

EMBARGOED UNTIL DELIVERY

**Statement of
Lieutenant General Dennis M. McCarthy, USMC (Ret)**

**National Executive Director
Reserve Officers Association of the United States**

before the

**Subcommittee on
Health, Education, Labor and Pensions**

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***“Serving the Nation and the Citizen Warrior through
Defense Education and Advocacy since 1922.”™***

**Reserve Officers Association
1 Constitution Avenue, N.E.
Washington, DC 20002-5655
(202) 646-7713**

The Reserve Officers Association of the United States (ROA) is a professional association of commissioned and warrant officers of our nation's seven uniformed services, and their spouses. ROA was founded in 1922 during the drawdown years following the end of World War I. It was formed as a permanent institution dedicated to National Defense, with a goal to teach America about the dangers of unpreparedness. When chartered by Congress in 1950, the act established the objective of ROA to: "...support and promote the development and execution of a military policy for the United States that will provide adequate National Security." The mission of ROA is to advocate strong Reserve Components and national security, and to support Reserve officers in their military and civilian lives.

The Association's 70,000 members include Reserve and Guard Soldiers, Sailors, Marines, Airmen, and Coast Guardsmen who frequently serve on Active Duty to meet operational needs of the uniformed services and their families. ROA's membership also includes officers from the U.S. Public Health Service and the National Oceanic and Atmospheric Administration who often are first responders during national disasters and help prepare for homeland security. ROA is represented in each state with 55 departments plus departments in Latin America, the District of Columbia, Europe, the Far East, and Puerto Rico. Each department has several chapters throughout the state. ROA has more than 505 chapters worldwide.

ROA is a member of The Military Coalition where it co-chairs the Tax and Social Security Committee. ROA is also a member of the National Military/Veterans Alliance. Overall, ROA works with 75 military, veterans and family support organizations.

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The Reserve Officers Association is a private, member-supported, congressionally chartered organization. Neither ROA nor its staff receive, or have received, grants, sub-grants, contracts, or subcontracts from the federal government for the past three fiscal years. All other activities and services of the Association are accomplished free of any direct federal funding.

President:

Col Paul Groskreutz, USAFR (Ret.) 770-973-5584

Staff Contacts:

Executive Director:

LtGen. Dennis M. McCarthy, USMC (Ret.) 202-646-7701

Legislative Director, Health Care:

CAPT Marshall Hanson, USNR (Ret.) 202-646-7713

Air Force Affairs, Veterans, Retirement:

LtCol Jim Starr, USAFR (Ret.) 202-646-7719

Army, QDR/G-R Commission:

LTC Robert "Bob" Feidler (Ret.) 202-646-7717

USNR, USMCR, USCGR, USPHS, NOAA:

Mr. Will Brooks 202-646-7710

Mr. Chairman and distinguished members of the Health, Education, Labor and Pensions Committee, on behalf of our 70,000 members, the Reserve Officers Association would like to express our appreciation for the opportunity to present testimony on issues that affect the 1.1 million men and women now serving in America's Reserve Components.

As ongoing contingency operations continue to bring about more mobilizations and deployments for Reserve Component members, many of these outstanding citizen soldiers, sailors, airmen, Marines, and Coast Guardsmen have put their civilian careers on hold while they serve their country in harms way.

As the Global War on Terrorism enters its seventh year, stresses are being placed on the employers of this nation's Guard and Reserve members who have been partners in fighting this war. The vast majority of our nation's employers are very patriotic, but as our nation continues military operations on a global scale, Reserve Component members are being mobilized, some for the second or third time, with employers facing many problems on the business front.

Because of this, the Reserve Officers Association has noted an increase in reemployment problems. ROA retains a lawyer to counsel National Guard and Reserve members as they are preparing to deploy and after they return. We have seen an increase in the number of phone calls and e-mails that ROA has been receiving.

The nature of the problems is changing. While many challenges still relate to lost jobs or demotions, others are dealing with lost seniority, promotions, pay raises and other employment related matters protected under the Uniformed Services Employment and Reemployment ACT (USERRA). The vast majority of these problems are corrected through good communications, as is demonstrated by the ombudsman program of the Employer Support for the Guard and Reserve that does an excellent job in correcting a large portion of these disagreements. Yet, not all the problems that arise can be settled through mediation.

USERRA is essentially a good law, but the challenge is enforcing it when the involved parties disagree. When Guard and Reserve members return to civilian employment following federal service, actions need to follow through to enforce the law. A growing population of Reserve Component members feels that the federal government isn't doing enough.

