

LAW REVIEW¹ 24031

May 2024

New SCRA Provision Makes Occupational Licenses Portable for Military Personnel and their Spouses.

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

4.9—SCRA enforcement.

4.11—Occupational license portability for military personnel and their spouses.

5.5—Other military service and family responsibilities.

***Portee v. Morath*, 2023 U.S. Dist. LEXIS 125796 (W.D. Texas July 21, 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 (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>.

***Portee v. Morath*, 2023 U.S. Dist. LEXIS 207241 (W.D. Texas Nov. 20, 2023).**

The National Healthy Marriage Resource Center of Brigham Young University has written:

Why is it important to understand the challenges to a healthy marriage that people in the military face? Some compelling reasons come readily to mind. First of all, married military personnel represent a sizable population, and that, in itself, merits attention. Nearly one-half of the nation's military personnel are married, amounting to almost 700,000 individuals. Moreover, these individuals will experience unique challenges to their marriages, such as deployment and combat stress. Perhaps as a result of some of these unique challenges, servicemen and women appear to have one of the highest divorce rates of any group in the nation. Also, when war or conflict strikes the nation, military spouses feel the effects. Many men and women join the military in order to serve their country and its ideals. If military personnel are struggling in their marriages, this situation can impact the ability of the military to perform its duties. But perhaps the most compelling reason simply may be that a healthy marriage contributes to a higher quality of life for an important group in society that serves the public interest, clearly a vital social goal.³

That same Brigham Young University resource center has also written: “The [military] spouse has to adjust his or her employment to the

³ See https://www.healthymarriageinfo.org/wp-content/uploads/2017/12/review_mmilitarylife.pdf.

military spouse's work. If he or she has a career, it is frequently interrupted by relocation."⁴

In Law Review 23019, First Lieutenant Tara Buckles wrote:

Military spouses face many hurdles when their service member receives [transfer] orders, including finding a new place to live, a new job, and settling in an entirely new environment. Spouses who work in fields that require professional or occupational licensure in order to work often face even more difficult paths to transition. Obtaining a new professional license is often expensive, time-consuming, and results in a hit to the overall family income while the spouse waits for the license to work.

This new law [the SCRA amendment] provides much-needed relief to these military families by providing license portability in all fields, except for the practice of law. This license portability applies not only to a military spouse, but to the service member as well.⁵

On 1/5/2023, Congress enacted and President Biden signed into law a new section of the Servicemembers Civil Relief Act (SCRA).⁶ That new section reads as follows:

(a) In general. In any case in which a servicemember or the spouse of a servicemember has a covered license and such servicemember or spouse relocates his or her residency because of military orders for military service to a location that is not in the jurisdiction of the licensing authority that issued the covered

⁴ Id.

⁵ Law Review 23019 (April 2023).

⁶ As is explained in Law Review 116 (March 2004), the SCRA was a long-overdue update and rewrite of the Soldiers and Sailors Civil Relief Act, which was originally enacted in 1917. Law Review 116 is by Colonel Mark E. Sullivan, USA (Ret.).

license, such covered license shall be considered valid at a similar scope of practice and in the discipline applied for in the jurisdiction of such new residency for the duration of such military orders if such servicemember or spouse—

(1) provides a copy of such military orders to the licensing authority in the jurisdiction in which the new residency is located;

(2) remains in good standing with—

(A) the licensing authority that issued the covered license; and

(B) every other licensing authority that has issued to the servicemember or the spouse of a servicemember a license valid at a similar scope of practice and in the discipline applied in the jurisdiction of such licensing authority;

(3) submits to the authority of the licensing authority in the new jurisdiction for the purposes of standards of practice, discipline, and fulfillment of any continuing education requirements.

(b) Interstate licensure compacts. If a servicemember or spouse of a servicemember is licensed and able to operate in multiple jurisdictions through an interstate licensure compact, with respect to services provided in the jurisdiction of the interstate licensure compact by a licensee covered by such compact, the servicemember or spouse of a servicemember shall be subject to the requirements of the compact or the applicable provisions of law of the applicable State and not this section.

(c) Covered license defined. In this section, the term “covered license” means a professional license or certificate—

(1) that is in good standing with the licensing authority that issued such professional license or certificate;

(2) that the servicemember or spouse of a servicemember has actively used during the two years immediately preceding the relocation described in subsection (a); and

(3) *that is not a license to practice law.*⁷

With the notable exception of licenses to practice law, active-duty military personnel and their spouses can now continue to utilize their state occupational licenses in new states when military Permanent Change of Station (PCS) orders transfer the service member from one state to another and the nonmilitary spouse moves with the military spouse to the new military assignment.

***Portee v. Morath*—the first federal court case applying this new SCRA provision.**

Hannah Magee Portee, the plaintiff, married Captain David Portee, an active-duty Air Force officer, on 7/29/2022. Shortly thereafter, Captain Portee received PCS orders directing him to transfer from Scott Air Force Base (AFB) in Illinois to Laughlin AFB in Texas and to report to his new duty station by 1/9/2023. Captain Portee reported to Laughlin AFB as ordered and his wife accompanied him to his new duty station.

