

September 21, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DAVID H. HAWES)	Docket No. 55-22685-SP
)	
(Denial of Reactor Operator License))	ASLBP No. 05-840-01-SP

NRC STAFF BRIEF CONCERNING
VETERAN'S RIGHTS

INTRODUCTION

On September 8, 2005, the Atomic Safety and Licensing Board (Board) issued an Order granting a hearing to David Hawes regarding the NRC staff's (Staff) proposed denial of his application for a reactor operator (RO) license. The Order also set a schedule for the Staff and for Mr. Hawes to file briefs addressing veteran's rights. The Staff now files its response to the Board's Order.

BACKGROUND

The subject of the hearing is the Staff's June 20, 2005 proposed denial of Mr. Hawes' RO license application based on his failure to pass the written portion of the May 27, 2005 examination. The RO examination consists of a written portion and an operating test. Mr. Hawes had previously taken the RO examination in 2002 and passed the written portion but had failed the operating test. NRC regulations permit an RO applicant who has failed either the written examination or the operating test to request to retake only the portion of the examination that he or she failed. See 10 C.F.R. § 55.35(b). An applicant seeking to retake only the written

examination or the operating test must apply to do so within two years of originally taking the test, or request and justify a specific exemption from the regulations. See 10 C.F.R. §§ 55.11 and 55.47.

Mr. Hawes is a member of the Georgia National Guard and an employee of the Southern Nuclear Operating Company (Southern) at the Vogtle Electric Generating Plant (Vogtle) in Waynesboro, Georgia. He first took the RO examination in 2002 and failed the operating test (although passing the written examination). Soon thereafter, he was mobilized for Operation Iraqi Freedom. He returned to his job at the Vogtle mid-2004, and applied to retake the RO examination in 2005, after the two-year time period had expired. His petition indicates that he did not request a waiver of the written examination. See NRC Staff's Response to Request for Hearing, dated August 1, 2005. When Mr. Hawes retook the test in May of 2005, he passed the operating test but failed the written examination. On June 28, 2005, he filed a request for a hearing to contest the Staff's proposed denial of the RO license on the grounds that he should not have been required to retake the written examination in May 2005.

At a telephone pre-hearing conference held on Thursday, September 1, 2005, the parties briefly discussed possible rights of veterans under statutory and regulatory law that could impact Mr. Hawes' claim. In its September 8, 2005 Order, the Board requested that the Staff file a brief by September 21, 2005, discussing any rights Mr. Hawes may have as a member of the Georgia National Guard who was mobilized for Operation Iraqi Freedom, pursuant to the Servicemembers Civil Relief Act of 2003, 50 U.S.C. Appendix §§ 501 *et seq.*, the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4333, and related rules.

DISCUSSION

Servicemembers Civil Relief Act of 2003 (SCRA)

The SCRA, formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940, is a federal law that gives all members of the military important rights as they enter active duty and during active duty. Mr. Hawes, who was called to active duty for Operation Iraqi Freedom, would qualify for the protections of the SCRA. However, the SCRA's protections are applicable to issues relating to rental agreements, security deposits, prepaid rent, eviction, installment contracts, credit card interest rates, mortgage interest rates, insurance coverage, foreclosure on mortgages and liens, civil judicial proceedings, income tax payments, and the like.

The Supreme Court has noted in the past that the SCRA should be interpreted broadly, "with an eye friendly to those who dropped their affairs to heed their country's call."

Boone v. Lightner, 319 U.S. 561, 575 (1943). Nevertheless, nothing in the Court's opinion or in the statute itself would extend the statute to cover the situation presented in Mr. Hawes' case. The SCRA does not touch upon employment or re-employment rights.¹ It is clear that the purpose of the statute is to prevent default judgments, foreclosures, evictions, negative credit reports, and the like, while a person is on active duty in the military. Therefore, the SCRA has no effect on Mr. Hawes' claims in this matter.

Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and Related Rules

While the SCRA provides service members called to active duty with a broad array of economic protections, the USERRA deals primarily with one issue: employment. The USERRA applies to virtually all employers, including the Federal Government, and provides employees

¹ The SCRA does provide for a stay of proceedings in a court or administrative agency for the period in which the service member is on active duty, and the protection of that service member against a default judgment. See 50 U.S.C. Appendix §§ 520-21. But, since there was no administrative proceeding pending during the time that Mr. Hawes was on active duty, the provisions are not applicable here.

who are absent from a position of employment because of service in the uniformed services with certain rights. As a National Guardsman called to serve in Operation Iraqi Freedom, petitioner should be eligible for the protections and rights that USERRA provides. USERRA provides employees who enter uniformed service with protection against discrimination by employers and prospective employers because of their uniformed service, as well as rights of re-employment upon returning from uniformed service.

The proposed rules implementing USERRA, cited by the Board in the September 8, 2005 Order, have not yet been finalized, and are, thus, inapplicable here. See 69 Fed. Reg. at 56,266 (2004). Rules implementing USERRA that apply to the Federal Government exist and have been finalized. See 5 C.F.R. Part 353. See *also* 64 Fed. Reg. 31,485 (1999); 60 Fed. Reg. 45,650 (1995). But, as discussed below, the Federal Government is not Mr. Hawes' employer, so these rules are inapplicable here. In any event, the rules, for the most part, track the statutory language of USERRA and do not offer much in the way of guidance.

The USERRA's essential requirement is that an employer re-employ an employee who is a returning service member. 38 U.S.C. § 4312. USERRA requires that the employer return the employee not to the position in which the employee was at the time he or she was called to uniformed service, but to the position that the employee would occupy had he or she not been called to uniformed service and was continuously employed by the employer. 38 U.S.C. 4313(a)(1). This is known as the "escalator" provision. If, for whatever reason, the returning service member is not at the time of re-employment qualified for the position that he or she would occupy had he or she been continuously employed, the employer must make reasonable efforts to qualify the employee. 38 U.S.C. 4313(a)(4)(B). Federal courts have held that, in the case of an employee who, if continuously employed during the time of service, would occupy a position requiring a qualification or promotion test which the employee missed because of his or her service, the employer is required to provide a makeup exam and provide

other reasonable training and accommodation regarding such qualification or promotional exam. See, e.g., *Fink v. City of New York and New York City Fire Department*, 129 F. Supp. 2d 511 (2001).

In the case of Mr. Hawes, he was employed by Southern at the Vogtle plant. Southern is a private employer and is subject to the USERRA. Therefore, Mr. Hawes may assert a right to be re-employed by his employer in the position that he would have occupied if he had been continuously employed by Southern during his deployment with the National Guard. At the time he was deployed to Iraq, Mr. Hawes was not a reactor operator, but could have been eligible to re-take the RO examination, if Vogtle had submitted his name to the NRC at that time.

Mr. Hawes could claim that under USERRA he is entitled to re-employment in the position of Reactor Operator and, as he is not qualified for the RO position, not having passed the RO exam, that “reasonable efforts” to qualify him must be made and should include: (1) administration of a makeup exam; and/or (2) a request by his employer to the NRC for an exemption from the usual NRC requirement to take the exam within 2 years to avoid having to take the entire exam again.

However, Mr. Hawes’ claim for re-employment lies against his employer, Southern, not the NRC. The rights that USERRA conveys are necessarily bounded by the employer-employee relationship. That is, except for the provision that bars discrimination against uniformed service members, which applies to initial employment, the re-employment and qualification provisions of USERRA necessarily apply only to the employer of the service member and to any other entity. This is explicitly stated in the statutory language and is also implicit from the statute itself, which continually makes reference to “re-employment.”

The USERRA at 38 U.S.C. § 4303 (3) defines “employee” as “any person employed by an employer.” An employer, as defined in 38 U.S.C. § 4303(4), is:

any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—

- (i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
- (ii) the Federal Government;
- (iii) a State;
- (iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and
- (v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.

