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Don't Let AFGE Override the USERRA Rights of PHS Officers at BOP

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The Bureau of Prisons (BOP), an agency in the United States Department of Justice (DOJ), operates 121 federal penal institutions around the United States, and each institution has a medical department to treat inmates. These medical facilities are very necessary because 17.4% of federal inmates are more than 50 years old. There are 873 Public Health Service (PHS) officers assigned to BOP, and they account for about 25% of the BOP medical workforce. Civilian BOP medical professionals account for the other 75%.

The PHS commissioned corps is a uniformed service in the United States Department of Health & Human Services (DHHS).[3] Our nation has five armed forces and seven uniformed services. The

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1500 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

[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 (lawyer) and retired in 2007. I am a life member of ROA. For six years (2009-15), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. For 34 years, I have been dealing with the federal law that protects the employment rights of members of the uniformed services, including the United States Public Health Service (PHS). 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 interagency task force work product that President George H.W. Bush presented to Congress, as his proposed rewrite of the 1940 Veterans' Reemployment Rights Act (VRRA). On 10/13/1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353, and that version 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), and as an attorney in private practice, at Tully Rinckey PLLC. To arrange for a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

five armed forces are the Army, Navy, Marine Corps, Air Force, and Coast Guard.[4] The seven uniformed services are the five armed forces plus the PHS commissioned corps and the commissioned corps of the National Oceanic & Atmospheric Administration (NOAA).[5]

As members of a uniformed service, PHS officers have rights under some but not all of the laws that Congress has enacted for the benefit of service members. If the statute only refers to members of the "armed forces," PHS officers are not included. If the statute refers to members of the "uniformed services," PHS officers are included. Two important statutes that apply to PHS officers are the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA).

As I explained in footnote 1, Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA most definitely applies to the PHS corps but not to the NOAA corps.[6] USERRA has its own definition of "uniformed services" and that definition is 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,* and any other category of persons designated by the President in time of war or national emergency.[7]

Under USERRA, a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services is entitled to prompt reemployment by the pre-service employer, after release from the period of service, if he or she meets the five USERRA conditions.[8] USERRA also makes it unlawful for an employer to discriminate in

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[3] The PHS corps consists of 6653 actively serving officers and no enlisted personnel. PHS officers serve with many federal agencies, including the Coast Guard, the Indian Health Service, the Food & Drug Administration, and the Centers for Disease Control, as well as BOP.

[4] Title 10, United States Code, section 101(a)(4) (10 U.S.C. 101(a)(4)).

[5] 10 U.S.C. 101(a)(5).

[6] In 1991, VADM Antonio Novello, the Surgeon General of the United States, was willing to contact Senator Alan Cranston (Chairman of the Senate Veterans' Affairs Committee) to request that the PHS corps be included. RADM Sigmund Petersen, the admiral heading up the NOAA corps, was unwilling to contact Senator Cranston, or perhaps his Department of Commerce superiors forbade him to contact the Senator. Please see Law Review 15002 (January 2015).

[7] 38 U.S.C. 4303(16) (emphasis supplied).

[8] The person must have left the civilian job for the purpose of performing uniformed service and must have given the employer prior oral or written notice. The person's cumulative period or periods of uniformed service, relating to that employer, must not have exceeded five years, but there are nine exemptions—kinds of service that do not count toward exhausting the person's limit. The person must have served honorably in the uniformed service and must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

employment on the basis of uniformed service, membership in a uniformed service, or application or obligation to perform service. USERRA provides:

> A person who *is a member of,* applies to be a member of, performs, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any *benefit of employment* by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.[9]

As I have stated, PHS officers make up about 25% of the BOP medical workforce, and BOP civilian medical professionals make up the other 75%. The civilian BOP medical professionals are members of and are represented by the American Federation of Government Employees (AFGE), a major union that represents federal civilian employees in many departments and agencies. Members of uniformed services (including PHS) are not eligible for membership in or representation by federal employee unions like AFGE.

