

29 May 2015

VADM Vivek H. Murthy, USPHS
Surgeon General of the United States
Tower Building
Plaza Level 1, Room 100
1101 Wootton Parkway
Rockville, MD 20852

Dear Admiral Murthy:

I write you regarding the assignment of PHS officers to the Bureau of Prisons as the executive director of the Reserve Officers Association. ROA is the professional association for commissioned officers, warrant officers, and noncommissioned officers of our nation's seven uniformed services. Our 50,000 members include 1,201 commissioned officers of the United States Public Health Service.

One of our members is a PHS officer, serving as a medical care provider at a federal prison operated by the Bureau of Prisons. Along with two BOP civilian medical employees, she provides primary medical care for prisoners at one of BOP's 121 prisons. In the BOP medical system, serving PHS officers provide about 25 percent of the staff, and BOP civilians provide the other 75 percent. The BOP civilian employees are members of and represented by a union, which has negotiated a master agreement with BOP management. Of course, the PHS officers are not represented by and are not eligible to join the union.

The master agreement controls, among other things, the assignment of individual BOP medical care providers to work schedules and the opportunity to take annual leave at preferred times. Employees with greater BOP seniority get the best opportunity to select favorable work schedules and days off.

Our member has been a PHS officer assigned to BOP for many years, but the union has argued (and at least at this particular BOP prison the management has agreed) that only BOP civilian employees have seniority for purposes of the selection of work schedules and days off. This means that our member gets what is left after the two BOP civilians (one of whom has worked for BOP for two years and the other for two months) have selected work schedules and days off.

At www.servicemembers-lawcenter.org you will find more than 1,300 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform, including in the PHS. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES

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"Serving Citizen Warriors Through Advocacy and Education Since 1922"

ROA initiated this column in 1997, and most of the articles are by Captain Samuel F. Wright, JAGC, USN (Ret.), who was until recently the director of our Service Members Law Center.

I am enclosing a copy of our Law Review 15041, which will soon be added to our website. In the article, Captain Wright expresses his opinion that making PHS officers take a back seat to junior BOP civilian medical employees, with respect to the selection of work schedules and days off, violates USERRA.

I understand that 873 of the 6,653 serving PHS officers are assigned to the BOP. This issue affects most or all of them. Perhaps you can address this unfair treatment of PHS officers.

Very respectfully,



Jeffrey E. Phillips
Executive Director

May 2015

Seniority for PHS Officers within the BOP Medical System

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

1.1.3.4—USERRA applies to PHS service

1.2—USERRA forbids discrimination

1.3.2.11—Vacations, holidays, and days off

1.8—Relationship between USERRA and other laws/policies

Q: I am a Commander (O-5) in the United States Public Health Service (PHS) and a life member of the Reserve Officers Association (ROA). The PHS is a uniformed service in the United States Department of Health and Human Services (DHHS). There are 6,653 actively serving PHS officers, and I have been actively serving for the last 19 years.

PHS officers serve for and with several federal agencies, including the United States Coast Guard (providing health care services for Coast Guard personnel and families), the Indian Health Service (providing health care services for Native Americans on reservations), and the Bureau of Prisons (providing health care services for inmates in federal prisons). I have spent my entire career at the Bureau of Prisons (BOP), mostly at the same prison.

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "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.

² Captain Wright was the Director of ROA's Service Members Law Center for six years, from June 2009 through May 2015.

two civilian colleagues in the selection of favorable work schedules and vacation times. This is most unfair and ought to be illegal.

The MA is ambiguous as to how PHS officers like me are to be treated for this purpose, and among the 121 prisons in the federal system there is a considerable difference of interpretation on this point. At this particular prison, the union has contended and management has agreed that only civilian employees have “seniority” under the MA.

I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Is the PHS commissioned corps a “uniformed service” for purposes of USERRA? Have my USERRA rights been violated? If so, what can I do about it?

A: The PHS commissioned corps is most definitely a uniformed service for USERRA purposes, and I think that you have a good argument that the way that management is treating you violates USERRA. First, let me provide some background.

As I have explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994. USERRA is codified in title 38 of the United States Code, at sections 4301-4335 (38 U.S.C. 4301-4335). The law enacted in 1994 was a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II.³

³ I have been dealing with the VRRRA and USERRA for the last 33 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 interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that President Clinton signed on October 13, 1994 was 85% the same as the Webman-Wright draft. I have

any other category of persons designated by the President in time of war or national emergency.”

38 U.S.C. 4303(16) (emphasis supplied).

Section 4311(a) of USERRA provides:

“(a) A person who *is a member of*, applies to be a member of, performs, has performed, 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.

38 U.S.C. 4311(a) (emphasis supplied).

Section 4303(2) of USERRA defines the term “benefit of employment” as follows:

“(2) The term "benefit", "benefit of employment", or "rights and benefits" means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, *and the opportunity to select work hours or location of employment.*”

38 U.S.C. 4303(2) (emphasis supplied).

providers, for purposes of selection of work schedules and vacation days, violates section 4311(a) of USERRA.

ROA Executive Director Jeffrey E. Phillips has written a letter to VADM Vivek H. Murthy, USPHS, the Surgeon General of the United States and head of the PHS commissioned corps, to alert him to this issue and to express ROA's concern about the way that you and other PHS officers are being treated.