

## Reemployment Rights as an ANG Technician

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

- 1.1.1.8—USERRA applies to the Federal Government
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**Q: I am a Chief Master Sergeant (E-9) in the Air National Guard (ANG) and a member of the Reserve Officers Association (ROA). I joined ROA because I have found your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) to be very useful, and Captain Wright, the Director of ROA’s Service Members Law Center (SMLC), has been most helpful to me by e-mail and telephone.**

**I was born in 1961 and graduated from high school in 1979. In 1983, I enlisted in the Air Force and served on active duty for five years, until 1988, when I left active duty and joined the ANG as a traditional, drilling ANG member. In 1989, I took a civilian job as an ANG technician. As a condition of employment, I maintained my membership and participation in the ANG. I performed inactive duty training (drill weekends) and active duty for training (annual training) in my military capacity. During the week, I worked for the ANG as a civilian technician, although it would have been difficult to tell that I was a civilian. My colleagues and I wore our Air Force uniforms and observed military courtesies at work.**

**After the terrorist attacks of September 11, 2001, I volunteered to go on active duty full-time, and my application was approved. I have been on full-time active duty since February 2002. As of August 2015, I have 20 years of active federal service—the five years from 1983-88, the 13 years from 2002 to 2015, and another two years during the 1988-2002 time period. I will be retiring from the Air Force as an E-9 and leaving active duty by retirement on August 31, 2015.**

**Although I will start receiving my regular Air Force retirement checks in September 2015, I am not ready to retire—I am only 53 years old. I think that I have the right to reemployment in the technician job. Yes, I realize that there is a five-year limit under USERRA, but except for the last four months (May 1, 2015 through August 31, 2015) all my 2002-2015 military orders**

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<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://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.

<sup>2</sup> BA, 1973, Northwestern University; JD, 1976, University of Houston; LLM, 1980, Georgetown University. Captain Wright was the Director of ROA’s Service Members Law Center from June 2009 through May 2015.

**contain language to the effect that “this period does not count toward your five-year limit under USERRA.”**

**How does USERRA apply to my situation? If I apply for reemployment in September, after I leave active duty on August 31, will I have the right to reemployment? Ordinarily, ANG technicians must be actively participating members of the ANG. If I retire from the Air Force on August 31, how does that affect my right to reemployment as a technician?**

### **Introduction**

**A:** Thank you for your kind words about the “Law Review” column and the SMLC. I worked for ROA, as the SMLC Director, for exactly six years, from June 1, 2009 through May 31, 2015. During that period, I received and responded to more than 35,000 e-mail and telephone inquiries, and about half of them were about USERRA. We also added about 900 new “Law Review” articles during the six years that I was the SMLC Director—we had 400 articles on-line in June 2009 and more than 1,300 now. I will continue adding new articles as time permits, and this article is that first that I have written since the end of my ROA employment.

### **Air National Guard and Army National Guard Technicians**

As I explained in Law Review 15032 (April 2015), the ANG and the Army National Guard (ARNG) are hybrid federal-state organizations. Today’s National Guard traces its origins to 1636, when the Massachusetts Bay Colony established the Massachusetts militia to defend the colony against attacks by the Pequot Indians. Other colonies and states later established similar state militias. Early in the 20<sup>th</sup> Century, Congress established the ARNG as a hybrid federal-state organization.<sup>3</sup> National Guard members are subject to call by the President for national emergencies (or they can volunteer), and they train periodically for that contingency. National Guard members are also subject to state call-ups, by the Governor.

Our nation’s armed forces have seven Reserve Components. In order of size (largest to smallest) they are the ARNG, the Army Reserve (USAR), the ANG, the Air Force Reserve (USAFR), the Navy Reserve (USNR), the Marine Corps Reserve (USMCR), and the Coast Guard Reserve (USCGR). Of the 908,853 RC members who have been called to the colors since the terrorist attacks of September 11, 2001, the ARNG and ANG together account for 488,360 of those called.<sup>4</sup> Under the Total Force Policy (adopted by the Department of Defense in 1973, when Congress abolished the draft), our nation is more dependent than ever before on the seven Reserve Components, and this most definitely includes the ARNG and ANG.

