

NUMBER 9, March 1999 (updated March 2003): Pension Rights Continued

By Capt. Samuel F. Wright, USNR
Judge Advocate General Corps

Q : I read with interest Law Review No. 4 [in the July 1998 issue of The Officer], concerning the right of the returning veteran to be treated as if he or she had been continuously employed, for purposes of civilian pension entitlements. I served on active duty, the first time, from 1965 to 1969, then left active duty and affiliated with the Army Reserve. While a Reservist, I was employed as a teacher for a local school district in New Jersey. I left my teaching job to re-enter active duty in 1973. Originally, I intended to leave active duty after four years and return to my teaching job, but I remained on active duty continuously until 1991, when I retired with 20 years of active duty. I returned to teaching, at the same school, in September 1991. I am now contemplating retirement from teaching. The way I read Law Review No. 4, I am entitled to civilian retirement credit for five of the 16 years of active duty that I performed after leaving my teaching job in 1973. Am I reading correctly? [Name withheld on request.]

A :No. In the first place, your 1975-91 active duty was completed before the Uniformed Services Employment and Reemployment Rights Act (USERRA) was enacted in 1994, so your rights are governed by the Veterans' Reemployment Rights (VRR) law, which USERRA replaced. Under the VRR law, the service limitation was four years; it is five years under USERRA. More importantly, under either the VRR law or USERRA, you are entitled to be treated as if you had been continuously employed, for pension and other seniority purposes, if and only if you meet all five of the eligibility criteria for re-employment. Issues 5-7 covered those eligibility criteria in some detail, and Issue 6 covered the service limitation.

You were not entitled to re-employment when you left active duty in 1991, because your period of active duty, after leaving your teaching job, was far in excess of the four-year service limitation. Because the school district was not required to re-employ you, it was not required to treat you as if you had been continuously employed, for pension and other seniority purposes.

Q: I am a commander in the Naval *Reserve. I am about to be re-called to active duty (voluntarily) for several years, to teach at the Naval Academy. The civilian job I am leaving has both a defined benefit plan (DBP), and a 401(k) plan, which would qualify as a defined contribution plan (DCP). Under the 401(k) plan, the employer matches employee contributions at the rate of 50 cents to the dollar, and the employee (like myself) is permitted to contribute up to 6 percent of his or her salary. I want to continue making these contributions, and to continue receiving the employer's matching contributions, while I am on active duty. Am I entitled to this? [Name withheld on request.]

A No. The employer is not required to make contributions, and the plan administrator is not required to accept contributions from you, while you are on active duty, because you cannot meet USERRNs eligibility criteria until you are released from active duty under honorable conditions and make a timely application for re-employment. Until that time, neither the employer, nor the pension plan administrator, nor you can know for certain that you will meet all the eligibility criteria. Several contingencies could arise that would prevent you from meeting the criteria. You could remain on active duty too long, like the officer in the question above. You could receive an "other-than-honorable" discharge. You could wait too long to apply for re-employment, or you could choose to take another job with a different employer, to name just a few of the possibilities.

If and when you meet the eligibility criteria, you will have the opportunity to make up the employee contributions, and to receive the employer matches. The 6 percent computation will then be made based upon what you would have earned at your civilian job if you had been continuously employed, not what you did earn as a commander on active duty. Thus, you will be treated as if you had been continuously employed, except that you may lose out on the interest and appreciation that these employer and employee contributions would have earned during your active-duty time, and you may also miss out on the "forfeiture distributions" that occurred during your absence from the job. All of this is discussed in detail in Topic 4.

Note: If your employer is giving you a hard time about time away from work for Reserve component training or service, or if you believe that your employer has denied you a benefit to which you believe yourself entitled under USERRA, I suggest that you contact the National Committee for Employer Support of the Guard and Reserve (NCESGR) at 1-800-336-4590. You may also wish to visit NCESGR's Web site at www.esgr.com.