

LAW REVIEW¹ 24021

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USERRA Applies to National Guard Technicians just as this Law Applies to Other Civilian Employees, but State Laws Cannot Constitutionally Be Applied to the Relationship Between a Federal Agency and a Federal Employee.

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

1.1.3.3—USERRA applies to National Guard service.

1.8—Relationship between USERRA and other laws/policies.

Ohio Adjutant General's Department v. Federal Labor Relations Authority, 143 S.Ct. 1193 (2023).³

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>.

³ This is a 7-2 decision of the United States Supreme Court, released on 5/18/2023. The Opinion of the Court was written by Justice Clarence Thomas, and he was joined by Chief Justice John Roberts, Justice Sonia Sotomayor,

Q: I am a Colonel in the Nebraska Army National Guard⁴ and a National Guard technician. I am also a life member of the Reserve Organization of America (ROA).⁵

Being a National Guard technician means that during normal work hours Monday through Friday I am a civilian employee of the Adjutant General of Nebraska and during drill weekends and annual training I am a National Guard soldier. During the week, when I am a civilian employee, I wear my Army uniform and observe military courtesies like saluting. If you saw me at work on a weekday afternoon, you probably would not be able to ascertain my “civilian” status just from observing me at work.

I have been away from my technician job many times for voluntary and involuntary periods of military training and service. I have read and reread your Law Review 16043 (May 2016), concerning the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I believe that all my military service periods that necessitated my absences from the technician job are exempt from the five-year limit.

I have been offered the opportunity to return to active duty, voluntarily, for six years, to serve as the United States Property & Fiscal Officer (USPFO) for Nebraska. I have also read and reread your Law Review 23040 (August 2023), stating your conclusion that voluntary USPFO service is not exempted from the USERRA five-year limit. If I leave my technician job for this six-year tour as the USPFO, will I have the right to be reemployed in my technician job?

Justice Elena Kagan, Justice Brett Kavanaugh, Justice Amy Coney Barrett, and Justice Ketanji Brown Jackson. Justice Samuel Alito wrote a dissent and was joined by Justice Neil Gorsuch.

⁴ The factual set-up for this article is hypothetical but realistic.

⁵ The Reserve Officers Association was established in 1922 and chartered by Congress in 1950. In 2018, the members amended the organization’s Constitution to make enlisted personnel, as well as officers, eligible for full membership, including voting and running for office. The organization adopted the “doing business as” name of Reserve Organization of America to emphasize that the organization represents and seeks to recruit as members enlisted personnel as well as officers.

Answer, bottom line up front:

No. A technician position is a civilian job. If you leave a technician job for voluntary or involuntary uniformed service, you will have the right to reemployment, *but you must meet the five USERRA conditions, including the five-year limit.* If you return to active duty to serve as the USPFO and remain on duty for more than five years, you will be beyond the five-year limit and will not have the right to reemployment.

Q: A friend told me that Nebraska has a state law that provides that an employee who leaves a civilian job for voluntary or involuntary military service for up to ten years has the right to reemployment. I think that I can take up the offer to return to active duty for six years, to serve as the USPFO, and then have the right to be reemployed in my National Guard technician position, based on this Nebraska law. What do you think?

A: First, neither Nebraska nor any other state has such a law. Second, even if there were such a state law, it would not apply and cannot constitutionally apply to the relationship between a federal agency and federal civilian employees.⁶

Q: I have been told that I am uniquely qualified for this USPFO position and that no other qualified person is willing to volunteer for this position. Where does that leave me?

A: One of the kinds of service that does not count toward exhausting an individual's five-year limit, with respect to an employer relationship, is duty performed by a service member who has been "ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services."⁷ If the Secretary of the Army determines that having a qualified USPFO in Nebraska is a

⁶ See *McCulloch v. Maryland*, 17 U.S. 316 (1819). As I have explained in Law Review 24020, the immediately preceding article in this series, National Guard technicians are federal employees, not state employees.

⁷ 38 U.S.C. § 4312(c)(4)(D) (emphasis required).

“critical requirement” of the United State Army and that only you are qualified and available, your six-year tour as the USPFO can be exempted from the computation of your five-year limit with respect to your employer relationship with the Department of the Army, as an Army National Guard technician.

Q: Who is the “Secretary concerned”?

A: For a member of the Army National Guard or Army Reserve, the “Secretary concerned” is the Secretary of the Army. The authority to make this determination has been delegated to the Assistant Secretary of the Army for Manpower & Reserve Affairs.⁸

After the Secretary or the Assistant Secretary makes the determination that your service as USPFO is necessary to meet a critical requirement of the Army, your orders need to include a statement to the effect that this determination has been made. With these “magic words” in your orders, your six-year tour as the USPFO will not count toward your five-year limit.

Q: I was commissioned a Second Lieutenant in May 2000, via the Reserve Officers Training Corps, when I graduated from college. I am approaching my Mandatory Retirement Date (MRD), in May 2030, with 30 years of commissioned service. One reason that I want to accept the opportunity to return to active duty for the USPFO position is that I think that this will be a great way to cap off my Army career. It is likely that when I complete my six-year tour as the USPFO, in May 2030, I will retire from the Army National Guard.

A National Guard technician must be a member of one of the Army National Guard units that he or she supports. If I apply for reemployment in May 2030, after I have retired from the National Guard, the Adjutant General of Nebraska will likely say that it is

⁸ See Law Review 12094 (September 2012).

impossible to reinstate me as a technician because I have retired from the Army National Guard. How will this work?

A: Here is what needs to happen. First, you need to make a timely application for reemployment with the Adjutant General of Nebraska, after you are released from this 2024-30 period of active duty. You need to meet and to document that you meet the five USERRA conditions for reemployment.

The Adjutant General will then determine that it is impossible to reinstate you as a technician. The Adjutant General needs to make that determination in writing and to provide a copy to the United States Office of Personnel Management (OPM). OPM will then be required to find for you an appropriate position in the Executive Branch of the Federal Government and to ensure that you are offered that position.

Here is the pertinent USERRA subsection:

If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).⁹

Please join or support ROA.

This article is one of 2,100-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing

⁹ 38 U.S.C. § 4314(d). See also Law Review 16009 (February 2016).

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).¹⁰

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 development and 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 “Law Review” 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,

¹⁰ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state 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 eight¹¹ 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 <https://www.roa.org/page/memberoptions>.

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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¹¹ Congress recently established the United States Space Force as the eighth uniformed service.

¹² You can also contribute on-line at www.roa.org.