As I explained in Law Review 15025 (March 2015), National Guard technicians of the ARNG and ANG have a unique hybrid status—partly state and partly federal, and partly civilian and partly military.<sup>5</sup> But for purposes of USERRA they are considered to be civilian employees of the state,

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<sup>3</sup> After creating the Air Force as a separate service (not part of the Army) in 1947, Congress created the ANG as a similar hybrid state-federal organization.

<sup>4</sup> Department of Defense, Defense Manpower Data Center, report dated May 28, 2015.

<sup>5</sup> A technician is required (as a condition of employment) to maintain membership in one of the National Guard units that the technician supports. During drill weekends and annual training tours, the technician participates in

and the state's Adjutant General (a state official) is considered to be their civilian employer. Thus, the enforcement mechanism for National Guard technicians claiming USERRA rights is through the appropriate federal district court, not through the Merit Systems Protection Board (MSPB), which is the forum for adjudicating claims that federal executive agencies have violated USERRA, as employers.

### **USERRA's five conditions for reemployment**

As I have explained in Law Review 1281 and other articles, you must meet five simple conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA. It is clear beyond any doubt that you met this condition in 2002.
- b. You must have given the employer prior oral or written notice. It is clear that you gave proper notice before you left your technician job for active duty in 2002 and that you have given your state's Adjutant General (your civilian employer for USERRA purposes) notice of each extension of your active duty period.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment. I will discuss this condition in detail below.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military. I am confident that you have served honorably and that you will not be receiving a disqualifying bad discharge.
- e. After release from the period of service, you have made a timely application for reemployment with the pre-service employer. Because your period of uniformed service has lasted longer than 180 days, you have 90 days (starting on the date of release, August 31) to apply for reemployment. I suggest that you apply as soon as possible after August 31.

### **USERRA's five-year limit**

It is clear that you left your civilian job for the purpose of performing uniformed service, and you gave the civilian employer prior notice. You have served honorably, and you will not receive a disqualifying bad discharge from the Air Force. You certainly have it in your power to make a timely application for reemployment, within 90 days after August 31. The long pole under the tent is the five-year limit, but I believe that you are still comfortably within the limit. As I have explained in Law Review 201 and other articles, there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting your limit. The five-year limit is set forth in section 4312(c) of USERRA, as follows:

(c) Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such

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unit activities in his or her military capacity. During the work week, the MNGT is a civilian employee, although he or she normally wears a military uniform and observes military courtesies (saluting, etc.).

person's cumulative period of service in the uniformed services, *with respect to the employer relationship for which a person seeks reemployment*, does not exceed five years, *except that any such period of service shall not include any service--*

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is--

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.<sup>6</sup>

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 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. USERRA went into effect 60 days after the date of enactment (that is, on December 12, 1994) and applies to reemployments initiated on or after that date.

Under the 1994 transition rules, the VRRRA (not USERRA) applies to a person who left his or her civilian job for uniformed service, completed the period of service, and applied for reemployment with the pre-service employer prior to December 12, 1994. The VRRRA had a four-year limit on the duration of the period or periods of uniformed service that a person

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<sup>6</sup> 38 U.S.C. 4312(c) (emphasis supplied). The citation refers to subsection (c) of section 4312 of title 38 of the United States Code. USERRA is codified in title 38 at sections 4301 through 4335 (38 U.S.C. 4301-4335).

could perform, with respect to a specific employer relationship. Like USERRA, the VRRRA had exemptions—kinds of service that did not count toward exhausting the four-year limit with respect to a specific employer relationship. Under the transition rules, if a period of service performed prior to December 12, 1994 was exempt from the VRRRA's four-year limit, it is also exempt from USERRA's five-year limit.

Because you began your technician career in 1989, we must look to the VRRRA with respect to the periods of uniformed service that you performed between 1989 (when you began your technician career) and December 12, 1994 (the effective date of USERRA). I have determined that your military service during that period was limited to weekend drills and annual training tours and one tour of *involuntary* active duty in 1990-91, for Operation Desert Shield/Storm. These periods did not count toward your four-year limit under the VRRRA, so they do not count toward your five-year limit under USERRA.

I have reviewed the military duty periods that you performed between December 12, 1994 (the effective date of USERRA) and February 2002, when you began the long active duty period that is now coming to an end. During those years, you performed inactive duty training (drills) each month and active duty for training (annual training) each year. All of those periods are exempt from the computation of your five-year limit, under section 4312(c)(3) of USERRA.<sup>7</sup>

During the late 1990s, you also performed a one-year period of military training, when your ANG unit transitioned from an aircraft type to a more modern aircraft type. That period is also exempt from the five-year limit under section 4312(c)(3) because the Secretary of the Air Force determined and certified in writing that the one-year training period was necessary for your professional development or for skill training or retraining.<sup>8</sup> When you began your current active duty period in January 2002, you had the entire five-year period available for use.

