NATIONAL GUARD/RESERVES

Applicability of Uniformed Services Employment and Reemployment Rights Act of 1994 Exemptions to Active Guard and Reserve Positions in SAF/IGQ

It has come to our attention that the National Guard Bureau (NGB) is currently advertising Active Guard and Reserve (AGR) investigating/action officer vacancies and indicating that certain applicants would be exempt from the 5-year limit for restoration of employment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). We find, based on the MVAs, that orders for these particular jobs with such an exemption noted are unlawful and that reliance upon such language in the announcements by an applicant could be to his or her detriment.

BACKGROUND

The United States Air Force Inspector General, Complaints Resolution Directorate (SAF/IGQ), intends to hire two AGRs; one lieutenant colonel-select/lieutenant colonel and one major-select/major, to serve as investigating/action officers in two positions are MVA 2013-117 and MVA 2013-118, respectively. The two announcements are identical except for the grade requirements. The positions are full-time, Title 10, statutory tours lasting two to four years. The position description in each MVA states that it is a Secretary of the Air Force (SecAF)-level position that "develops and directs policy, programs, procedures, and processes under the Air Force Inspector General Complaints Resolution (SAF/IGQ) program. Conducts, evaluates, and manages noncriminal inquiries and investigations regarding assertions received from the President, Congress, Secretary of Defense, The Inspector General, Headquarters Air Force, and National Guard Bureau(NGB). Responsible for the oversight and validation of IG inquiries and investigations conducted by Major Commands (MAJCOMS)[,] Air National Guard (ANG) and Air Force Reserve (AFRC) units, Direct Reporting Units (DRUs), and Field Operating Agencies (FOAs). Provides oversight for reprisal, restriction, and improper Mental Health Evaluation (IMHE) referral investigations. . . . Duties will also include training of field IGs and investigating officers."

Our concern is with the following language in the MVAs, found in Section 4, "About Statutory Tours:" "Drill Status Guardsman are currently EXEMPT from the 5 Year limit for restoration rights for a civilian employer IAW the Uniformed Services Employment and Restoration Rights Act (USERRA). (i.e., Private Airline, State or Municipality). Military Technicians are currently EXEMPT from the 5 Year limit for restoration rights only back to the State in which they were assessed to the Statutory Tour Program IAW the Uniformed Services Employment and Restoration Rights Act (USERRA)." No exemptions to the 5-year cumulative service limitation are cited in the MVAs, nor is any explanation provided for asserting such exemptions. Based on similar issues with which we have dealt, we are assuming the exemption envisioned by the

drafters of the MVAs is the one for support of a national emergency declared by the President or Congress.[1] This legal review focuses on use of that exemption.

LAW AND GUIDANCE

USERRA, found at 38 United States Code (U.S.C.) Chapter 43, states in Section 4312 that "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if . . . the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years."[2] 38 U.S.C. § 4312(c) provides exemptions to the 5-year limit, one of which is for service "performed by a member of the uniformed service who is . . . ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned."[3]

The Secretary of Defense's (SecDEF) policy with regard to USERRA is set out in DoDI 1205.12, *Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services*. SecDEF policy is to support non-career service by taking appropriate actions to *inform and assist* uniformed service members and former service members who are covered by the USERRA.[4] Such support includes documenting periods of service that are exempt from a service member's cumulative 5-year absence.[5] It levies upon the service secretaries the responsibility to ensure compliance with the DoDI and to specify, as required, and document the periods of active duty that are exempt from the 5-year cumulative service limitation that a service member may be absent from a position of civilian employment while retaining reemployment rights.[6] In paragraph 6.6, the DoDI sets out the requirement for service secretaries to determine, among other things, those periods of active duty when a service member is ordered to, or retained on, active duty because of a war or national emergency declared by the President or Congress. If the purpose of the order to, or retention on, active duty is for the direct or indirect support of the war or national emergency, then ensure the service member's orders are so annotated since that period is exempt from the 5-year cumulative service limit.[7]

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[1] There are a number of exemptions to the 5-year cumulative service limit. However, given the fact that these are voluntary 2 to 4-year AGR tours for O-4s and O-5s, this exemption appeared to be only one which could logically (even if inappropriately) be considered. See 38 U.S.C. § 4312(c) and DoDI 1205.12, Paragraph E2.3 (quoted in its entirety in footnote 7, below).

[2] 38 U.S.C. § 4312(a)(2)

[3] 38 U.S.C. § 4312(c)(4)

[4] DoDI 1205.12, Section 4

[5] DoDI 1205.12, Paragraph 4.5

[6] DoDI 1205.12, Paragraph 5.2.4

[7] DoDI 1205.12, Enclosure 2, Paragraph E2.3, sets out the exceptions to the maximum period of service for coverage:

> E2.3. EXCEPTIONS TO THE MAXIMUM PERIOD OF SERVICE FOR COVERAGE: In order to retain reemployment rights and benefits provided by Chapter 43 of 38 U.S.C.

