

LAW REVIEW¹ 26012

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The Dole Act Improved the USERRA Provision for Attorney Fees in MSPB USERRA Cases.

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

1.4—USERRA enforcement.

Q: I am a Captain (O-6) in the Judge Advocate General's Corps of the Navy Reserve and a life member of the Reserve Organization of America (ROA). I am also a lawyer in private practice. I represent employees, former employees, and unsuccessful applicants for employment in cases under several laws, including the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader's attention to www.roa.org/lawcenter. 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 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 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. You can reach me by e-mail at SWright@roa.org.

I am a big fan of your “Law Review” articles on the ROA website. I have utilized your articles and I have shared your articles with some of my clients and also with my colleagues and subordinates in the Navy Reserve.

I have a client with a USERRA claim against a Federal executive agency. After reading and studying your Law Review 24052 (November 2024) concerning USERRA’s enforcement mechanism for claims against Federal executive agency employers, I initiated an action against the agency in the Merit Systems Protection Board (MSPB). Although the USERRA violation was egregious and the liability was clear, the agency fought me tooth-and-nail. My necessary legal services to this client can be conservatively valued at \$75,000.

When the trial date before the Administrative Judge (AJ) of the MSPB was near, the agency offered my client a settlement that was quite adequate for her but contained only a token amount for attorney fees. How do you recommend that I proceed?

A: On 1/2/2025, President Joe Biden signed into law the Senator Elizabeth Dole Veterans Healthcare and Benefits Improvement Act (Dole Act).³ In addition to major improvements to the title 38 chapters that provide for healthcare and benefits administered by the United States Department of Veterans Affairs, the Dole Act made major improvements to USERRA. I invite your attention to our Law Review 25006 (February 2025). That article is by ROA life member Colonel George C. Aucoin, USMC (Ret.). The article details the Dole Act improvements to USERRA.

³ Public Law 118-210, 138 Stat. 2706.

In March 2023, Matthew Schwartzman (ROA's Legislative Director), Lieutenant Colonel Brian Lawler, USMC (Ret.) (ROA life member and USERRA lawyer with a very successful nationwide USERRA practice), and I met with the majority staff of the House Committee on Veterans' Affairs.⁴ The Dole Act improvements to USERRA are the direct result of that meeting.

One of the Dole Act improvements is directly on point to the situation you face. This provision was drafted and suggested by Colonel Lawler, and he has stated that he had in mind a situation exactly like your situation when he drafted this provision.

I invite your attention to section 4324(c)(4), which provides as follows:

If the [Merit Systems Protection] 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.*⁵

Under section 4324(c)(4) as amended, your client can accept the agency's settlement offer and receive the back pay and other relief to

⁴ Kathryn Piscitelli, Esq, a Florida attorney with a nationwide USERRA practice and co-author of *The USERRA Manual*, participated in the meeting by Zoom and offered several valuable suggestions.

⁵ 38 U.S.C. § 4324(c)(4). The italicized sentence was added by the Dole Act on 1/2/2025.

which she is entitled, and then you can litigate the amount of the attorney's fees separately in the MSPB. Because of this 2025 amendment, a Federal executive agency that has violated USERRA can no longer avoid paying attorney fees that are owed by driving a wedge between the plaintiff and his or her attorney. This is a most welcome improvement.

The practical effect of this amendment is to keep offending agencies from realizing that they were caught with their hand in the cookie jar, then settling the case and precluding the service member's legal counsel, who competently represented his or her client to achieve the desired result for the client, from being paid for his or her time and expertise.

If USERRA is to be effectively enforced against lawbreaking employers, qualified attorneys must have a financial incentive to represent employees, former employees, or unsuccessful applicants for employment in USERRA cases.⁶

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This article is one of more than 2,300 "Law Review" articles available at www.roa.org/lawcenter— 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

⁶ Another Dole Act improvement addresses the awarding of attorney fees in USERRA cases involving State and local government employers and private sector employers. See Law Review 25006 (February 2025).

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.

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recently expanded eligibility to include ancestors and lineal descendants of past or present service members, so families can stand with those who serve.

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