

September 15, 1997

The Honorable Wayne G. Carvalho  
Police Chief  
County of Hawaii  
349 Kapiolani Street  
Hilo, Hawaii 96720-3998

Dear Chief Carvalho:

Re: Military Active Duty Training

By your April 25, 1997 letter, you requested our advice on your concerns regarding military active duty training. According to the information provided by your office, orders dated January 15, 1997 ordered a police officer in your department to active duty for training (ADT) from March 20, 1997, through August 18, 1997. The police officer was ordered to attend the Infantry Officer Advanced Course, which appears to be a requirement for him to retain his eligibility as a captain in the Hawaii Army National Guard and to be considered for promotion to major. You stated that the police officer "voluntarily requested to attend the Infantry Officer Advanced Course to promote his military professional development and career, to retain his rank as Captain, and to be considered for promotion to the rank of Major in the Guard." Consequently, the issued orders to attend the Infantry Officer Advanced Course were the result of the police officer's request.

Finally, you stated in your letter that the Hawaii County Department of Civil Service initially believed that the County was obligated to comply with the provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L No. 103-353, 108 Stat. 3149, most of which is codified in 38 U.S.C. §§ 4301 - 4333 ("USERRA" or "the Act"). However, the County is "not convinced, after a review of the facts that the intent and purposes of the ACT apply in this unique situation." As a result of the County's new position regarding the application of USERRA to the police officer, you requested a legal opinion regarding the issues addressed hereinbelow. ([top](#))

#### ISSUES PRESENTED AND BRIEF ANSWERS

1. Whether the Hawaii Police Department could lawfully refuse a request by an employee to voluntarily attend active duty training in the uniformed services. Pursuant to 38 U.S.C. § 4303(13), "service in the uniformed services' means the performance of duty on a voluntary or involuntary basis" (emphasis added) and "includes active duty, active duty for training, initial active duty for training, inactive duty training, [and] full-time National Guard duty." Whether the training is voluntary or involuntary is irrelevant for purposes of USERRA.
2. Whether the Hawaii Police Department could have denied an employee's request for service in the uniformed services if it could sufficiently justify the action pursuant to the undue hardship provisions of 38 U.S.C. §§ 4303(15) and 4312. The Hawaii Police Department could not have denied the employee's request based on the undue hardship exemption. The undue hardship exemption applies to the reemployment of an employee returning and seeking reemployment following service in the uniformed service and is limited to three unique circumstances that must be addressed on a case-by-case basis by the employer who, in any case where undue hardship is raised, has the "burden of proving the impossibility or unreasonableness, [or] undue hardship." 38 U.S.C. § 4312(d)(2). Accordingly, the answer to this question has both a legal and factual component. With respect to the legal component, such a request could be denied by an employer claiming undue hardship if the limited circumstances justifying such a claim were met. With respect to the facts and how they apply to the law, this office is not in a position to address this issue as it applies to the specific circumstances raised in your letter. Therefore, your office should contact your legal counsel. ([top](#))

3. Whether the Hawaii Police Department is required to return an employee to the employee's original position or can it reassign the employee to another unit or a reduced classification upon the employee's return. Pursuant to 38 U.S.C. § 4311(a), an employee "shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of [the employee's] membership [in a uniformed service], application for membership, performance of service, application for service, or obligation." Additionally, 38 U.S.C. § 4311(c) provides that an employer shall be considered to have engaged in actions prohibited under 38 U.S.C. § 4311(a) if the employee's "membership [in a uniformed service], application for membership, service, application for service, or obligation for service . . . is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." Accordingly, as stated in the preceding question, the answer to this question has both a legal and a factual component. With respect to the legal component, an employer is precluded from denying certain benefits to an employee by reason of the employee's membership in a uniformed service. With respect to the facts and how they apply to the law, since 38 U.S.C. § 4311 places the burden upon the employer to "prove that the action would have been taken in the absence" of any service in the uniformed services, this office is not in a position to address this issue on behalf of the Hawaii Police Department. Therefore, your office should contact your legal counsel. ([top](#))

## DISCUSSION

1. The Hawaii Police Department Cannot Lawfully Refuse a Request by an Employee for Military Leave on the Basis that an Employee Volunteered for Such Service.

USERRA was enacted for the specific purpose of protecting the employment opportunities, rights, and benefits of those serving in the uniformed services. The purposes of USERRA, as set forth in 38 U.S.C. § 4301(a), are:

- (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
- (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
- (3) to prohibit discrimination against persons because of their service in the uniformed services.

