

LAW REVIEW¹ 23039
July 2023
Second Supreme Court Case in Two Years
About National Guard Technicians
By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.1.3.3—USERRA applies to National Guard service.

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

9.0--Miscellaneous

Ohio Adjutant General's Department v. Federal Labor Relations Authority, 2023 U.S. LEXIS 2057 (May 18, 2023).

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 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>.

This is the second United States Supreme Court decision about National Guard technicians in two years.³ The Supreme Court decided that dual-status technicians are federal employees, not State employees, for purposes of the jurisdiction of the Federal Labor Relations Authority, the Federal Executive Branch agency that administers and enforces the federal statute that provides for collective bargaining between federal agencies and their employees. The Adjutant General of Ohio argued that the Army National Guard (ARNG) and Air National Guard (ANG) technicians in Ohio were employees of the State of Ohio, not the Federal Government, and that therefore the FLRA had no jurisdiction and the Adjutant General is not required to bargain collectively with these technicians through the union that they have chosen to represent them. By a 7-2 vote, the Supreme Court rejected that argument.⁴

Q: What are dual-status technicians?

A: Last year's Supreme Court decision explained the hybrid status of dual status technicians as follows:

This case concerns the application of the windfall elimination provision to a unique position in federal employment: the “military technician (dual status).” 10 U. S. C. § 10216. As its name suggests, this rare bird has characteristics of two different statuses. On one hand, the dual-status technician is a “civilian

³ Last year at this time, the Supreme Court decided *Babcock v. Kijakazi*, 142 S. Ct. 641 (2022). In that case, the Supreme Court decided that dual-status technicians in the Army National Guard, Army Reserve, Air National Guard and Air Force Reserve are not members of the armed forces for purposes of a statute exempting members of the armed forces from an offset between their Federal civilian pensions and their Social Security benefits. Technicians have a hybrid civilian-military status, and they typically qualify for both Federal civilian pensions and Reserve Component pensions at age 60 or earlier if they have contingency service after 1/28/2008. As a result of *Kijakazi*, retired technicians suffer Social Security offsets for their Federal civilian pensions but not for their military pensions. Lieutenant Colonel Susan Lukas and I discuss this case in detail in Law Review 22035 (June 2022).

⁴ Justice Clarence Thomas wrote the Opinion of the Court and was joined by Chief Justice John Roberts, Justice Sonia Sotomayor, Justice Elena Kagan, Justice Brett Kavanaugh, Justice Amy Barrett, and Justice Ketanji Brown Jackson. Justice Samuel Alito wrote a dissenting opinion and was joined by Justice Neil Gorsuch.

employee” engaged in “organizing, administering, instructing,” “training,” or “maintenance and repair of supplies” to assist the National Guard. § 10216(a)(1)(C); 32 U. S. C. §§ 709(a)(1)-(2). On the other, the technician “is required as a condition of that employment to maintain membership in the [National Guard]” and must wear a uniform while working. 10 U.S.C. § 10216(a)(1)(B); 32 U. S. C. §§ 709(b)(2)-(4).

This dual role means that technicians perform work in two separate capacities that yield different forms of compensation. First, they work full time as technicians in a civilian capacity. For this work, they receive civil-service pay and, if hired before 1984, Civil Service Retirement System pension payments from the Office of Personnel Management. See 5 U.S.C. §§ 2101, 8332(b)(6); 42 U.S.C. § 410(a)(6)(A) (1970 ed.); 26 U.S.C. § 3121(b)(6)(A) (1970 ed.). Second, they participate as National Guard members in part-time drills, training, and (sometimes) active-duty deployment. See 32 U. S. C. §§ 502(a), 709(g)(2). For this work, they receive military pay and pension payments from a different arm of the Federal Government, the Defense Finance and Accounting Service. 37 U.S.C. §§ 204, 206; 10 U. S. C. § 1.⁵

Q: What is “full-time support”?

A: A Reserve Component is made up primarily (90% or more) of part-timers who are only paid for the days when they serve or train to maintain their readiness to serve. The cost of a Guard or Reserve part-timer is only a fraction of the cost of a full-time Active Component

⁵ *Kijakazi*, 142 S. Ct. at 643-44.

service member, so the Reserve Components are a cost-effective way to provide for defense readiness.⁶

A Reserve Component needs a cadre of full-timers to perform essential functions like recruiting, maintenance of aircraft and other equipment, and preparing the training for the part-timers on their drill weekends and annual training tours. In the four Army and Air Force Reserve Components (the Army Reserve, the Army National Guard, the Air Force Reserve, and the Air National Guard), most of this full-time support (FTS) is provided by “technicians.”