You have provided me a copy of National Guard Bureau (NGB) Special Orders AA-40 and AA-41, both dated December 3, 2013. Both documents are signed by Brigadier General Robert S. Williams, the Commander of the Air National Guard Readiness Center. Special Order AA-40 amends Special Order AA-197, dated January 14, 2002. Special Order AA-41 amends Special Order AA-430, dated March 31, 2008. In both cases, these two 2013 Special Orders add the following language to your 2002 and 2008 orders:

The period of service under these orders is exempt from the five-year limit as provided in 38 U.S.C. 4312(c)(4)(B).

In accordance with Assistant Secretary of the Air Force (Reserve Affairs) memorandum dated 7 December 2001, service performed by members [of the ANG or USAFR] who volunteer for active duty service under section 12301(d) of title 10, United States Code (USC), in direct or indirect support of Operation Noble Eagle, Operation Enduring Freedom, Operation Northern Watch, Operation Southern Watch or other missions and operations associated with the national emergency are exempt from time served

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<sup>7</sup> 38 U.S.C. 4312(c)(3).

<sup>8</sup> The "magic words" to that effect are included in your orders for this one-year period.

toward the five year cumulative active duty limit authorized under (USERRA) effective 14 September 2001 until further notice.

The title of the relevant office is Assistant Secretary for Manpower and Reserve Affairs, not Assistant Secretary for Reserve Affairs. This typographical error in your orders does not detract from the effect of these “magic words” added to your orders. These periods of active duty do not count toward your cumulative five-year limit with respect to your reemployment rights as an ANG technician.

You have provided me a copy of Special Order AA-2065, dated December 9, 2014, and that order contains the following language: “Member entered Title 10 Statutory Tour effective 15 Feb 02 and will remain exempt from the five-year limit as provided in 38 USC 4312(c)(4)(B).<sup>9</sup> After 1 May 2015, member will no longer be exempt from the five-year limit as provided in 38 USC 4312(c)(4)(B).” I think that this special order buttresses the conclusion that the duty that you performed between February 15, 2002 and April 30, 2015 is exempt from USERRA’s five-year limit. The four-month period from May 1 through August 31 of 2015 does not put you over the five-year limit.

Your initial four-year statutory tour, from February 2002 to February 2006, did not put you over the five-year limit. Before you agreed to volunteer for a follow-on tour, you asked for assurance that these periods of voluntary active duty were exempt from USERRA’s five-year limit, and you received such assurance, in writing, from the Air National Guard Readiness Center. I think that you were and are entitled to rely on these written assurances and that you are not over the five-year limit when you leave active duty by retirement on August 31, 2015.

### **You will be entitled to reemployment under USERRA**

If you apply for reemployment within 90 days after August 31, you will then meet the five USERRA conditions for reemployment. Accordingly, you will then be entitled to reemployment “in the position of employment in which the person [you] would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform.”<sup>10</sup>

You need to identify the kind of job that you *would be holding now* if you had not left your ANG technician job in January 2002 and if you had remained continuously employed during the entire intervening period. Because more than 13 years have passed, you are probably entitled to a substantially better job than the one you left.

### **The role of OPM**

An ANG technician must be a participating ANG member. Because you will be retiring from the Air Force on August 31, you will not be qualified to be a technician when you apply for

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<sup>9</sup> Emphasis supplied.

<sup>10</sup> 38 U.S.C. 4313(a)(2)(A).

reemployment in September 2015. The Adjutant General of your state should determine and state in writing that it is “impossible or unreasonable” to reemploy you as a technician because you are retired and no longer a participating ANG member. After the Adjutant General has made that determination, the United States Office of Personnel Management (OPM) will then be required to identify for you an appropriate position in a federal executive agency (probably but not necessarily DOD) and *ensure that you are offered that position*. The relevant USERRA section is section 4314, which reads as follows:

§ 4314. Reemployment by the Federal Government

(a) Except as provided in subsections (b), (c), and (d), if a person is entitled to reemployment by the Federal Government under section 4312, such person shall be reemployed in a position of employment as described in section 4313.