With the exception of any federal or state law that provides more benefits to an employee, USERRA supersedes all federal and state laws (including local ordinances), as well as contracts, agreements, policies, plans, or practices. Specifically, 38 U.S.C. § 4302(b) provides: ([top](#))

- (a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

Therefore, USERRA is the controlling law for resolution of the issues presented regarding military active duty training. ([top](#))

Based on your April 25, 1997 request, your concern is founded upon the idea that the police officer volunteered to attend ADT rather than serving involuntarily. You clearly stated in your letter that you were "concerned with possible future requests of these 'voluntary' military leaves of absences as opposed to the involuntary 'call ups' and other generally accepted, and more traditional summer encampments."

Based upon our review of USERRA, we believe that it is clear that service means both volunteer as well as involuntary duty. Pursuant to 38 U.S.C. § 4303(13), "service in the uniformed services' means the performance of duty on a voluntary or involuntary basis" (emphasis added) and "includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty." ([top](#))

Finally, in this case, it appears that the ADT was a requirement for the police officer to retain his current rank. Just as your police officers are required to participate in regular ongoing training, the members of the National Guard are required to engage in regular ongoing training. However, to serve as an officer in the National Guard, additional training is required, at the risk of losing rank. Accordingly, officers in the National Guard are expected to maintain their minimum qualifications which often include participation in ADT if they want to maintain their rank. While ADT may constitute voluntary duty, which is clearly covered by USERRA, it is required if the officer desires to retain the officer's present rank and achieve promotion to a higher rank.

For purposes of responding to your specific question, whether duty or ADT is voluntary or involuntary is irrelevant as USERRA clearly contemplates such duty and brings all members of the National Guard under the protections of USERRA. ([top](#))

State law similarly protects all members of the Hawaii National Guard from adverse actions by employers when a member is ordered to service or training. Pursuant to section 121-30, Hawaii Revised Statutes, "[t]he governor or the governor's designated representative also may order the national guard into active service in nonemergency situations for duty and training in addition to the drill and instruction required by section 121-28." Pursuant to section 79-21, Hawaii Revised Statutes:

Every officer and employee of the State and the several counties who is a member of the national guard, air national guard, naval militia, organized reserves, including the officers' reserve corps, and the enlisted reserve corps, shall be entitled to absent oneself from one's duties or service while engaged in the performance of ordered military or naval duty and while going to and returning from such duty. ([top](#))

No officer or employee shall be subjected by any person, directly or indirectly, by reason of the absence to any loss or diminution of vacation or holiday privileges or be prejudiced by reason of the absence with reference to promotion or continuance in office, employment, reappointment to office, or reemployment.

Clearly there is no distinction between voluntary or involuntary service. Rather, the protections of section 79-21 apply to any member of the Hawaii National Guard ordered into service. ([top](#))

It should also be pointed out that pursuant to section 121-28, Hawaii Revised Statutes, failure of a member of the Hawaii National Guard to "participate in assemblies for drill and instruction at any designated armory or rendezvous, encampments, maneuvers, or other exercise" is subject to court-martial.

Therefore, pursuant to USERRA, as well as state law, it appears that the Hawaii Police Department is precluded from refusing a request by an employee for military leave if the employee has been so ordered to duty. ([top](#))

2. An Employer's Right to Deny a Request for Service Based on Undue Hardship is Limited and

Contained in the Uniformed Services Employment and Reemployment Rights Act.

In your April 25, 1997, letter, you requested an opinion clarifying whether you could have denied the police officer's request for leave for ADT "if we had sufficiently justified undue hardship under the [Act]."

"Undue hardship" is defined in 38 U.S.C. § 4303(15), which states: ([top](#))

(15) The term "undue hardship", in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer. ([top](#))

The reemployment rights of employees and employers, as contained in 38 U.S.C. § 4312, are defined in part as follows:

(d)(1) An employer is not required to reemploy a person under this chapter if

(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;

(B) in the case of a person entitled to reemployment under subsection (a), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or

(C) the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period. ([top](#))

An employer may deny reemployment if one of the three circumstances of 38 U.S.C. § 4312(d)(1) is applicable. The information provided to us does not indicate that the Hawaii Police Department is claiming that the circumstances of the Department have "so changed as to make such reemployment impossible or unreasonable." Likewise, it does not appear that the "federally funded Community Policing Officer (PO III) position" is "a brief, nonrecurrent period" with "no reasonable expectation that such employment will continue indefinitely or for a significant period."

