LAW REVIEW 1022

USERRA Applies in Determining Career Overtime Average for Pension Purposes

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Q: I have been a city police officer since 1985, and I expect to retire later this year, with 25 years of police service. I am an Army Reserve officer and life member of ROA. My police department career has been interrupted by short and long periods of military training and duty, including weekend drills, annual training, and call-ups for Operation Desert Storm (1991), Operation Joint Guard (1998), and Operation Iraqi Freedom (2003-04 and 2006-07).

The police department has a defined benefit pension plan, together with the city's fire department. Am I entitled to have these times, when my civilian career was interrupted by military service, computed into the time when I am eligible to retire and the amount of my monthly pension check?

A: Yes, under the Uniformed Services Employment and Reemployment Rights Act (USERRA). In computing your eligibility to retire and the amount of your pension entitlement, you must be treated *as if you had been continuously employed* during each of these interruptions, provided you met the USERRA eligibility criteria for reemployment after each interruption. Those criteria are:

1. You must have left a position of civilian employment for the purpose of performing voluntary or involuntary service in the uniformed services.
2. You must have given the employer prior oral or written notice.
3. Your cumulative period or periods of uniformed service, relating to that employer, must not have exceeded five years. All involuntary service and some voluntary service are exempted from the computation of the five-year limit. Please see Law Review 201 for a definitive discussion of what counts and what does not count.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. You must have reported back to work in a timely manner or have made a timely application for reemployment.

After a period of less than 31 days of service (like a drill weekend or a two-week annual training period), you are required to report for work at the start of the first full regularly schedule work period on the first day after the completion of the period of service, the time required for safe transportation from the place of service to your residence, plus eight hours (for rest). *See* 38 U.S.C. 4312(e)(1)(A). After a period of 31-180 days of service, you are required to apply for reemployment within 14 days after release from the period of service. *See* 38 U.S.C. 4312(e)(1)(C). After a period of 181 days or more of service, you have 90 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D). For purposes of this article, I am assuming that you met these criteria for each military interruption, including drill weekends.

"Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section." Title 38, United States Code, section 4318(a)(1)(A) [38 U.S.C. 4318(a)(1)(A)].

"A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services." 38 U.S.C. 4318(a)(2)(A).

"Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits *and for the purpose of determining the accrual of benefits under the plan."* 38 U.S.C. 4318(a)(2)(B) (emphasis supplied).

Q: For decades, the city has based the determination of the individual police officer's or firefighter's pension on the individual's high compensation year (including overtime) during the individual's last five years before retirement. Under this system, the individual has a powerful incentive to work as much overtime as possible during the last year of employment. The city recently changed the system. Under the new system, the computation of the individual's pension is based on the individual's Career Overtime Average (COTA).

In anticipation of my impending retirement, I asked the city's personnel department to compute my COTA. The personnel department added up all the overtime hours that I have worked, in my entire career, including a reasonable projection of those that I will work between now and my retirement, and then divided by 25 (for 25 years of service). I think that I have been gypped. In several of these 25 years, I worked no or very little overtime—I was away from work for military service for most or all of the year. In computing my COTA, am I entitled to include an estimate of overtime hours that I would have worked but for my military service?

A: Yes, under 38 U.S.C. 4318(b)(3). "For purposes of computing an employer's liability under paragraph (1) [38 U.S.C. 4318(b)(1)] …, the employee's compensation during the period of service shall be computed –(A) at the rate the employee *would have received* but for the period of service described in subsection (a)(2)(B)." 38 U.S.C. 4318(b)(3)(A) (emphasis supplied).

Thus, the city is required to compute a reasonable estimate of the number of hours of overtime that you would have worked during each of the military interruptions of your police department career. This should include drill weekends when you had the opportunity to work overtime but found it necessary to refuse overtime, in order to report for your military drills.

Q: Until recently, the computation of an individual's pension was based on the overtime that he or she worked during the most lucrative year, which was usually the last year before retirement. Thus, neither the individual nor the city had a reason to keep the kind of detailed records that are necessary to make the computation you refer to above. What happens if no reasonable estimate can be made?

A: If the number of hours of overtime that you would have worked during your 1998 period of service for Operation Joint Guard cannot be reasonably estimated, the city must compute your overtime for that period based on your overtime hours during the last 12 months of city employment before that period of service. 38 U.S.C. 4318(b)(3)(B).

You probably know young police officers and firefighters who are members of the National Guard or Reserve. Advise them, going forward, to keep detailed records of each time he or she finds it necessary to refuse an overtime opportunity because of military training or service.

Even for 1998, it should be possible to come up with a reasonable estimate of the number of hours of overtime that you would have worked. How many overtime hours did you work in 1997? In 1999? Also, look to other police officers of your approximate seniority level in 1998, and in your police department unit or organization. How many overtime hours did they work in 1998?

Q: The city attorney said that these federal law requirements do not apply because the city's pension plan is not governed by ERISA. What is ERISA? Is the city attorney correct?

A: ERISA is the Employee Retirement Income Security Act, a federal law enacted in 1974. ERISA governs private sector pension plans, but USERRA applies to pension plans in both the private sector and the public sector. Section 4318 of USERRA applies to "a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) *or a right provided under any Federal or State law governing pension benefits for governmental employees*." 38 U.S.C. 4318(a)(1)(A) (emphasis supplied).

The reemployment statute has applied to the Federal Government and to private employers since 1940. In 1974, Congress amended the law to make it apply to state and local governments as well. The constitutionality of applying the reemployment statute to the states and their political subdivisions has been upheld. *See Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979).

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.