(b) (1) If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall--

(A) identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 and for which the person is qualified; and

(B) *ensure that the person is offered such position*.

(2) The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that--

(A) the Federal executive agency that employed the person referred to in such paragraph no longer exists and the functions of such agency have not been transferred to another Federal executive agency; or

(B) it is impossible or unreasonable for the agency to reemploy the person.

(c) If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, 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).

*(d) 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).*<sup>11</sup>

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<sup>11</sup> 38 U.S.C. 4314 (emphasis supplied).

Here is what should happen. You apply for reemployment in early September, shortly after you leave active duty on August 31. The Adjutant General of your state acts quickly and provides you a letter stating that it is “impossible or unreasonable” to reemploy you as a technician because you have retired from the Air Force. You then send a certified letter to the OPM Director and include a copy of the Adjutant General’s letter and a copy of this article. It is OPM’s responsibility to identify an appropriate position for you and to ensure that you are offered that position, but I suggest that you do some research and find some appropriate positions that would satisfy you and mention those positions in your letter to OPM.

### **Enforcing USERRA against OPM**

**Q: I think that I will not have a problem with the Adjutant General because all I am asking him to do is to sign a letter stating the obvious. If OPM refuses to act or simply ignores my certified letter, what remedy do I have?**

**A:** In accordance with section 4324 of USERRA, the Merit Systems Protection Board (MSPB)<sup>12</sup> will receive and adjudicate your claim that OPM has violated USERRA. Here is the entire text of section 4324:

§ 4324. Enforcement of rights with respect to Federal executive agencies

(a)

(1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)

(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall--

(i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and

(ii) notify such person in writing of such decision.

(b) A person may submit a complaint against a Federal executive agency *or the Office of*

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<sup>12</sup> The Civil Service Reform Act of 1978 split the former Civil Service Commission into three agencies. OPM inherited most of the CSC’s functions and staff and serves as the personnel office for the Executive Branch of the Federal Government. The MSPB inherited the adjudicative responsibilities. The MSPB has three members, each of whom is appointed by the President with Senate confirmation. The Office of Special Counsel (OSC) inherited the investigative and prosecutorial functions. USERRA, enacted in 1994, assigned important new responsibilities to OPM, the MSPB, and the OSC.



*Personnel Management* under this subchapter directly to the Merit Systems Protection Board if that person--

- (1) has chosen not to apply to the Secretary for assistance under section 4322(a);
- (2) has received a notification from the Secretary under section 4322(e);
- (3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or
- (4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d) (1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.<sup>13</sup>

An MSPB case starts before an Administrative Judge (AJ) of the MSPB, at one of the MSPB's regional offices around the country. Because your case is against OPM, your case will start before an AJ of the MSPB office in Alexandria, Virginia—the office that serves the National Capital Region. The AJ conducts a trial and makes findings of fact and conclusions of law. If you lose before the AJ, you can appeal to the MSPB itself, here in DC. Similarly, if you win the

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<sup>13</sup> 38 U.S.C. 4324 (emphasis supplied).

agency (OPM in this case) can appeal to the MSPB. If you lose before the MSPB, you can appeal to the United States Court of Appeals for the Federal Circuit.<sup>14</sup> If you win at the MSPB, the agency cannot appeal to the Federal Circuit.<sup>15</sup>

**Q: How do I initiate an MSPB USERRA complaint? Who will represent me before the AJ, the MSPB, and maybe the Federal Circuit?**

**A:** A person who claims that his or her USERRA rights have been violated by any employer (federal, state, local, or private sector) can file a written USERRA complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).<sup>16</sup> That agency will investigate your complaint and then advise you in writing of the results of its investigation.<sup>17</sup>

When DOL-VETS advises you of the results of its investigation, you can then request (in effect demand) that DOL-VETS refer the case file to the OSC.<sup>18</sup> If OSC is satisfied that you have a valid case, it may represent you in filing and prosecuting your case at the MSPB, at no cost to you.<sup>19</sup>

If OSC decides not to represent you, it must notify you of that decision within 60 days after receiving the referral from DOL-VETS.<sup>20</sup> When you receive the declination of representation letter from the OSC, you can then bring your case to the MSPB with private counsel that you retain.<sup>21</sup>

