

LAW REVIEW 1090

Federal Civilian Retirement Credit for Military Service

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.3.2.3—Pension Credit for Service Time

Q: I am a Lieutenant Commander in the Coast Guard Reserve and a member of ROA. I graduated from the Coast Guard Academy and was commissioned an Ensign in 1998, and I then served on active duty for five years. I left active duty in 2003 and affiliated with the Coast Guard Reserve.

Shortly after I left active duty, I applied for and was hired as a federal civilian employee. I purchased federal civilian employee retirement credit for the five years of active duty. I was required to pay 3% of my Coast Guard base pay, for those five years, to get this credit.

I was recently recalled to active duty for a year, and I am deployed to the theater of operations in Southwest Asia. After I am released from active duty and return to my civilian job in a few months, I want to get federal civilian retirement credit for this additional year of active duty.

I have heard a report that because I am serving in-theater this time I can get federal civilian employee retirement credit for this year of active duty without having to pay 3% of my Coast Guard base salary. Is that report correct?

This is confusing. Every time I talk to a lawyer or personnel official, I get a different answer. Please explain how this all works.

A: You will be entitled, upon returning to your civilian job, to federal civilian pension credit for this current year of active duty, and you will not be required to pay 3% of your Coast Guard base pay to purchase this credit. But this has nothing to do with your service in-theater. The same rules would apply if you were serving on active duty at the "Buzzards Point" headquarters of the Coast Guard, here in our nation's capital.

If you meet the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA), you will be entitled to prompt reemployment in the civilian job that you would have attained if you had been continuously employed (usually but not always the job you left). Moreover, upon reemployment you will be entitled to the seniority and pension credit that you would have received in the civilian job if your federal civilian career had not been interrupted by this period of uniformed service.

USERRA applies to the Federal Government, state and local governments, and private employers, regardless of size. USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b).

As I explained in Law Review 0766 and other articles, you must meet five eligibility criteria to have the right to reemployment under USERRA:

- You must have left a civilian position of employment for the purpose of performing voluntary or involuntary uniformed service, INCONUS or OCONUS. It is clear that you meet this criterion.
- You must have given the employer prior oral or written notice. I shall assume that you gave such notice.
- Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. Your 1998-2003 active duty period does not count toward your limit, because it was before you began your federal civilian career. Your current year of active duty does not count because it is involuntary—you were mobilized. Please see Law Review 201 for a definitive explanation of the five-year limit.
- You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. You will meet this criterion unless you do something incredibly stupid.
- You must have made a timely application for reemployment with the pre-service civilian employer, after release from the period of service. After a period of more than 180 days of continuous service,

you have 90 days to apply for reemployment. Shorter deadlines apply after shorter periods of service.

You clearly meet the first two criteria, and you have it in your power to meet the other three. I suggest that you carefully document that you meet these five requirements. It is important to dot the is and cross the ts.

After you meet the five criteria and return to work in the civilian job, you will need to make up the missed employee pension contributions. You don't need to make them up immediately, and you can use pre-tax dollars, out of your federal civilian salary after returning to work, through payroll withholding.

Computing the missed employee contributions will be based on what you would have paid if you had remained in the civilian job instead of going on active duty. Computing what you would have paid is not complicated. We just need to look at what you were paying in before you were called to the colors and what your colleagues at the civilian job pay in during the time that you were away from work for service. Your earnings from the Coast Guard during the year of active duty are not relevant for purposes of this determination.

It should be emphasized that your current year of active duty is fundamentally different from your 1998-2003 service. Your current active duty interrupted your federal civilian career. Your 1998-2003 service was before you began your federal civilian career. USERRA applies to your current active duty period but not to your 1998-2003 service. Your 1998-2003 service was governed by 37 U.S.C. 204, and that is the source of the requirement that you pay 3% of your Coast Guard base pay in order to get civilian retirement credit for the 1998-2003 service.

When you began your federal civilian career in 2003, you were required to pay 3% of your 1998-2003 Coast Guard base pay, to purchase federal civilian retirement credit for that five-year period, because USERRA did not apply to that service. The rules that applied to your 1998-2003 service do not apply to your current period of service.

