

USERRA Investigation-Enforcement Crisis

While there are many pressing issues that face National Guard and Reserve members today, one item that needs far more attention than it is (or has been) getting is the inconsistency that the Department of Labor has been known for when it comes to investigating USERRA claims. This inconsistency has the potential to undermine retention, reduce morale to dangerously low levels, and even destroy Guard and Reserve families financially and emotionally. For some time I have tried to bring this to the attention of various service member groups and even senior leadership within the National Guard – I need your help to get a discussion going about this crisis; and make no mistake, this is a crisis.

USERRA

The Uniformed Services Employment and Reemployment Act (USERRA) was established as a major revision of the Veterans' Reemployment Rights Act (VRR). VRR was established just before the start of the Second World War to protect those called to serve this country as tensions increased and the United States started to prepare for war. After being revised many times for other conflicts, major changes were needed in the aftermath of Operation Desert Storm. USERRA became effective on 13 October 1994, and has been revised since then to address items discovered as it has been enforced.

Enforcement and Investigation

Enforcement of USERRA falls to the Department of Justice (DOJ). However, investigation of USERRA violations is the responsibility of the Department of Labor under its Veterans Education and Training Service (VETS). When a service member feels they have been discriminated against they fill out a form that starts the investigation process, and it is up to VETS to look into the service members' claims. If VETS determines that the case is meritorious and is unable to get resolution with the employer they can refer it to the Department of Justice. Not all USERRA cases are determined to have merit, and not all cases referred to the DOJ will be accepted for legal action. In some cases, a lack of thorough investigation by VETS results in a determination of No Merit, and it is extremely unlikely that DOJ would accept a case for legal action if VETS is asked by the service member to forward it to DOJ after VETS makes a No Merit determination. In some cases, a poorly investigated case by VETS has resulted in a No Merit determination – even though the case *did indeed* have merit.

VETS Failure

I experienced first-hand how haphazard their investigations can be when I was discriminated against by the Board of Public Utilities in Kansas City, Kansas (BPU). I was "sent home" in July of 2010 after completing 168 days of a six-month probationary period – you can read all about my story at www.bpu168days.info. Despite evidence that clearly demonstrated they went so far as to violate their own internal policies and falsified documents VETS determined that my case had no merit. After I obtained a copy of the investigation file by VETS I was able to find discrepancies in BPU's responses and documentation; this, coupled with research I did on my own was compiled and taken to a private

attorney. This attorney accepted my case on commission and we filed suit; however, because of expenses I would incur (that my attorney could not pay for on her own) and could not afford to pay for I eventually had to settle the case for less than ten percent of my actual losses in wages and benefits. Had VETS done an adequate job of investigating my case, it might have been resolved without referral to DOJ, or at the least have been forwarded with a meritorious determination to DOJ – where I would not have had to incur costs related to the case.

Impact

VETS' failure to adequately pursue justice in this case has caused my family and me irreparable harm. Through our preparation for the court case, it was calculated that the loss of wages (and more importantly, benefits) through December of 2013 was well over \$300,000.00 – with a potential loss at retirement of near 1.2 million dollars. That is a loss that can be calculated; other things affected by the loss of employment aren't so easily calculated. I found myself doubting people; this was manifested not only in my civilian life but my military life as well. Just putting on my uniform was a reminder of what happened. Communication in my family was impacted because my employment was something we didn't want to talk about. Somehow we have been able to regroup and move forward, but the lingering effects remain.

While I have been somewhat resilient, who's to say the next Guard or Reserve member will be? Not every USERRA case winds up being a loss of employment – it can mean loss of seniority, loss of benefits, or even loss of promotion. What could the effect of these be on retention of qualified personnel?

A leading cause of marital problems is financial difficulty – a loss of employment surely would surely qualify. According to Suicide.org two of the “negative life experiences” that have been shown to cause depression that could lead to suicide are “divorce, separation, or breakup of a relationship” and a “serious loss, such as a loss of a job, house, or money.” It goes without saying that not all USERRA cases that go unresolved lead to these extreme outcomes, but service member and veteran's groups know all too well that far too many of our warriors are not being taken care of. I do not know any quantitative data that would show how many are victims of civilian employment discrimination because far too many go unreported – possibly in part due to the poor work performed by VETS in their investigations.

How many service members are an “acceptable loss” to something that is supposed to be against the law and there is (supposed to be) a process in place to attain justice?

What Do We Need?

My case, along with some other cases (I discovered in my case) show that clearly VETS needs to do a far better job, plain and simple. There obviously needs to be more and better training of their investigators. I have no investigative training and no legal background, yet as soon as I saw the formal VETS file on my case I was able to note discrepancies that anyone with reasonable attention to detail could see. The VETS investigator had to ask for extensions to conclude my case, and to this day I cannot see from his own file why he needed them – it would appear that his opinion was formed far before he had his one

and only face-to-face meeting with me. I provided him with extensive information that would reinforce my assertion of discrimination, and nearly all of it was ignored. Comments I made regarding files BPU sent me (versus what BPU sent him) should have raised red flags that could have prompted further investigation. Questions he asked in his interviews (which he did not even have corrected copies of when he met with me) should have led to follow-up questions that would have exposed more of the *real* story. VETS' file was a majority of the case we planned – BPU provided DOL the bulk of what we put together. Why didn't this get done by the investigator?

I also found a case where a VETS investigator found “no merit” in a service member’s case after documents were received from the service member’s former employer. The problem is they were falsified: dated “29 February” even though it was not a leap year! This went right past the investigator, and the service member had to obtain private counsel in order to get justice in his case – something that should not have had to happen.

Conclusion

I know there are many issues that face Guard and Reserve members today. With the operational tempo being faced (due to the continued reliance on the National Guard and Reserve units) there are going to be civilian employers that are unwilling to support their employees in uniform. Some employers go that “extra mile” to support their citizen soldiers and airmen, and these employers deserve even more praise than they get; however, not all employers care. In those cases, we need the Department of Labor through the Veterans Education and Training Service to give their very best to insure service members get justice. This needs to be a priority for service member organizations – if it is not a priority I do not know what is.

If anyone wants to discuss USERRA, VETS and their inadequacies or my case please feel free to contact me. My goal is to prevent what happened to me from happening to anyone else.

Respectfully Submitted,

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