

## New NLRB Decision Points the Way to Stronger USERRA Enforcement

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

1.1.1.1—USERRA applies to hiring halls and joint employers

1.1.1.8—USERRA applies to Federal Government

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

***Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, 362 NLRB No. 186 (National Labor Relations Board Aug. 27, 2015).***<sup>3</sup>

***Silva v. Department of Homeland Security, 2009 MSPB 189 (Merit Systems Protection Board Sept. 23, 2009).***<sup>4</sup>

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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 1,350 "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> Captain Wright is the author or co-author of more than 1,200 of the almost 1,400 "Law Review" articles available at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he 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 into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for 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. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

<sup>3</sup> This is a decision of the National Labor Relations Board (NLRB). The NLRB is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions. This description comes directly from the NLRB website, [www.nlrb.gov](http://www.nlrb.gov).

<sup>4</sup> This is a decision of the Merit Systems Protection Board (MSPB). **The MSPB is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems. The Board was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454. The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: Office of Personnel Management (OPM), which manages the Federal work force; Federal Labor Relations Authority (FLRA), which oversees Federal labor-management relations; and, the Board.**

In this recent decision, the National Labor Relations Board (NLRB) broadened the NLRB's conception of the circumstances under which a company can be considered to be the "joint employer" of another company's employees, when the two companies jointly control aspects of the employer-employee relationship. In its decision, the NLRB majority wrote: "The procurement of employees through staffing and subcontracting arrangements, or contingent employment, has increased steadily since [1984]. The most recent Bureau of Labor Statistics survey from 2005 indicated that contingent workers accounted for as much as 4.1 percent of all employment, or 5.7 million workers."

The NLRB did not mention the Uniformed Services Employment and Reemployment Rights Act (USERRA) in its recent decision, but a broader interpretation of the "joint employer doctrine" will be helpful in the effective administration of employment laws generally, including USERRA. For example, please see the second case cited above, a 2009 decision of the Merit Systems Protection Board (MSPB) in an interesting and important case under USERRA.

Brigadier General Michael J. Silva, USAR (a life member of ROA)<sup>5</sup> is the named appellant in an important case under USERRA. The facts in this article come directly from the published decision.

From June 2005 to May 2006, Mr. Silva worked for SPS Consulting LLC (SPS) on a contract with the United States Department of Homeland Security (DHS). SPS provided DHS with financial support services through two positions, one of which was titled Financial Manager (FM). SPS put Mr. Silva in the FM position, but under the contract DHS retained the right to approve or disapprove any substitutions of the person serving as FM.

In February 2006, General Silva was selected to command the 411th Engineers and immediately prepare for mobilization and deployment to Iraq. He immediately notified SPS and DHS. Mr. Silva suggested a particular person to fill his job, and she was hired, with DHS' approval.

In May 2006, General Silva was called to active duty and deployed to Iraq. He was released from active duty in August 2007, and he made a timely application for reemployment with SPS and DHS. Although he met the eligibility criteria for reemployment under USERRA, he was not reemployed.

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**The Board assumed the employee appeals function of the Civil Service Commission and was given new responsibilities to perform merit systems studies and to review the significant actions of OPM. The Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted in 1994, gave the MSPB additional duties and responsibilities concerning the adjudication of claims that federal executive agencies, as employers, have violated USERRA.**

**The mission of the MSPB is to "Protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." MSPB's vision is "A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people." MSPB's organizational values are Excellence, Fairness, Timeliness, and Transparency. MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. In addition, MSPB reviews the significant actions of the Office of Personnel Management (OPM) to assess the degree to which those actions may affect merit. This description comes directly from the MSPB website, [www.mspb.gov](http://www.mspb.gov).**

<sup>5</sup> General Silva was ROA's National President from 2013 to 2015. He was ROA's Army Vice President at the time this case was decided.

SPS initially told Mr. Silva that it would reemploy him in the FM position that he had left, but the company changed its position and told him that it would not reemploy him because DHS had disapproved his reemployment. The new employee apparently did a fine job during Mr. Silva's absence, and the DHS contract administrator did not want her to be displaced.