It is clear from the use of the word “including” that the USERRA does not purport to make the Federal Government an employer for purposes of USERRA in all cases, but only in cases in which the Federal Government pays salary or wages for work performed, or has control over employment opportunities. The regulations implementing USERRA for the Federal Government agree with this interpretation. 5 U.S.C. 353.103(a), “persons covered”, states that “[t]he provisions of this part pertaining to the uniformed services cover each agency employee” with “agency” being defined as it is in 5 U.S.C. § 105: “an executive department, a Government corporation, and an independent [executive] establishment.” Therefore, the Federal Government and federal agencies are only employers for USERRA purposes when they actually employ the individuals in question.

In this case, the NRC does not pay Mr. Hawes’ salary or wages. He is employed by a private entity. Southern determines which of its employees should take the RO examination and submits their applications to the NRC for review. The written examination may be prepared by employees of Southern or by the NRC staff, using NRC and industry guidance. Southern employees administer and grade the written examination and the Staff administers the

operating test. The NRC issues or denies the RO license based on whether the candidate meets the regulatory requirements, including a passing grade on the examination. Although “control over employment opportunities”² is not defined in the statute, and the definition of it is not completely clear from the context, it can be assumed that it includes the power to, *inter alia*, hire and fire,³ a power that the NRC does not have with respect to Mr. Hawes’ employment. Therefore, the NRC does not have “control over employment opportunities” that would render it an employer for USERRA purposes. 38 U.S.C. § 4303(4). In addition, the implementing regulations that apply to the Federal Government only refer to “agency employees” and define that term in such a way as to clearly exclude cases like Mr. Hawes. Thus, any rights afforded by USERRA may only be asserted against a Federal agency by an employee of that agency. See 60 Fed. Reg. 45,650 (1995).

Even assuming for purposes of argument only, that the NRC were an employer of Mr. Hawes’ for USERRA purposes, he would still be unable to invoke USERRA protections against the NRC. Section 4312(a) and (b) make clear that, in order to avail oneself of re-employment rights, one must have given advance written or verbal notice of such uniformed service to such person’s employer, unless such notice is impossible or unreasonable for reasons of military necessity. 38 U.S.C. § 4312(a) and (b). Mr. Hawes provided no such advance notice to the NRC and therefore could not invoke USERRA re-employment rights against NRC.

In sum, if Mr. Hawes has rights to re-employment, to protection from discrimination, and

² Although no court has defined “control over employment opportunities” in the context of USERRA, courts interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, have held that a government entity that administers a test and/or issues a license is not an employer under Title VII. See, e.g. *Woodward v. Virginia Bd. of Bar Examiners*, 420 F. Supp. 211, 212 (E.D. Pa 1977), *aff’d*, 598 F. 2d 1345 (4th Cir. 1979) (per curiam). See also *George V. New Jersey Bd. of Medical Examiners*, 636 F. Supp. 953 (D. NJ 1985); *Delgado v. McTighe*, 442 F. Supp. 725, 730 (E.D. Pa 1977).

³ See *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 618 (E.D. Va 1999).

for reasonable efforts for qualification under USERRA due to his uniformed service, those rights are enforceable against his employer, Southern, or against prospective employers, in the case of discrimination. The NRC is not Mr. Hawes' employer under USERRA and, therefore, he cannot invoke USERRA's protections against NRC.

CONCLUSION

SCRA does not appear to provide any rights upon which Mr. Hawes may base his claim, as it primarily concerns economic rights not at issue here. USERRA does provide rights of re-employment which could entitle a claimant to a make-up promotional or qualifying exam or other special considerations regarding such an exam, but such protections may only be invoked against one's employer. Because the NRC is not Mr. Hawes' employer under USERRA, Mr. Hawes cannot invoke rights under USERRA against the NRC. Therefore, these statutes and related rules do not provide Mr. Hawes with a basis for his claim that NRC improperly required him to retake the written portion of the RO exam, and do not affect this proceeding.

Respectfully submitted,

/RA/

Susan L. Uttal
Counsel for NRC staff

Dated at Rockville, Maryland
this 21st day of September, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF BRIEF CONCERNING VETERAN'S RIGHTS" in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, or, as indicated by asterisk, by deposit in the U.S. Postal Service, with copies by electronic mail, or, as indicated by a double asterisk, by deposit in the NRC's internal mail system, this 21ST day of September, 2005:

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