Background: The Uniformed Services Employment and Reemployment Rights Act (USERRA) significantly strengthens and expands the employment and reemployment rights of all uniformed service members. Reemployment rights extend to persons who have been absent from a position of employment because of service in the uniformed services, which means the performance of duty on a voluntary or involuntary basis including:

- Active duty
- Active duty for training
- Mobilization
- Presidential Recall

- Active duty for Special Work
- Initial active duty for training
- Weekend or Weekday Drill
- Absence from work for an examination to determine a person's fitness for any of the above types of duty.
- Federal National Guard Duty
- State National Guard Duty
- Funeral honors duty performed
- Duty performed by intermittent disaster response personnel for the Public Health Service

USERRA was signed into law by President Clinton October 13, 1994, but the law is actually 63 years old. USERRA was a complete rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced to August 1940, when Congress provided re-employment rights to those who left civilian jobs when voluntarily or involuntarily recalled to active duty. The law was amended during the 1960s to provide protection to National Guard and Reserve members performing training duty.

USERRA applies to "re-employments initiated" on or after December 12, 1994, while preserving vested rights under the prior law.

Section 4301 of USERRA (38 U.S.C. 4301) sets forth the purposes that Congress had in mind when it enacted this law: to encourage service in the uniformed services; to minimize disruption of employment and income by providing for the prompt re-employment of those who have served; and to prohibit discrimination against those who serve or have served. Section 4301 also sets forth "the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter" [38 U.S.C. 4301(b)].

On December 19, 2005, the U.S. Department of Labor (DOL) published final regulations impacting USERRA. The regulations clarify the rights and obligations of individuals serving in active duty with respect to their civilian employment. The DOL also finalized regulations regarding employer notice obligations of USERRA rights in the workplace, which took effect on January 18, 2006. A complete text of the regulations is available at www.dol.gov/vets/regs/fedreg/final/2005023961.pdf.

Discussion: Currently, the agencies tasked to enforce USERRA are the Departments of Labor and Justice. DOL's Veterans' Employment and Training Service (VETS) handles USERRA complaints and other veterans' issues. DOL-VETS provides assistance to all persons having complaints under USERRA. If resolution is unsuccessful following an investigation, the privately employed Reservist may have his or her claim referred to the Department of Justice for consideration for representation in the appropriate District Court, at no cost to the claimant.

Labor currently employs 189 investigators nationwide with authority to perform USERRA investigations. Of those, 115 are primary investigators; the other 74 are regional administrators and management officials. DOL's fiscal 2007 budget for veteran re-employment rights enforcement was \$13.7 million. These investigators work other cases beside USERRA.

Labor officials told GAO that the department had 166 USERRA complaints by federally employed service members from the beginning of the project in 2005 through fiscal 2006. Of those, it “closed” 155 (93 percent). The GAO has indicated that average time for processing complaints was between 53 and 86 days, although the data used may have included duplicate complaints. Some files were credited as “closed” without resolution, and time is not measured by actual elapsed time, but by time spent processing.

Unfortunately, actual elapsed times of cases often take one to two years to investigation and process. Within DOL, cases are still processed on paper; this slows information transfer, and creates the risk of duplication. In the vast majority of cases, the outcome is dismissal of the claim. Since USERRA’s passage in 1994, most USERRA enforcements were by Reservists who sought private litigation.

A demonstration project was established by the Veterans Benefits Improvement Act of 2004 (VBIA). In the act, Congress expanded Office of Special Council’s (OSC) role. Under the VBIA, jurisdiction over *federally* employed Reservist USERRA cases was split between OSC and DOL-VETS. Since 2005, about half of the serving RC members with federal reemployment problems could have allegations directly investigated by OSC.

OSC employs seven people; a unit chief, three investigators and three attorneys, who focus almost solely on USERRA cases. The office has a budget of \$2.5 million. GAO said OSC received 269 complaints from the start of the project in 2005 through September 2006. Of those, it closed 176 cases (65 percent) at an average 115 days per case.

OSC reported 45 corrective actions out of 176 cases resolved. The Department of Justice’s Civil Rights Division has filed 13 lawsuits and reaching 7 consent decrees since FY 2005.

GAO reports that 72 percent of Reservists with reemployment problems never seek federal remedy. Many are discouraged by the elapsed time it takes for DOL to investigate and process complaints as the employee is in ongoing disagreement with their employers during the duration. Others Reserve Component members can’t afford private litigation. The Reserve Officers Association received a report about one Army Reserve unit where of 79 members who returned from deployment 11 faced reemployment problems, with most simply seeking different employment. What is needed is not only a federal office which can focus and streamline USERRA cases, but a collaboration between federal and private representation to serve this country’s patriots who are transitioning back to becoming private citizens following a tour as warriors.

The Reserve Officers Association is exploring the establishment of a *Servicemembers Law Center*, advising active and reserve members who have been subject to legal problems that occur during deployment. This new center would be located in the

renovated Minute Man Memorial Building on Capitol Hill. A position paper is attached to this testimony

The law center would provide counseling to demobilized Reserve and separated Active component members, and could provide a referral service for those needed legal assistance. This law center would also educate private lawyers about USERRA and the Servicemember Civil Relief Act and promote representation of RC members by private lawyers.

