

Law Review 1294

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Who Gets To Decide that a Period of Service Is Exempt from the Five-Year Limit under USERRA?

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

1.3.1.2—Character and Duration of Service

Q: I am a member of the Air National Guard. In October 2006, I left my civilian job as a local police officer to perform voluntary active duty, and I have been on full-time military duty ever since. I will be leaving active duty at the end of the current fiscal year, on September 30, 2012. I plan to apply for reemployment with the police department immediately thereafter, but the police chief has told me in no uncertain terms that my job has been filled, that I am not welcome back, and that he believes that I will not have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The issue is the five-year limit.

I have read your Law Review 201 and many other articles. I acknowledge that I have been away from my civilian job for almost six years and that most of this period counts toward the five-year limit set forth in section 4312(c) of USERRA, 38 U.S.C. 4312(c). I have sent you a copy of my military order dated August 21, 2009, issued by the Air National Guard headquarters here in my state. Numbered paragraph 28 of that order provides: “The period of service under these orders is exempt from the five-year limit as provided in 38 USC 4312(c)(4)(B).” Do you think that I will have the right to reemployment when I leave active duty and apply for reemployment at the police department next week?

A: Yes, but it would be prudent to get the Air National Guard headquarters in your state to dot the Is and cross the Ts in order to remove all doubt as to your right to reemployment.

As I explained in Law Review 1281 and other articles, [\[1\]](#) you must meet five conditions to have the right to reemployment under USERRA:

1. You must have left a civilian position of employment (federal, state, local or private sector) for the purpose of performing 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 your employer relationship with this police department, must not have exceeded five years.
4. You have been released from the period of service without having received a punitive or other-than-honorable discharge that will disqualify you under section 4304 of USERRA, 38 U.S.C. 4304.
5. You must have made a timely application for reemployment with your pre-service employer after release from the period of service.

For purposes of this article, I will assume that you meet conditions a and b and that you will meet d and e next week, when you are released from active duty on September 30. I will also assume that the duty that you have performed since October 2006 counts toward your five-year limit, with the possible exception of the one year of service under the order dated August 21, 2009. If this year of service (from August 24, 2009 to August 23, 2010) counts toward your five-year limit, then you are almost a year over your five-year limit. If that year is exempt, you are just short of the five-year limit. Thus, your right to reemployment at the police department all comes down to the question of whether that year of service is exempt or not exempt from the limit.

Section 4312(c) of USERRA sets forth the five-year limit and the exemptions—the kinds of service that do not count toward an individual’s limit. Here is the entire text of that subsection:

“(c) Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person’s cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section [10147](#) of title [10](#), under section [502\(a\)](#) or [503](#) of title [32](#), or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is—

(A) ordered to or retained on active duty under section [688](#), [12301\(a\)](#), [12301\(g\)](#), [12302](#), [12304](#), or [12305](#) of title [10](#) or under section [331](#), [332](#), [359](#), [360](#), [367](#), or [712](#) of title [14](#);

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section [12304](#) of title [10](#);

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter [15](#) of title [10](#) or under section [12406](#) of title [10](#); or

(F) ordered to full-time National Guard duty (other than for training) under section [502\(f\)\(2\)\(A\)](#) of title [32](#) when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.”

38 U.S.C. 4312(c).

Your order cites section 4312(c)(4)(B) as authority for the proposition that the year of service to be performed under that order is exempt from the computation of your five-year limit. That subsection exempts from the limit service performed by a member of a uniformed service who has been “ordered to or retained on active duty (other than for training) under any provision of law *because of* a war or national emergency declared by the President or Congress, *as determined by the Secretary concerned.*” 38 U.S.C. 4312(c)(4)(B) (emphasis supplied).

The term “Secretary concerned” is not defined in USERRA, but it is defined in section 101(a)(9) of title 10 of the United States Code. This refers to the Service Secretary, like the Secretary of the Air Force for the Air Force (which includes the Air Force Reserve and the Air National Guard). The authority to make determinations with respect to exempting periods of service from USERRA’s five-year limit is normally delegated by the Secretary of the Air Force to the Assistant Secretary for Manpower & Reserve Affairs.[\[2\]](#)

On October 25, 2011, the Honorable Daniel B. Ginsberg (Assistant Secretary of the Air Force for Manpower and Reserve Affairs) published a memorandum addressed to the Chief of Staff of the Air Force, the Director of the Air

National Guard, and the Chief of Air Force Reserve. The memorandum relates to the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In the second paragraph of his memorandum, Assistant Secretary Ginsberg made clear that he was “acting on behalf of the Secretary of the Air Force.”

In his memorandum, Assistant Secretary Ginsberg wrote:

“I categorically approve the following exemptions from the five-year limit:

1. Periods of service performed by an ARC [Air Reserve Command] member ordered to or retained on active duty under 10 U.S.C. 12301(d) on or after September 14, 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Acts, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations.
2. Periods of service performed by a member of the Regular Air Force retained on active duty under 10 U.S.C. 12305 or other provisions of law on or after September 14, 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Acts, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations.
3. Periods of service performed by an ARC member for the purpose of fulfilling training requirements necessary for professional development through in-residence Developmental Education (DE).”

In his memorandum, Assistant Secretary Ginsberg stressed that for exemptions under section 4312(c)(4)(B), the basis for the order must be linked to the war or national emergency. In a footnote he wrote: “Linkage to the National Emergency may be shown by one or more [of] various ‘indicia’ including citation to Presidential Proclamation 7463 or to Executive Order 13223 or to a named operational mission associated with the National Emergency or to funding sources that support named operations or missions associated with the National Emergency. In most cases, members ordered to duty under 10 U.S.C. 12301(d) but serving under 10 U.S.C. 12310 (AGR duty), 10 U.S.C. 10211, or 10 U.S.C. 12402 will not fit this criteria.”

Assistant Secretary Ginsberg directed that the following statement be included in the service member’s orders: “The period of service under these orders is exempt from the five-year limit as provided in 38 U.S.C. 4312(c)(4)(B).” If the statement should have been but was not included in the member’s orders, the statement is to be included in the member’s DD-214 and personnel file. The member can probably rely on such a statement. USERRA gives the Service Secretary the authority to make such determinations, and those determinations are probably not subject to judicial review, although USERRA does not explicitly preclude judicial review of such determinations.

Thus, I think that you are on reasonably strong ground that your year of service under the order dated August 21, 2009 does not count toward your five-year limit with respect to the police department. Because so much depends upon that year being exempt, I think that it would have been prudent for the Air National Guard headquarters in your state to have cited Secretary Ginsberg’s memorandum^[3] and have explained how it determined that your service met the “because of a war or national emergency” criterion, under the rules set forth in that memorandum.

We have reason to believe that the local police chief will not reemploy you willingly and will likely fight you tooth and nail about your USERRA rights. Thus, it would be prudent to dot all the Is and cross all the Ts. I understand that there are several score of air National Guard members, in your state alone, who are affected by this issue.

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 794 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

[2] Similarly, the Secretary of the Navy normally delegates this authority to the Assistant Secretary of the Navy for Manpower & Reserve Affairs, with respect to members of the Navy Reserve and Marine Corps Reserve, and the Secretary of the Army normally delegates this authority to the Assistant Secretary of the Army for Manpower & Reserve Affairs, with respect to the Army Reserve and the Army National Guard.

[3] Yes, I recognize that the Ginsberg Memorandum is dated September 2011, more than two years after the order in question. The Ginsberg Memorandum replaces a similar memorandum signed by the Assistant Secretary of the Air Force for Manpower & Reserve Affairs in December 2001. That memorandum should have been cited in your order.