AFGE locals at federal prisons represent the BOP civilian employees who operate the prisons, including but not limited to the BOP medical personnel who account for 75% of the BOP medical workforce. AFGE has a nationwide collective bargaining agreement (CBA) with BOP, governing the terms and conditions of employment for BOP corrections officers, medical personnel, and other BOP employees at the 121 penal institutions. Under the CBA, the medical personnel (including PHS officers as well as BOP civilian medical personnel) bid for preferred job assignments, work schedules, and days off. Allocation of desired assignments, shifts, and days off has been done by seniority, which is defined as longevity in the BOP medical system, either as a PHS officer or as a BOP civilian medical professional.

For example, let us assume that at a specific BOP medical facility there are four nurses, including one PHS officer and three BOP civilian nurses. Mary Jones has been a PHS officer for 22 years and has been assigned to the BOP medical system for that entire time. Joe Smith, a BOP civilian, has worked for the BOP medical system for ten years, while Alex Adams has been a BOP civilian nurse for five years and Brenda Barnes has been a BOP civilian nurse for 22 days. Under the system as it has operated for many years, Mary Jones has had the most seniority and has generally gotten the assignments, schedules, and days off for which she has bid.

For several years, the AFGE prison locals have sought to exclude the PHS officers from the bidding process. AFGE contends that only civilian employees have seniority that should be recognized in the bidding process. If AFGE has its way, Mary Jones (with 22 years of PHS service in the BOP medical system) will lose out in the bidding process to Brenda Barnes, with 22 days of BOP civilian service.

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[9] 38 U.S.C. 4311(a) (emphasis supplied).

AFGE Local 817 in Lexington, Kentucky initiated an arbitration proceeding against BOP, concerning the issue of permitting PHS officers to participate in the process of bidding for and receiving preferred job assignments, work schedules, and days off. The arbitrator held that only BOP civilian employees have the right to participate in this process—the PHS officers must get only the assignments, schedules, and days off not selected by the civilian employees, without regard to the number of years that a PHS officer has been assigned to the BOP medical department. BOP appealed the arbitrator's award to the Federal Labor Relations Authority (FLRA), which affirmed the arbitrator's award.[10]

The PHS officers assigned to BOP were not parties to the arbitration proceeding or the FLRA proceeding, and they had no opportunity to intervene and to make themselves heard on this issue. Depriving the PHS officers of valuable rights without giving them the opportunity to be heard violated the Due Process Clause of the 5th Amendment of the United States Constitution.[11]

I believe (contrary to the FLRA) that depriving the PHS officers of the opportunity to participate in the bidding process violates section 4311 of USERRA. The opportunity to participate in the process of determining job assignments, work schedules, and days off is a benefit of employment, and the PHS officers are being deprived of this benefit on the basis of their membership in a uniformed service (PHS).

Section 4303 of USERRA defines 16 terms used in this law. The definition of "benefit of employment" includes "the opportunity to select work hours or location of employment."[12]

The National Labor Relations Board (NLRB) governs the bargaining relationship between private sector employers (except those in the railroad and airline industries, which are governed by a separate law) and unions representing the employees. The FLRA is a mini-NLRB for federal agencies as employers and labor organizations (like AFGE) that represent federal civilian employees. The FLRA has three members, each of whom is appointed by the President with Senate confirmation.
Carol Walter Pope is the Chairman, and the two other members are Ernest DuBester and Patrick Pizzella. This was a 2-1 decision. Member Pizzella wrote a vigorous and eloquent dissent.

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[10] *See United States Department of Justice Federal Bureau of Prisons Federal Medical Center Lexington, Kentucky (Agency) and American Federation of Government Employees Council of Prison Locals #33 Local 817 (Union),* 69 FLRA No. 3 (FLRA October 16, 2015).
[11] The 5th Amendment provides in pertinent part that: "No person shall be ..deprived of life, liberty, or property without due process of law."
[12] 38 U.S.C. 4303(2).

