority, paid with State funds, for State emergencies like fires, floods, tornadoes, riots, etc. Until recently (1/5/2021), USERRA did not apply to State Active Duty.

On 1/5/2021, President Trump signed into law the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020.⁷ Section 7004 of that new law amended section 4303(13) of USERRA⁸ by inserting the following after “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 (50 U.S.C. 1601 et seq.), and 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 (42 U.S.C. 5170).”

Section 7004 also added a new subsection (15) to section 4303 of USERRA,⁹ as follows:

The term “State active duty” means training or other duty, other than inactive duty, performed by a member of the National Guard of a State—(A) not under

⁶ The Army National Guard of the United States is one of the eight Reserve Components of the armed forces. In descending order of size they are the Army National Guard of the United States (ARNGUS), the Army Reserve (USAR), the Air National Guard of the United States (ANGUS), the Air Force Reserve (USAFR), the Navy Reserve (USNR), the Marine Corps Reserve (USMCR), the Coast Guard Reserve (USCGR), and the Space Force Reserve, which is new and just getting organized. The ARNGUS and ANGUS are hybrid Federal-State entities. The other Reserve Components are purely Federal entities.

⁷ Public Law 116-315.

⁸ 38 U.S.C. § 4303(13).

⁹ Section 7004 of the amending legislation redesignated former 38 U.S.C. § 4303(15) (defining the term “undue hardship”) as 38 U.S.C. § 4303(16). Presumably, with this change the definition of “uniformed services” previously at 38 U.S.C. § 4303(16) is now located at 38 U.S.C. § 4303(17).

section 502 of title 32 or under title 10; (B) in the service of the Governor of a State; and (C) for which the member is not entitled to pay from the Federal Government.

Previously, USERRA did not protect the civilian jobs of National Guard members on State active duty—called by the Governor, under State authority, paid with State funds, for State missions. Effective 1/5/2021, most State active duty is now protected by USERRA. While this recent amendment is not exactly a model of clear legislative drafting, we are most pleased with this expansion of USERRA coverage.

In 1915, Congress created the United States Naval Reserve.¹⁰ In 2015, I attended three ceremonies commemorating the centennial of the organization in which I served for many years. Prior to 1915, New York and several other States had “naval militia” organizations. Some sailors in those organizations were recruited for the new Naval Reserve, but Congress did not create a “Naval National Guard.” Organizations like the New York Naval Militia and the California State Guard Maritime Component are purely State entities, not hybrid Federal-State entities like the Army National Guard.

In the years since the terrorist attacks of 9/11/2001, there have been times when so many Army National Guard soldiers and Air National Guard airmen had been Federalized that there were not enough left at home to respond to domestic emergencies like fires, floods, riots, pandemics, and other emergencies. Accordingly, several States have reinvigorated their “State Guard” organizations to fill this gap. Members of these State organizations perform important work, but absences from their civilian jobs (Federal, State, local, or private sector) are not protected by USERRA.¹¹

Section 4303 of USERRA¹² defines 17 terms used in this law. 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, and any other category

¹⁰ In 2005, Congress changed the name to “Navy Reserve.”

¹¹ I am telling you what the law is, not what I want it to be.

¹² 38 U.S.C. § 4303.

of persons designated by the President in time of war or national emergency.¹³

USERRA does not define the term “Armed Forces,” but that term is defined in the definitions section of Title 10 of the United States Code, and that term means the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard.¹⁴ *State military organizations like the New York Naval Militia, the California State Guard Maritime Component, and the Alaska State Defense Force do not qualify as “armed forces” or “uniformed services” under USERRA.* Service in these State organizations is not protected by USERRA under any circumstances.

Q: What about State law? Does California not have a law that protects the civilian jobs of members of State military forces like the CSGMC?

A: California law provides:

Any public employee and any employee of a corporation, company, firm, or other person who is a member of the State Guard is entitled to a temporary military leave of absence without pay while engaged in military duty for purposes of military training, drills, unit training assemblies, or similar inactive duty training for not to exceed 15 calendar days annually, including time involved in going to and returning from that duty.¹⁵

This State law or any State law cannot constitutionally be applied to the relationship between the Federal Government and a Federal employee.¹⁶

The bottom line is that you have no legal protection in your Federal civilian job if you are away from that job for voluntary or involuntary service or training in the CSGMC.

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. New articles are added each month.

ROA is more than a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. 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

¹³ 38 U.S.C. § 4303(17).

¹⁴ 10 U.S.C. § 101(a)(4).

¹⁵ Cal Mil & Vet Code § 395.9.

¹⁶ See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

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 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.

If you are now serving or have ever served in any one of our nation's eight¹⁷ 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 20002¹⁸

Here is a link to the website of the California State Guard Maritime Component:
<https://stateguard.cmd.ca.gov/public/maritime-component/>.

Here is a comprehensive article about the Militia Act of 1903:
https://en.wikipedia.org/wiki/Militia_Act_of_1903.

Here is an article about the famous "Rainbow Division" of World War I, World War II, and the present day. In World War I, the division was created by consolidating National Guard units from 26 States and the District of Columbia:

[https://en.wikipedia.org/wiki/42nd_Infantry_Division_\(United_States\)](https://en.wikipedia.org/wiki/42nd_Infantry_Division_(United_States))

¹⁷ Congress recently established the United States Space Force as the 8th uniformed service.

¹⁸ You can also contribute on-line at.