When DOL-VETS advises you of the results of its investigation, you can then bring your case to the MSPB with private counsel, instead of requesting referral to the OSC.<sup>22</sup> Alternatively, you can bypass DOL-VETS altogether and file your claim with the MSPB without ever having filed a complaint with DOL-VETS.<sup>23</sup> If you proceed with private counsel and prevail, the MSPB may award you attorney fees as part of the relief.<sup>24</sup>

**Q: How do you think OPM will respond to my request that it find me an alternative federal civilian position and ensure that I am offered the position? If OPM refuses to do that and I**

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<sup>14</sup> 38 U.S.C. 4324(d)(1). The Federal Circuit is a specialized federal appellate court that sits here in DC and has nationwide jurisdiction, but only over certain kinds of cases. Among the categories of cases that go to the Federal Circuit are appeals from MSPB decisions.

<sup>15</sup> 38 U.S.C. 4324(d)(1).

<sup>16</sup> 38 U.S.C. 4322(a) and (b). You can file your complaint with DOL-VETS through its website, at [www.dol.gov/vets](http://www.dol.gov/vets).

<sup>17</sup> 38 U.S.C. 4322(d) and (e).

<sup>18</sup> 38 U.S.C. 4324(a)(1). This is for complaints against federal agencies, as employers. Cases against state and local governments and private employers are referred to the United States Department of Justice (DOJ). 38 U.S.C. 4323(a)(1).

<sup>19</sup> 38 U.S.C. 4324(a)(2)(A).

<sup>20</sup> 38 U.S.C. 4324(a)(2)(B).

<sup>21</sup> 38 U.S.C. 4324(b)(4). You can also represent yourself in bringing your case to the MSPB, but I do not recommend that course of action. Abraham Lincoln said, "A man who represents himself has a fool for a client." And the law today is so much more complicated than it was during Lincoln's lifetime.

<sup>22</sup> 38 U.S.C. 4324(b)(2).

<sup>23</sup> 38 U.S.C. 4324(b)(1).

<sup>24</sup> 38 U.S.C. 4324(c)(4).

**bring an action against OPM in the MSPB, how do you think the MSPB and the Federal Circuit will rule?**

**A:** I think that it is likely that OPM will refuse to find you an alternative position and ensure that you are offered the position, based on *Woodman v. Office of Personnel Management*<sup>25</sup> and *Dowling v. Office of Personnel Management*.<sup>26</sup> I think that those cases are both wrongly decided and distinguishable from your case.

Both *Woodman* and *Dowling* deal with National Guard technicians who were away from their technician jobs for many years of active military duty and who claimed exemptions from the five-year limit under USERRA and the four-year limit under the VRRRA. The MSPB and the Federal Circuit held that William E. Woodman and Edward J. Dowling had “abandoned” their civilian positions for military careers.<sup>27</sup>

Unlike Edward J. Dowling and William E. Woodman, you never said or did anything that can reasonably be construed as an abandonment of your pre-service technician job. You kept the Adjutant General of your state informed about the extensions of your active duty period. Before you agreed to an additional active duty period in 2006, you asked for and obtained reassurance from the National Guard Bureau (NGB) and the Air National Guard Readiness Center (ANGRC) that your active duty periods did not count toward your five-year limit under USERRA. I think that the NGB and the ANGRC are estopped to assert that you “abandoned” your technician position.<sup>28</sup>

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<sup>25</sup> 258 F.3d 1372 (Fed. Cir. 2001). The citation means that you can find this case in Volume 258 of *Federal Reporter Third Series*, and this case starts on page 1372. I discuss *Woodman* in detail and criticize it in Law Review 0927 (June 2009).

<sup>26</sup> 393 F.3d 1260 (Fed. Cir. 2004).

<sup>27</sup> I invite the reader’s attention to Law Review 14090 (December 2014), by LTC Mathew B. Tully and me. In that article, Colonel Tully and I criticize in great detail the “abandonment” doctrine adopted by the Federal Circuit and the MSPB in several cases. We believe that the service member’s intent about returning or not returning to the civilian job, before or during the period of service, is not relevant and should not be discussed. The point of USERRA and the VRRRA is to keep the service member’s pre-service position back there as an “unburned bridge.” If the service member meets the five USERRA conditions after release from the period of service, he or she is entitled to reemployment, regardless of what the service member may have intended or said that he or she intended before or during the period of service.

<sup>28</sup> I discuss the equitable doctrine of estoppel in Law Review 198 and other articles.