Q: After I began my federal civilian job in 2003, I was covered by the Federal Employee Retirement System (FERS). I pay, through withholding from my federal salary, 1% of my salary for the "FERS automatic contribution" and I also make contributions to the Thrift Savings Plan (TSP) and receive employer matches and tax benefits for these contributions. After I return to work in my civilian job, will I have the opportunity to make up both the 1% automatic contribution and the TSP contributions?

A: Yes. As to the TSP make-up contributions, the TSP Administrator will determine how long you will be given to make up those contributions. The make-up period will be between two times and four times your period of service, but not more than five years. You will make these make-up contributions, along with your ongoing contributions, out of pre-tax dollars, through withholding from your federal civilian salary.

Q: There is a separate TSP plan for military personnel on active duty. As a reservist recalled to active duty for a year, am I eligible to participate in the military TSP? Is it to my advantage to do so? If I participate in the military TSP while on active duty, what effect will that have on my opportunity to do make-up TSP civilian contributions after I leave active duty and return to work?

A: As a reservist on active duty, you are eligible to participate in the military TSP, just like a regular on active duty long term. You should consider carefully the opportunity to participate in the military TSP while you are on active duty, as this is likely to be in your best interest.

You cannot make contributions to the military TSP and the civilian TSP for the same period of time. But making the military contributions now may be worth more than the likely but not certain opportunity to make up these contributions later, after you return to your civilian job. I am referring to the "bird in hand is worth two in the bush" theory. It is unlikely but not inconceivable that you may not return to your civilian job, for any of several reasons, to include death or serious injury.

There is another consideration. The stock market has gone up recently and may continue rising—I do not claim the gift of prophecy. If you believe that the market will rise significantly, you will want to get your money and the employer matches into your TSP account sooner rather than later, in order to take advantage of a rising market.

Q: The HR specialists at my federal agency, back in Washington, seem hopelessly confused about USERRA and about my rights with regard to FERS and TSP. Each time I speak to them on the telephone or exchange e-mails with them, I get a different answer. What can be done to educate these folks?

A: I hear this complaint all the time. It has been almost four decades since Congress abolished the draft in 1973. Most of the folks that we deal with in government and in business and academia have never served in the military. No one in their families has served, and they have no close friends in the armed forces. They are clueless with regard to military matters.

In the Veterans' Benefits Improvement Act of 2008, Congress enacted a new final section of USERRA, as follows:

§ 4335. Training for Federal executive agency human resources personnel on employment and reemployment rights and limitations

(a) Training Required.— The head of each Federal executive agency shall provide training for the human resources personnel of such agency on the following:

- (1) The rights, benefits, and obligations of members of the uniformed services under this chapter.
- (2) The application and administration of the requirements of this chapter by such agency with respect to such members.

(b) Consultation.— The training provided under subsection (a) shall be developed and provided in consultation with the Director of the Office of Personnel Management.

(c) Frequency.— The training under subsection (a) shall be provided with such frequency as the human resources personnel of Federal executive agencies are kept fully and currently informed of the matters covered by the training.

(d) Human Resources Personnel Defined.— In this section, the term "human resources personnel", in the case of a Federal executive agency, means any personnel of the agency who are authorized to recommend, take, or approve any personnel action that is subject to the requirements of this chapter with respect to employees of the agency.

38 U.S.C. 4335.

Section 4335 was enacted more than two years ago, but I see no evidence that federal agencies have complied with this requirement to train human resources personnel on USERRA.

ROA established the Law Review Library in 1997 and the Service Members Law Center in 2009 in order to educate service members, employers, and others about USERRA and other laws that are particularly pertinent to those who serve our nation in uniform. Please go to www.roa.org/law_review. You will find more than 750 articles about USERRA and other laws. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

I invite your attention specifically to Law Review 0757 (October 2007), by Major (now Lieutenant Colonel) Mathew B. Tully, a life member of ROA who is the founding partner of Tully Rinckey PLLC of Albany, New York and Washington, DC. His article is a primer on the relationship between military service and the federal civilian employee retirement system.