

LAW REVIEW¹ 26070

October 2026

USERRA Protects New Federal Probationary Employees When They Are Fired.

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

1.1.1.8—USERRA applies to the Federal Government.

**1.1.2.1—USERRA applies to part-time, temporary, at-will, and
probationary employees.**

1.2—USERRA forbids discrimination.

1.4—USERRA enforcement.

1.8—Relationship between USERRA and other laws/policies.

¹ I invite the reader's attention to [Law Center | ROA](#). You will find more than 2,300 "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 Spouses' Protection Act (USFSPA), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), 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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 44 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 VRRRA 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 VRRRA 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. As of 5/1/2026, I have come out of retirement and have affiliated with Maher Legal Services in an "of counsel" role. You can reach me by e-mail at samuel@maherlegalservices.com or by telephone at (708) 468-8155.

In 1997, the Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated the “Law Review” column in *The Officer*, ROA’s monthly magazine. In 2000, we added the “Law Review” articles to our website, www.roa.org. Starting in September 2001, when 19 terrorists killed almost 3,000 Americans in that terrible Tuesday morning, ROA started adding new articles each month. We now have more than 2,300 articles on our website, along with a detailed subject index, to facilitate finding articles about specific topics.³

In January 2004, we published Law Review 108. Because this is an important topic, and because almost 23 years have passed since we published the article, we are republishing the article now.

Law Review 108
January 2004:
Letter To Federal Agency Concerning USERRA
Case Involving an Agency Employee.
By CAPT Samuel F. Wright, JAGC, USNR*

As ROA’s ombudsman, Captain Wright sent this letter to the general counsel of a federal agency, concerning a USERRA case involving an employee of that agency. For the magazine, we have edited out all references to the name of the National Guard member and the agency.

Dear Mr. Blank:

³ I am the author of more than 80% of the published “Law Review” articles, but I am 75 and will not be around forever to author and update these articles. We are always looking for “other than Sam” articles by other lawyers.

Here at the Reserve Officers Association (ROA), I write a "Law Review" column for The Officer, our monthly magazine. You can find the back issues on our Web site, www.roa.org. Click on "Legislative Affairs" then "Law Review Archive." You will find more than 100 articles, mostly by me and mostly about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

USERRA was enacted in 1994, and it is codified at 38 U.S.C. §§ 4301-4333. USERRA was a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. The VRR law was codified at 38 U.S.C. §§ 2021-2026.

One of the major improvements made by USERRA was the establishment of an enforcement mechanism for federal-sector reemployment rights cases. The VRR law applied to the Federal Government, as a civilian employer, as well as state and local governments and private employers, but there was no real enforcement mechanism for federal-sector cases. The Merit Systems Protection Board (MSPB) would apply the VRR law as a defense to a charge of "unexcused absence," but only if the employee otherwise could appeal to the MSPB.

A federal employee in the first year of federal employment cannot, generally speaking, appeal a dismissal to the MSPB. As you know, probationary employment is a subset of at-will employment. If I am an at will employee, the employer can fire me for any reason, *except for a reason that is forbidden by federal law*.

For example, if the employer fires me for activities protected by the National Labor Relations Act, the National Labor Relations Board does

not lose the authority to remedy such a violation simply because I am an at-will or probationary employee. The same principles apply under USERRA.

Under the VRR law, some federal supervisors and personnel offices made a mockery of this law's protection by the simple expedient of firing a federal employee who is a Reservist before the employee passed the one-year employment point. Prior to the enactment of USERRA, such a wrongly discharged employee had no remedy and no forum for the adjudication of his or her claim.

When USERRA was drafted, we made sure to provide a remedy for federal employees in this situation. I invite your attention to 38 U.S.C. § 4324(c)(1), which provides that "the Merit Systems Protection Board **shall** adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b)." (Emphasis supplied.)

It is clear beyond any room for disagreement that USERRA gives the MSPB jurisdiction to adjudicate a USERRA claim involving a federal employee, even if the employee cannot otherwise invoke MSPB jurisdiction. This conclusion is buttressed by USERRA's legislative history. I invite your attention to House Rep. No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2472.

In two published cases, the MSPB has held that it has jurisdiction to hear and adjudicate USERRA complaints by probationary federal employees who cannot otherwise get to the MSPB. I invite your attention to *Jasper v. United States Postal Service*, 73 MSPR 367 (1997) and *Petersen v. Department of the Interior*, 71 MSPR 227 (1996).

All of this brings us to the case of Major John Doe, a member of the Army National Guard. Major Doe was hired by your Timbuktu regional office on 14 July 2002. His civilian supervisors gave him a hard time with his National Guard responsibilities and ultimately fired him on 29 May 2003, shortly before his one-year anniversary of employment. He appealed the dismissal to the MSPB.

I have in front of me the "Initial Decision" of MSPB Administrative Judge [Name Withheld], dated 27 October 2003. Judge [Withheld] found that the MSPB had jurisdiction under USERRA, citing *Jasper* and *Petersen*. She also found that Mr. Doe (who represented himself at the hearing) had met his burden of proof and had established that your agency had violated USERRA.

I also have in front of me the "Agency Motion for Extension of Time to File Petition for Review and Designation of Counsel." This motion was signed by an attorney in your office on 10 November 2003. On that same date, MSPB Clerk Bentley M. Roberts Jr. granted your agency an extension until 22 December 2003, to file the petition for review.

In her motion, your staff attorney averred that "the instant matter raises novel legal issues involving the interplay of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the statutory probation period found in 5 U.S.C. 7511(a)." With all due respect, that is not a novel legal issue. That issue was definitively resolved in *Jasper* and *Petersen*, the cases cited by Judge [Withheld].