I invite the readers' attention to Law Review 0829 (June 2008), titled "USERRA Overrides the Interests of the Replacement Employee." You can find more than 1,400 articles at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You can also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

The lack of a current vacancy in the FM position, at the time Mr. Silva applied for reemployment, in no way excused SPS from its obligation to reemploy Mr. Silva. In some circumstances, reemploying the returning veteran necessarily means displacing another employee, and this is apparently one of those cases. If an employer could defeat the reemployment rights of the employee called to the colors simply by filling the position, USERRA would be of little value.

I can certainly sympathize with SPS' predicament. USERRA required the company to reemploy Mr. Silva, but the DHS contract administrator threatened to terminate the contract if SPS did so. But customer preference can never be a defense to a violation of USERRA or any employment law. "We must violate USERRA because our customer insists that we do so" is indefensible. I invite the readers' attention to Law Review 0629 (April 2006).

As I explained in Law Review 154 (Dec. 2004), and as the Department of Labor (DOL) USERRA regulations provide at 20 C.F.R. 1002.37, it is possible for an individual employee to have two employers, in the same job, at the same time. This is called the "joint employer" situation and Mr. Silva's situation is a good example.

SPS and DHS were Mr. Silva's joint employers at the time he was called to the colors, in that each entity had control over certain aspects of his employment situation. Both SPS and DHS had responsibilities under USERRA. By standing in the way of the reemployment of the returning veteran, DHS violated USERRA, even though Mr. Silva never worked for DHS in the traditional sense—he was not a federal civilian employee.

Mr. Silva complained to DOL's Veterans' Employment and Training Service (DOL-VETS), alleging that both SPS and DHS had violated USERRA. DOL-VETS is responsible for investigating complaints that any employer has violated USERRA. *See* 38 U.S.C. 4321, 4322. The reemployment statute applies to essentially all employers in this country, including the federal government, state and local governments, and private employers, regardless of size.

DOL-VETS investigated Mr. Silva's complaint and agreed with his allegation that both SPS and DHS had violated USERRA. After unsuccessful efforts to convince both employers to come into compliance, DOL-VETS referred Mr. Silva's case against SPS to the Attorney General (AG), in accordance with 38 U.S.C. 4323(a). DOL-VETS referred Mr. Silva's complaint against DHS to the Office of Special Counsel (OSC), in accordance with 38 U.S.C. 4324(a)(1).

Under section 4323 of USERRA cases against state and local governments and private employers are to be filed in the United States District Court for any district where the private employer maintains a place of business or where the state or local government exercises its functions. See 38 U.S.C. 4323(c). Under section 4324 of USERRA, cases against federal executive agencies are to be filed in the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency.

If the AG is reasonably satisfied that the claimant is entitled to the USERRA benefits that he or she seeks, the AG may appear and act as attorney for the claimant (after referral from DOL-VETS) in filing and prosecuting the case in the appropriate federal district court. See 38 U.S.C. 4323(a)(1). If OSC is reasonably satisfied that the claimant is entitled to the benefits that he or she seeks, OSC may represent the claimant in a USERRA action before the MSPB, against a federal agency. See 38 U.S.C. 4324(a)(2)(A).

The AG declined to represent Mr. Silva in filing suit against SPS. In accordance with standard practice in these matters, the AG has not explained and will not explain the rationale for declining representation. Mr. Silva retained private counsel (attorney Thomas Jarrard, another life member of ROA) and sued SPS in the United States District Court for the Eastern District of Virginia and obtained significant relief.

The AG declined to represent Mr. Silva in his claim against SPS, but OSC found his case meritorious and initiated an MSPB action against DHS. In accordance with MSPB rules, his case was presented to an Administrative Judge (AJ) of the MSPB. The AJ conducted a hearing on the merits of Mr. Silva's claim but then granted the DHS motion to dismiss based on an asserted lack of MSPB jurisdiction over cases of this nature (involving "joint employees" who are not federal employees in the traditional sense).

The OSC appealed, on behalf of Mr. Silva, to the MSPB itself. The MSPB consists of three members, each of whom is appointed by the President with Senate confirmation. On September 23, 2009, the MSPB agreed with OSC and found that it has jurisdiction to hear Mr. Silva's case against DHS. The MSPB remanded the case to the AJ to make findings on the merits of Mr. Silva's claim. On remand, Mr. Silva and DHS agreed to a settlement under which Mr. Silva received a substantial but confidential cash settlement from DHS.