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The Military Record Is Wrong about the dates I Drilled in August 2009

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
About Sam Wright

1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service
1.3.1.3—Timely application for reemployment
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Q: I am a Lieutenant Colonel in the Air Force Reserve, recently retired, and a life member of the Reserve Organization of America (ROA).[3] On the civilian side, I am a pilot for a large airline—

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, 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 1700 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 General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 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 proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 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), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

[3] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of

let's call it Very Big Air Line or VBAL. For many years, the Chief Pilot and other VBAL officials have given me a hard time about my occasional absences from work for Air Force Reserve service, although those absences were clearly protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have read with great interest many of your "Law Review" articles about USERRA.

VBAL's harassment of me over my Air Force Reserve service has continued even after I retired from the Air Force Reserve six months ago. The company is now trying to fire me, claiming that I lied about my drill dates in August 2009, more than a decade ago.

At the time, I was a Major in an Air Force Reserve unit that generally drilled on the first weekend of every month, and the first weekend of August 2009 was 1-2 August. The airline obtained records showing that the unit drilled on 1-2 August and that I drilled with the unit.

I remember that month, and I drilled with a few unit members on the fourth weekend of the month, 22-23 August, and I took military leave from VBAL on that weekend. Because the Air Force record shows that I drilled 1-2 August, the airline is accusing me of "fraud" in obtaining military leave for the 22-23 August weekend.

I recall that at the time our reserve unit had more pilots than aircraft. To give more pilots the opportunity to fly to maintain their proficiency as fighter pilots, we spread out our drills over four weekends in a month, and in that month, I drilled in the fourth weekend. For administrative convenience, all airmen in the unit were recorded as "present" for the first weekend of the month, even if they drilled during a different weekend.

The purpose of the drill recording system was to ensure that each reserve airman was correctly paid for the drills that he or she performed and received reserve retirement points for those drills. It never occurred to us that the system might be used for a different purpose—for verifying to a civilian employer, more than a decade later, that a reservist had drilled on a specific weekend.

VBAL has brought me "up on charges" for unauthorized absence from my airline job for the weekend of 22-23 August 2009. The airline insists that the Air Force record of my drill attendance is the "best evidence" of the weekend during that month when I drilled.

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personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

I have tried to find evidence supporting my recollection about how drills were recorded and that all members were shown as present for the first weekend of the month even if they drilled on a different weekend. I know that Colonel Smith, our Commanding Officer at the time, died in 2016. For other officers in the unit, I cannot recall their names, only their call signs.

I recall that there was an enlisted clerk who very efficiently recorded our drill attendance and ensured that we were paid timely and correctly. I cannot remember his name. I only recall that we all called him "Radar" because he looked a little like Radar O'Reilly on the television show "MASH." Help!

A: Based on my own experience in the Navy Reserve, from March 1980 (when I left active duty) through March 2007 (when I reached my mandatory retirement and became a "gray area retiree"), I can certainly believe that reserve payroll records are imprecise as to the exact dates that individual reservists performed inactive duty training (drills). It is wrong to use records that were created and maintained for one specific purpose for an entirely different purpose, more than a decade later.

I invite the reader's attention to Department of Defense Instruction (DODI) 1205.12 of 2/24/2016, with Change 1 dated 5/20/2016.[4] I invite the reader's attention specifically to Section 2(a) of Enclosure (2) of the instruction, which reads as follows:

> The Military Departments [Department of the Army, Department of the Air Force, Department of the Navy] will …
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> a. Provide verification of absence due to uniformed service to civilian employers upon request, regardless of the duration of the service-related absence.

I agree that it is appropriate for military authorities to reassure civilian employers that individual Reserve Component members have in fact performed military service as claimed, but it is also necessary to inform employers about the limitations of the accuracy of payroll records, particularly when the employer is asking about a period of service that was completed more than a decade before the request.

It should also be noted that USERRA protects the service member's absence from his or her civilian job for any period that was *necessitated* by the uniformed service. The absence *necessitated* by the period of uniformed service is not limited to the actual period of service. It also includes a period of absence before and after the period of service, for travel in both directions and rest before the commencement of service and before the return to the civilian job.[5]

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[4] You can find the entire text of this instruction at the end of Law Review 19106 (December 2019).

[5] Please see Law Review 19109 (December 2019).

Please join or support ROA

This article is one of 1900-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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