The FLRA website explains the origin and role of the FLRA as follows:

> The FLRA is an independent administrative federal agency that was created by Title VII of the Civil Service Reform Act of 1978 (also known as the Federal Labor Relations Statute) (the Statute). The Statute allows certain non-postal employees to organize, bargain collectively, and to participate through labor organizations of their choice in decisions affecting their working lives. The primary statutory responsibilities of the FLRA include:
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> a. Resolving complaints of unfair labor practices.
> b. Determining the appropriateness of units for labor organization representation.
> c. *Adjudicating exceptions to arbitrators' awards.*
> d. Adjudicating legal issues relating to duty to bargain and negotiability.
> e. Resolving impasses during negotiations.[13]

BOP appealed the arbitrator's award to the FLRA, on several grounds. One ground was BOP's assertion that complying with the arbitrator's award would require BOP to violate USERRA. The FLRA majority rejected this BOP argument as follows:

> The Agency [BOP] argues that the award is contrary to USERRA because the award requires the Agency to "deny [the PHS nurses] a benefit of employment." As relevant here, USERRA provides that a current or former member of a uniformed service shall not be denied ... any benefit of employment by an employer on the basis of that membership." A "benefit of employment" is a "term, condition, or privilege of employment ... that accrues by reason of an employment contract or agreement ... and includes ... the opportunity to select work hours or location of employment." USERRA also provides that an employer can defeat a claim that it violated the statute by demonstrating that it would have taken the same allegedly illegal action in the absence of the affected person's uniformed service membership.
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> Here, to comply with the award, the Agency must not set aside assignments for *any* [emphasis in original] non-bargaining unit employees before the unit [civilian employee] nurses bid on a full roster [of available assignments], regardless of the employees' uniformed service membership. As discussed above, USERRA prohibits discrimination against a current or former member of the uniformed services *based on that membership* [emphasis supplied]. In this case, because the award denies the service [PHS] nurses a benefit based on their non-bargaining unit status—not their current or former membership in the uniformed services—the Agency has not demonstrated that the award requires the Agency to violate USERRA. Thus, the Agency's argument provides no basis for finding the award contrary to USERRA.

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[13] *See* https://www.flra.gov (emphasis supplied).

The FLRA has held that it is lawful to deprive the PHS nurses of a valuable benefit of employment based on their non-bargaining unit status, although their non-bargaining unit status is the inevitable result of their membership in a uniformed service. Federal law excludes members of uniformed services (including PHS) from inclusion in federal employee bargaining units and from membership in or representation by federal employee unions like the AFGE.

The FLRA majority's sophistic attempt to distinguish "non-bargaining unit status" from membership in a uniformed service is reminiscent of a similarly sophistic argument advanced by the United States Postal Service (USPS) and accepted by the Merit Systems Protection Board (MSPB) and reversed and lambasted by the United States Court of Appeals for the Federal Circuit[14] as follows:

> We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of absence when that absence was for military service. ... The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA.[15]

In its first case construing the 1940 reemployment statute, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act."[16] Similarly, USERRA explicitly provides that no agreement between an employer and a labor organization can reduce USERRA benefits:

> This chapter [USERRA] supersedes any State law (including any local law or ordinance), *contract, agreement,* policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[17]

The FLRA decision is fatally flawed because it allows the AFGE-BOP CBA to override USERRA. Moreover, the FLRA has no authority to interpret and apply USERRA. Congress gave that responsibility (with respect to federal agencies as employers) to the MSPB, not the FLRA.[18] MSPB decisions can be appealed under certain conditions to the Federal Circuit. FLRA decisions can be appealed under certain conditions to the District of Columbia Circuit.

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[14] The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the MSPB.
[15] *Erickson v. United States Postal Service,* 571 F.3d 1364, 1368 (Fed. Cir. 2009).
[16] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).
[17] 38 U.S.C. 4302(b) (emphasis supplied).
[18] 38 U.S.C. 4324.