Hannah Portee was licensed as a school counselor by the State of Ohio on 7/21/2021 and by the State of Missouri on 7/22/2022. During 2022, she was employed as a long-term substitute school counselor at a middle school in Ohio and as a guidance counselor at an elementary school in Missouri.

On 10/4/2022, after she had married Captain Portee and in anticipation of his transfer to Texas, Ms. Portee communicated with Texas education officials and applied for a guidance counselor certificate so

⁷ 50 U.S.C. § 4025a (emphasis supplied). This new SCRA section was added by section 19(a) of Public Law 117-333, 136 Stat. 6137 (Jan. 5, 2023).

that she could work in her chosen profession at her husband's new duty station. Her request for the certification was rebuffed. In February 2023, after she had moved to Texas with her husband, she became aware of the new SCRA provision and informed Texas authorities of this federal law. The Texas authorities told her that the new federal law "does not apply to Texas."

The United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.⁸

Two centuries ago, the Supreme Court, in one of its seminal cases, recognized that the Supremacy Clause means what it says and that a federal statute trumps a conflicting state statute.⁹ In the 1860s, our nation fought a bloody civil war about the supremacy of federal authority over state authority, in the context of an unconstitutional attempt to split the union to preserve the terrible institution of slavery, and the federal side prevailed. State authorities in Texas and other former Confederate states do not like to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

Ms. Portee retained attorney Brandon J. Grable of Grable Grimshaw PLLC in San Antonio and sued the State of Texas in the United States District Court for the Western District of Texas. The named defendant was Mike Morath, the Commissioner of the Texas Education Agency.

⁸ United States Constitution, Article VI, Clause 2, called the "Supremacy Clause." Yes, it is capitalized just that way, in the style of the late 18th Century.

⁹ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

Through her attorney, Ms. Portee sought a preliminary injunction that would permit her to work as a school counselor in Texas despite not having a Texas certificate in that profession. This was a “pure question of law” case, because the State of Texas never denied the factual assertions that Ms. Portee made in her complaint.

To obtain a preliminary injunction, a party must show four things:

- a. A likelihood of success on the merits when the case goes to trial.
- b. Irreparable injury to the party seeking the preliminary injunction if the injunction is denied.
- c. That the balance of the equities tips in favor of the party seeking the preliminary injunction.
- d. That granting the preliminary injunction is in the public interest.¹⁰

The United States Department of Justice (DOJ) intervened in the case and supported Ms. Portee’s legal theory and her assertion that granting the preliminary injunction was in the public interest. Judge Robert L. Pitman ruled in favor of Ms. Portee and granted her the preliminary injunction on 7/21/2023.

Section 4025a(c)(2) requires that the military spouse have “actively used” the out-of-state professional license during the two years immediately preceding the relocation due to military orders. The State of Texas insisted that this means that Ms. Portee must document that she worked as a licensed school counselor in Ohio and Missouri during *all of 2021 and 2022*, before she relocated to Texas with her husband in January 2023. Judge Pitman correctly rejected this stingy interpretation of the new federal law.¹¹

¹⁰ See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).

¹¹ See generally Law Review 24010 (February 2024). In that article I cite and summarize nine Supreme Court cases holding that laws enacted for service members and veterans should be “liberally construed” for their intended beneficiaries. I contend that the same liberal construction should apply to laws enacted for military spouses and family members.

On 11/20/2023, Judge Pitman granted Ms. Portee's motion for judgment on the pleadings, and he transformed the preliminary injunction into a permanent injunction. He also awarded Ms. Pitman court costs and reasonable attorney fees.¹² The State of Texas did not appeal from Judge Pitman's order. This case is over.

Kudos to Ms. Portee's lawyer

Bravo Zulu to attorney Brandon J. Grable of San Antonio for his imaginative, diligent, and effective representation of Ms. Portee and for his having achieved a most valuable precedent that will help thousands of other military families in Texas and the other 49 states.

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 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).¹³

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

¹² *Portee v. Morath*, 2023 U.S. Dist. LEXIS 207241 (W.D. Texas Nov. 20, 2023).

¹³ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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, 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 eight¹⁴ 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

¹⁴ Congress recently established the United States Space Force as the eighth uniformed service.

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
Washington, DC 20002¹⁵

Here is a link to a *Stars & Stripes* article dated 12/7/2023 about this issue and this case:

<https://www.stripes.com/opinion/2023-12-07/texas-education-agency-military-families-12288493.html>

On 8/30/2023, Texas Governor Greg Abbott sent a memorandum, linked below, to all State agencies informing them of the enactment of 50 U.S.C. § 4025a and directing them to comply with this new federal requirement. As a result of this memorandum, Texas Attorney General Ken Paxton did not appeal from Judge Pitman's order dated 11/20/2023.

file:///C:/Users/Sam%20Wright/Downloads/State_Agency_Leaders_Servicemembers_Civil_Relief_Act.pdf

¹⁵ You can also contribute on-line at www.roa.org.