Conclusion: The Reserve Officers Association recommends the following:

- 1) The National Committee for Employer Support of the Guard and Reserve (ESGR) should be better resourced to expand its outreach programs as it is better to prevent a problem by educating employers or resolve a problem at the lowest level.
- 2) The Department of Labor should follow the success of the Office of Special Council with dedicated investigators and lawyers assigned to DOL-VETS who specifically focus on USERRA cases.
- 3) The Office of Special Council should handle all of the federal employee USERRA cases.
- 4) USERRA case files should be electronic maintained and transmitted, allowing access to ESGR, DOL-Vets, OSC, and DOJ and the service member.
- 5) Congress should mandate better reporting by all Federal agencies by providing details on:
 - how many cases.
 - how they are resolved.
 - how long the actual elapsed time takes

Accomplishment of objectives should be measured by results rather than outputs.

- 6) ROA also hopes that the committee will support the Servicemembers Law Center project. It would be a:
 - hub for sharing information on USERRA and SCRA.
 - an education source on rights and responsibilities under USERRA for serving members and provided continuing legal education to private council.
- 7) Further, we hope this committee will support improvements to USERRA and work with the Veterans Affairs committee to accomplish this. Additional items are needed to strengthen USERRA:
 - Do not allow employers to discriminate by asking prospective employees if they are in the Guard or Reserve

- Exempt employees from penalties when their insurance lapses if their motor carrier license expires while mobilized (i.e., the Federal Motor Carrier Safety Administration).
- Exempt from age restrictions for federal law enforcement retirement application when deployment causes the member to miss completion of the application to buy back retirement eligibility.
- Work with Federal agencies to abide by USERRA/SCRA standards.
- Amend 38 U.S.C. 4323(d)(1)(C)—the "liquidated damages" provision in the amount of \$20,000 or the amount of the actual damages, whichever is greater. Provide a provision in section 4324—for the federal executive agencies provision, such as found in section 4323—as it applies to states, political subdivisions of states, and private employers.
- Amend Title 38 U.S.C. 4323(e) to mandate (rather than simply permit) injunctive relief to prevent or correct a USERRA violation.
- Amend Title 49 U.S.C. 44935 to include Transportation Security Administration (TSA) screeners under USERRA.
- Amend 38 U.S.C. 4302(b) to make it clear that USERRA overrides an agreement to submit future USERRA disputes to binding arbitration.
- Amend 38 U.S.C. 4303 (definition of "employer") to clarify that a successor in interest inherits the predecessor's USERRA obligations and that there need not be a merger or transfer of assets to support a finding of successor liability.
- Amend 38 U.S.C. 4323 and 4324 to authorize punitive damages for willful and egregious USERRA violations.
- Devise a method to tie the escalator principle to merit pay systems.



ROA POSITION PAPER

Reserve Officers Association of the United States
One Constitution Avenue, NE, Washington, DC 20002-5655

Toll-Free: (800) 809-9448 xt 713
Direct: (202) 646-7713
www.roa.org - mhanson@roa.org

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SERVICEMEMBERS LAW CENTER

CONCEPT: *ROA Servicemembers Law Center*, advising active and reserve members who have been subject to legal problems that occur during deployment. This new center would be located in the renovated Reserve Officers Association Building.

JUSTIFICATION: Recruiting of prior service members into the Reserve Component is on the decline because service members leaving active duty fear ramification of ongoing deployments on new civilian careers. A legal center would help:

Recruit: Encourage new members to join the Guard and Reserve by providing a non-affiliation service to educate prior service members about Uniformed Services Employment and Reemployment Rights Act (USERRA) and Servicemember Civil Relief Act (SCRA) protections.

Retain: Work with Active and Reserve Component members to counsel Uniformed Services Former Spouse Protection Act (USFSPA), USERRA and SCRA protections for deployed or recently deployed members facing legal problems.

LAW CENTER'S SERVICES.

Counseling: Review cases, and advise individuals and their lawyers as to legitimacy of actions taken against deployed active and reserve component members.

Referral: Provide names of attorneys within a region that have successfully taken up USFSPA, USERRA and SCRA issues.

Promote: Publish articles encouraging law firms and lawyers to represent service members in USFSPA, USERRA and SCRA cases.

Advise: File Amicus Curiae, "friend of the court" briefs on servicemember protection cases.

Educate: Quarterly seminars to educate attorneys a better understanding of USFSPA, USERRA and SCRA.

ROA's CONTRIBUTIONS:

ROA would set-aside office spaces.

ROA's Defense Education Fund would hire an initial staff of one lawyer, and one administrative law clerk to man the Servicemembers Law Center to advise and counsel individuals and their legal representatives.

Anticipated startup cost, first year: \$750,000 (for personnel, furnishing, leasing, travel, etc.)

Reserve Officers Association of the United States
One Constitution Avenue, NE, Washington, DC 20002-5655
Toll-Free: (800) 809-9448 ext. 713
Direct: (202) 646-7713
legislative director – Marshall Hanson
Email: mhanson@roa.org

Attachment