A technician has a hybrid military-civilian status. He or she is required to be a member of and to maintain membership in one of the Reserve or National Guard units that he or she supports, and the technician participates in inactive duty training (drills) and annual training in his or her military capacity, and when the unit is mobilized the technician usually goes with the unit, in the technician’s military status.⁷ On other workdays, the technician is considered to be a civilian employee of the Reserve Component.

If you were to visit a military installation on a weekday, you would not be able to distinguish the technicians from the full-time active-duty service members or the Reserve Component service members there for service or training. The technicians wear their military uniforms and observe military courtesies (saluting, etc.) while at work, and they

⁶ Lieutenant General Richard Scobee, at the time the Chief of the Air Force Reserve, testified to Congress as follows: “The Air Force Reserve is a cost-effective, accessible, and ready force. When the nation needed rapid pandemic response, we had medical personnel on the ground in New York and New Jersey within 48 hours. We provide strategic depth for national defense while operating on only 3% of the total Department of the Air Force budget. We are committed to attracting top talent by fostering a culture of inclusion in which every Airman is valued and can thrive.”

⁷ Babcock was called to the colors and deployed to Iraq for a year in 2005-06.

perform essential functions for the Reserve Components of which they are members.

In the Army National Guard and Air National Guard, the technicians have a hybrid Federal-State status in addition to their hybrid military-civilian status. For purposes of the Uniformed Services Employment and Reemployment Rights Act (USERRA), a technician is an employee of the Adjutant General⁸ of the State where the technician serves.⁹ For other purposes, National Guard technicians are treated as Federal employees of the Department of the Army (for ARNG technicians) or the Department of the Air Force (for ANG technicians).

In the Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve, dual-status technicians are not used. Most of the FTS needs are met by reservists on full-time Active Guard and Reserve (AGR) duty.

Q: What are the Reserve Components?

A: Our nation has seven Reserve Components of the armed forces.¹⁰ In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The Air National Guard and Army National Guard are hybrid Federal-State entities, while the other six Reserve Components are purely Federal.

⁸ The Adjutant General is the State official who heads up the Army National Guard and Air National Guard of a specific State or territory.

⁹ See 38 U.S.C. § 4303(4)(B). See Law Review 14029 (March 2014) and Law Review 15020 (March 2015) concerning the enforcement of the USERRA rights of National Guard technicians.

¹⁰ The newly created United States Space Force does not yet have and may never have a Reserve Component. As is explained in Law Review 23028 (Nay 2023), the leaders of the Space Force and the Department of the Air Force have proposed that Congress establish a single-component Space Force that includes both full-time and part-time members.

Now more than ever, our nation depends upon the Reserve Components for national defense readiness. The number of Reserve Component part-timers is almost equal to the number of people serving full-time in the Active Component of the armed forces, so the Reserve Components account for almost half of our nation's pool of trained personnel available in an emergency. More than one million National Guard and Reserve personnel have been called to the colors since the terrorist attacks of 9/11/2001, the "date that will live in infamy" for our time.

Q: In Law Review 22053 (September 2022), Law Review 19061 (July 2019), and Law Review 08036 (August 2008), among other articles, you have stated explicitly that National Guard technicians are State employees for purposes of the Uniformed Services Employment and Reemployment Rights Act (USERRA). Does this 2023 Supreme Court decision cause you to change your opinion?

A: No. USERRA explicitly provides that National Guard technicians are employees of the Adjutant General of the State where the technician is employed.¹¹ For USERRA purposes, National Guard technicians are State employees. For most other purposes, they are Federal employees. Yes, this hybrid status is confusing and cumbersome, but this is the system that Congress has enacted.

Q: Who is the Adjutant General of a State? How is that official appointed? What duties does that official perform?

¹¹ "In the case of a National Guard technician employed under section 709 of title 32 [of the United States Code], the term 'employer' means the adjutant general of the State on which the technician is employed." 38 U.S.C. § 4303(4)(B).

A: The Adjutant General is the head of the ARNG and ANG of a specific State. In most States, the Adjutant General is appointed by the Governor, sometimes with the advice and consent of one or both houses of the State Legislature. The 2023 Supreme Court decision makes clear that the Adjutant General is a Federal official for some purposes, but for USERRA enforcement purposes and other important purposes the Adjutant General is a State official. I think that this 2023 Supreme Court decision does not change anything regarding USERRA enforcement for National Guard technicians, but we will keep the readers informed of developments on this important issue.

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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 for 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, 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 eight¹² 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
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¹² Congress recently established the United States Space Force as the eighth uniformed service.

¹³ You can also contribute on-line at www.roa.org.