It should be noted that the provisions of 38 U.S.C. § 4312(d)(1)(B) require that any claim of undue hardship on the employer is not broad sweeping, but limited to three very specific circumstances. Firstly, 38 U.S.C. § 4313(a)(3), applies only to those individuals who have incurred or aggravated a disability during a period of service and who are not qualified for the position despite reasonable efforts by the employer to accommodate the disability. Secondly, 38 U.S.C. § 4313(a)(4), applies only to those individuals who are not qualified in the position in which they would have been, or were, employed, or who cannot become qualified with reasonable efforts by the employer in any other position that is the nearest approximation to the position the employee would have been, or was, employed. Thirdly, 38 U.S.C. § 4313(b)(2)(B), applies also to those with a disability incurred in, or aggravated during, a period of service. The information provided to us does not indicate that the police officer fits any of the three exceptions for the undue hardship provisions. ([top](#))

The answer to your specific question whether the Hawaii Police Department could have denied the police officer's request if it had "sufficiently justified undue hardship" pursuant to 38 U.S.C. § 4312(d)(1)(B) is no. The undue hardship exemption applies to reemployment. However, the answer to your question as it may apply to the reemployment of the police officer has both a legal and a factual component. With respect to the legal component, reemployment of a police officer making such a request could be denied by an employer claiming undue hardship if the limited circumstances justifying such a claim were met. However, pursuant to 38 U.S.C. § 4312(d)(2), the Hawaii Police Department would have the burden of proving the undue hardship of any accommodation, training or efforts to accommodate the disability. Accordingly, with respect to the facts and how they apply to the law, since this burden is upon the employer, the specific answer to your question regarding whether the Hawaii Police Department could have denied reemployment of the police officer if it could sufficiently justify the action pursuant to the undue hardship provisions of 38 U.S.C. §§ 4303(15) and 4312 can only be answered by your office. Therefore, since we are not in a position to address this issue as it applies to the specific circumstances raised in your letter, your office should contact your legal counsel. ([top](#))

### 3. An Employer Is Precluded From Discriminating in Employment Against an Employee by Reason of the Employee's Service in a Uniformed Service.

You have asked whether the Hawaii Police Department is required to return the police officer "to his original PO III position" or whether he can "be reassigned in another unit as a Police Officer II position (PO-II) upon his return to the Department?"

"Benefit," "benefit of employment," and "rights and benefits" are defined in 38 U.S.C. § 4303(2) as:

[A]ny advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment. ([top](#))

Pursuant to 38 U.S.C. § 4311(a), an employee "shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of [the employee's] membership [in a uniformed service], application for membership, performance of service, application for service, or obligation."

Additionally, 38 U.S.C. § 4311(b) provides that an employer shall be considered to have denied the rights afforded by 38 U.S.C. § 4311(a), if the employee's "membership [in a uniformed service], application for membership, service, application for service, or obligation for service . . . is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, performance of service, application for service, or obligation." ([top](#))

It should be noted that the Veterans Reemployment Rights Act, codified at 38 U.S.C. §§ 2021-2027 as amended, which is the predecessor to the current USERRA:

was enacted for the significant but limited purpose of protecting the employeereservist against discriminations like discharge and demotion motivated solely by reserve status. Congress wished to provide protection to reservists comparable to that already protecting the regular veteran from "discharge without cause"to insure that employers would not penalize or rid themselves of returning reservists after a mere pro forma compliance with [another section of the Act requiring employers to grant reservist-employees a leave of absence in order to train].

Novak v. Mackintosh, 919 F. Supp. 870, 875 (D.S.D. 1996).

If an employee is "denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment" by reason of that employee's service in the uniformed service, the employer is considered to have engaged in prohibited actions unless it can show that it would have taken the same action in the absence of the employee's service in the uniformed service. Accordingly, with respect to the legal component of your question, an employer is precluded from denying certain benefits to an employee by reason of the employee's membership in a uniformed service. With respect to the facts and how they apply to the law, since 38 U.S.C. § 4311 places the burden upon the employer to "prove that the action would have been taken in the absence" of any service in the uniformed services, we are not in a position to address this issue on behalf of the Hawaii Police Department. Therefore, your office should contact your legal counsel. ([top](#))

#### CONCLUSION

Based solely on the facts presented in your April 25, 1997, letter, it does not appear that you have sufficient justification for adverse action against the police officer.

Very truly yours,

Larry L. Zenker  
Deputy Attorney General

APPROVED:

Margery S. Bronster

Attorney General

LLZ:

c: Major General Edward V. Richardson  
Lieutenant Colonel Claude T. Ishida

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