

LAW REVIEW 15002¹

January 2015

Is the NOAA Commissioned Corps a Uniformed Service for Purposes of USERRA?

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1.1.3.4—USERRA and PHS Corps

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1.8—Relationship between USERRA and other laws/policies

Q: I graduated from college two years ago with a degree in oceanography. I have a good job, but it has nothing to do with oceanography. I am seriously considering joining the commissioned corps of the National Oceanic & Atmospheric Administration (NOAA), but I probably will not make the NOAA Corps my career. If I serve in the NOAA Corps for three to five years and then leave, will I have the legal right to reemployment in my current civilian job?

I have researched this question on the Internet, and I found your fascinating articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Does USERRA cover the NOAA commissioned corps?

A: USERRA has its own definition of the term “uniformed services” and that definition includes the Public Health Service (PHS) commissioned corps but not the NOAA commissioned corps. If you leave a civilian job (federal, state, local, or private sector) for service in the armed forces (Army, Navy, Marine Corps, Air Force, or Coast Guard) or the PHS commissioned corps, and if you meet the USERRA eligibility conditions,³ you have the legal right (binding on your pre-service employer) to reinstatement in the position that you would have attained if you had been continuously employed or another position (for which you are qualified) that is of like

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, and we add new articles each week.

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³ To have the right to reemployment under USERRA, you must have left a civilian job (federal, state, local, or private sector) for the purpose of performing service in the uniformed services, and you must have given the employer prior oral or written notice. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years, but there are nine exemptions—kinds of service that do not count toward exhausting your five-year limit. You must have been released from the period of service without having received a disqualifying bad discharge from your uniformed service. After release from the period of service, you must have made a timely application for reemployment.

seniority, status, and pay. But a person returning from active service in the NOAA Corps is not entitled to reemployment under USERRA as presently written.

Section 4303 of USERRA⁴ defines 16 terms used in this statute. When a statute defines terms, those definitions control in interpreting that particular statute, not the dictionary definition or the definition found elsewhere in the United States Code. USERRA defines the term “uniformed services” as follows: “The term ‘uniformed services’ means the Armed Forces,⁵ the Army National Guard and 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.”⁶ The NOAA corps is a uniformed service as defined by section 101(a)(5) of title 10, but it is not a uniformed service for purposes of USERRA.

Q: Why was the NOAA Corps excluded from USERRA coverage? Was this an oversight? Were those who drafted USERRA even aware of the NOAA Corps?

A: I worked for the United States Department of Labor (DOL) as an attorney from September 1982 until September 1992. Along 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. On October 13, 1994, President Bill Clinton signed Public Law 103-353, USERRA,⁷ 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 (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II. The VRRRA mentioned the PHS Corps but not the NOAA Corps, and PHS officers had reemployment rights under the VRRRA, before the 1994 enactment of USERRA.

Susan Webman and I were very much aware of the PHS Corps as well as the NOAA Corps, and we wanted both to be included in USERRA coverage. The Webman-Wright draft (blessed by President Bush) used the definition of “uniformed services” that can be found in section 101(a)(5) of title 10 of the United States Code. If that version had been enacted unchanged, both NOAA Corps officers and PHS Corps officers⁸ would have had reemployment rights, just like personnel of the Army or any other armed force.

In April 1991, I spent a whole day in a detailed discussion (line by line and word by word) of the USERRA draft blessed by President George H.W. Bush. I met for the whole day with attorney Chuck Lee, the Chief Counsel of the Senate Veterans’ Affairs Committee, then chaired by

⁴ 38 U.S.C. 4303.

⁵ Section 101(a)(4) of title 10 of the United States Code defines the term “armed forces” to include only the Army, Navy, Marine Corps, Air Force, and Coast Guard. Section 101(a)(5) defines the term “uniformed services” to include the five armed forces plus the PHS commissioned corps and the NOAA commissioned corps.

⁶ 38 U.S.C. 4303(16).

⁷ The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft blessed by President Bush.

⁸ The NOAA Corps and the PHS Corps only have commissioned officers, not enlisted personnel.

Senator Alan Cranston of California. Early in that meeting, we discussed USERRA coverage and the USERRA definitions, including the definition of “uniformed services.” Mr. Lee informed me that Senator Cranston was opposed to including the PHS Corps and the NOAA Corps, fearing that the traditional veterans’ organizations would oppose expanding the definition of “veteran” to include persons who had served in those two services.⁹

On the morning after my meeting with Mr. Lee, I contacted Vice Admiral Antonia C. Novello (Surgeon General of the United States and head of the PHS Corps) and Rear Admiral Sigmund R. Petersen (Director of the NOAA Corps), and I explained the need to contact Senator Cranston if the PHS Corps and the NOAA Corps were to be included in USERRA. Admiral Novello thought that the issue was important. She visited Senator Cranston and asked for the PHS Corps to be included, and it was included. Admiral Petersen did not contact Senator Cranston, probably because he did not have permission within the Department of Commerce to reach out to the Senator. This explains how it came to pass that the PHS Corps is included in USERRA but the NOAA Corps is not.

Q: Have there been efforts to amend USERRA in order to include the NOAA Corps?

A: Yes. On May 23, 2013 Senator Mark Begich of Alaska introduced S. 1068, the proposed “NOAA Commissioned Corps Amendments Act of 2013.” Section 409 of that bill would have amended section 4303(16) of USERRA (the definition of “uniformed services”) by adding the NOAA Corps. Other sections of the bill would have made other changes sought by the NOAA Corps leaders.

Senator Begich’s bill passed the Senate on February 11, 2014, but it did not pass the House of Representatives, and the 113th Congress ended at the end of 2014. It will be necessary to restart the process with a new bill and new bill number in the 114th Congress. It will be necessary to find a new Senate sponsor because Senator Begich failed in his 2014 reelection effort.

⁹ I explained to Mr. Lee that this objection did not make a lot of sense, because our draft law did not include the term “veteran”—only “uniformed services.” An individual who had served in the uniformed services, including the PHS Corps and the NOAA Corps, would be entitled to reemployment in the pre-service job, just like persons who had served in the Army. Nonetheless, Mr. Lee indicated that Senator Cranston opposed including the PHS Corps and the NOAA Corps.