In a memorandum to the Chief of Staff of the Air Force; the Director, Air National Guard; and the Chief, Air Force Reserve, dated 25 October 2011, The Honorable Secretary Ginsberg, Assistant Secretary of the Air Force for Manpower and Reserve Affairs (SAF/MR), acting on behalf of the SecAF, addressed designated exemptions to the 5-year cumulative service limit. In this memorandum, he approved an exemption for "[p]eriods of service performed by an [air reserve component] ARC member ordered to or retained on active duty under 10 U.S.C. § 12301(d) on or after September 14, 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Attacks, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations." Secretary Ginsburg further stated in this memorandum that the above exemption was specifically based on the authority of 38 U.S.C. § 4312(c)(4), which exempts a service member "ordered to or retained on active duty (other than for training) under any provision of law ***because*** of a war or national emergency . . . (emphasis in the original)." Secretary Ginsberg further clarified "In other words, *the basis for the order must be linked to the war or national emergency* (emphasis added)." In a footnote to that statement, he added, "In most cases, members ordered to duty under 10 U.S.C. § 12301(d), but serving under 10 U.S.C. § 12310 (AFR duty) . . . will *not* fit this criteria (emphasis added)."

(reference (b)), the cumulative length of absences from the same employer cannot exceed 5 years. Not counted toward this limit is:

E2.3.1. Service beyond 5 years is required to complete an initial service obligation;

E2.3.2. Service during which an individual was unable to obtain release orders before the expiration of the 5-year cumulative service limit through no fault of his or her own;

E2.3.3. Inactive duty training; annual training; ordered to active duty for unsatisfactory participation; active duty by National Guardsmen; for encampments, maneuvers, field operations or coastal defense; or to fulfill additional training requirements as determined by the Secretary concerned, for professional skill development, or to complete skill training or retraining;

E2.3.4. Involuntary order or call to active duty, or retention on active duty;

E2.3.5. *Service resulting from an order to, or retention on, active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;* (emphasis added)

E2.3.6. Ordered to active duty in support of an operational mission for which personnel have been involuntarily called to active duty;

E2.3.7. Performing service in support of a critical mission or requirement, as determined by the Secretary concerned;

E2.3.8. Performing service in the National Guard when ordered to active duty by the President to suppress an insurrection or rebellion, repel an invasion, or execute laws of the United States; and,

E2.3.9. Voluntary recall to active duty of retired regular Coast Guard officers or retired enlisted Coast Guard members.

ANALYSIS

The drafters of the MVAs did not identify the USERRA exemption upon which they relied in determining that drill status Guardsmen and military technicians going into the positions at issue are exempt from the 5-year cumulative service limit, nor did they provide justification for their statements that the positions are exempt. There is nothing in the description of the positions which would indicate that the existence of the positions (and a call to active duty to fill them) is "because of a war or national emergency" or that the basis for orders filling the positions is "linked to the war or national emergency." Secretary Ginsberg specifically identifies positions such as these (members ordered to active duty under 10 U.S.C. § 12301(d) but serving as AGRS) as *not* fitting the criteria as exempt because of war or national emergency. Therefore, it is our opinion that inclusion of exemption language in the announcement and subsequently on the member's orders is in direct contravention of the law, and DoD and Air Force guidance.

An additional concern is the potential that an applicant could rely on the language in the announcement and subsequently apply for and get hired into one of the AGR positions assuming that he or she will have employment rights despite exceeding the USERRA 5-year cumulative service limit. 38 U.S.C. § 4312(h) states that in determining a person's entitlement to protection under Chapter 43, the timing, frequency, and duration of the person's training or service, or the nature of the training or service in the uniformed service shall not be a basis for denying the protection of Chapter 43 "if the service does not exceed the limitations set forth in subsection (c)." While the Air Force has set forth guidance in order to stay within the limitations discussed above, as evidenced in Secretary Ginsburg's memorandum, the NGB arguably is exceeding these limitations by inappropriately placing exemption language in orders and advertising non-exempt positions as exempt. Given that DoD policy is to take appropriate actions to "*inform and assist* uniformed Service members . . . (emphasis added)," the inclusion of erroneous language in the MVAs, presumably followed by orders citing an exemption to which the member is not entitled, seems particularly egregious.

We recommend that NGB/HR, on behalf of the ANG, withdraw MVAs 2013-117 and 2013-118 and reissue them without the exemption language identified in this legal review.

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