I respectfully submit that your agency has willfully violated USERRA, its legislative history and intent, and the policy of the Bush administration

in the way that it treated Major Doe. Please do not compound the violation by proceeding with this appeal.

I invite your attention to 38 U.S.C. § 4301(b): "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." As an agency that enforces employee protections, your agency should, I respectfully submit, be especially careful about observing employee protection in its relationship with its own employees.

More than 300,000 members of the National Guard and Reserve have been called to active duty since the 11 September atrocities. More than 30,000 of those are federal employees, and several of them have made the ultimate sacrifice.

Accordingly, I am writing to ask you to do three things:

- a. Drop your appeal of the Doe case.
- b. Completely and immediately comply with the administrative judge's decision and order.
- c. Review all of your agency's internal personnel policies to ensure that they are fully consistent with USERRA.

Thank you for your kind attention to this request.

Note: After receiving this letter, the agency dropped its appeal and complied with the administrative judge's decision and order. The National Guard officer is back at work, with back pay. It is unclear whether the agency has comprehensively reviewed its personnel policies to ensure consistency with USERRA.

*Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense, or the Federal Government.

This disclaimer was included in the article because, at the time, I had not yet retired from the Navy Reserve. I retired 4/1/2007.

End of the reprint of Law Review 108.

Now that 24 years have passed since we published this article, I think that I can now say that the agency involved in the case was the National Labor Relations Board (NLRB), and I sent the letter to General Counsel Arthur F. Rosenfeld. Mr. Rosenfeld never responded to my letter, and no one at the NLRB responded on his behalf.

I hope that Mr. Rosenfeld appreciated the delicious irony of the fact that the NLRB, which would never countenance an employer evading its legal responsibilities by asserting that probationary employees had no remedy, was making exactly that claim with respect to one of its own employees.

On its website, the NLRB describes itself as follows:

The NLRB is an independent federal agency enforcing the National Labor Relations Act, which guarantees the right of most private sector employees to organize, to engage in group efforts to improve their wages and working conditions, to determine

whether to have unions as their bargaining representative, to engage in collective bargaining, and to refrain from any of these activities. It acts to prevent and remedy unfair labor practices committed by private sector employers and unions.

Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses, and the U.S. economy.⁴

Section 4324 of USERRA⁵ provides an effective enforcement mechanism with respect to USERRA violations by federal executive agencies as employers. I have placed the entire text of section 4324 at the end of this article.

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those who serve our country in uniform?

A: As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an “of counsel” role. This firm has a great team, headed by attorneys John Maher and Kevin Mikolashek, both of whom have served as Army judge advocates for many years. These attorneys and this firm have a great record, and I am proud to join their team.

⁴ <https://www.nlrb.gov/>.

⁵ 38 U.S.C. § 4324.

Here is a link to the Maher Legal Services website:

<https://www.lawyersdefendingwarriors.com/about>.

Join the Organization That Fights for You

This article is one of more than 2,300 "Law Review" articles available at [Law Center | ROA](#) — a free legal resource that the Reserve Organization of America (ROA) has built and maintained since 1997, adding new articles every month.

ROA is the only national military organization dedicated exclusively to America's reserve components — all eight of them. From the 6,179 members of the Coast Guard Reserve to the 329,705 soldiers of the Army National Guard, ROA exists to serve the nearly 773,000 men and women who answer the call while maintaining civilian lives. No other organization does what we do for the people we serve.

Our roots run deep. On October 2, 1922, veterans of the Great War gathered at Washington's historic Willard Hotel — at the invitation of General of the Armies John J. Pershing — to build something lasting. One of the junior officers in that room was Captain Harry S. Truman, who, as President, signed ROA's congressional charter in 1950. That charter gives us a clear mission: advocate for policies that ensure adequate national security. For more than a century, we've made the case that America's Reserve Components and National Guard are among the most cost-effective pillars of our national defense.

Beyond this library of legal resources, ROA files amicus curiae ("friend of the court") briefs in the Supreme Court and federal courts, and actively educates service members, military spouses, attorneys, employers, legislators, and others about the legal rights of those who serve — and how to enforce them. We provide this information to all service members, regardless of membership. But it's ROA members — through their dues and contributions — who make it possible.

Your membership makes the mission possible.

If you are currently serving, or have ever served, in any of America's eight uniformed services, you are eligible to join ROA — and membership starts at just \$20 for a full year, or \$450 for life. Officers and enlisted personnel alike qualify, whether your service was in the Active Component, the National Guard, or the Reserve. ROA has also recently expanded eligibility to include ancestors and lineal descendants of past or present service members, so families can stand with those who serve. Join online at [Reserve Organization of America - ROA](#) or call 800-809-9448.

If you are not eligible for membership but believe in this mission, your financial contribution directly funds this resource and the advocacy work that protects those who serve. Donations may be mailed to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

Here is the entire text of section 4324 of USERRA:

(a)

(1)

A person who receives from the Secretary [of Labor] 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 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 shall award such person reasonable attorney fees, expert witness fees, and other litigation expenses. The Board may, in its discretion, award reasonable attorney fees in a case settled before the issuance of an order if the person can demonstrate that significant attorney fees were incurred and that justice requires such an award.

(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.

(3) In such Federal Circuit proceeding, the court shall award such person reasonable attorney fees, expert witness fees, and other litigation expenses if such person—

(A)

prevails in such Federal Circuit proceeding; and

(B)

is not represented by the Special Counsel in such Federal Circuit proceeding.

38 U.S.C. § 4324 (emphasis supplied).

See also Law Review 24052 (November 2024) for a detailed description of USERRA's enforcement mechanism with respect to cases against Federal executive agencies.