

May 2013

### **Federal Thrift Savings Plan and USERRA**

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

#### **1.3.2.3—Pension credit for service time**

**Q: I am a Major in the Army Reserve and a member of ROA. I have worked for the Federal Government, as a civilian, since 1998. My federal civilian retirement plan is called FERS—Federal Employee Retirement System. I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>1</sup>**

**I am wondering how USERRA applies to me with respect to my retirement benefits under FERS. I recently returned to work after a one-year involuntary call to active duty. I was on active duty from April 1, 2012 to March 31, 2013, and I returned to my civilian federal job in late April 2013.**

**The principal component of FERS is the Thrift Savings Plan (TSP). Money is withheld from my federal civilian salary, pre-tax, and contributed to my TSP account, and the federal agency matches my contributions. The money in my account is invested, along with tens of thousands of other federal employees’ accounts, in diversified safe investments, and there was a significant run-up in the stock market and in the TSP investments during the year that I was on active duty.**

**I have read in your articles that under USERRA’s “escalator principle” I am entitled to be treated *as if I had been continuously employed* in the civilian job, during the year that I was on active duty, with respect to civilian pension credit. Our civilian personnel office has told me that USERRA does not apply to the TSP. Is that correct?**

**A: It is true that USERRA does not apply to the TSP. Section 4318(a)(1)(B) of USERRA provides: “In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those provided in section 8432b of title 5 [of the United States Code]. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.” 38 U.S.C. 4318(a)(1)(B).<sup>2</sup> Thus, your pension rights are governed by section 8432b<sup>3</sup> and not by USERRA. Your rights under section 8432b are very similar to and in at least one respect more generous than under USERRA.**

Subsection (a) of section 8432b provides: “This section applies to any employee [federal employee covered by FERS] who—(1) separates [from federal civilian service] or enters leave-without-pay status in order to perform

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<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 890 articles by Captain Wright and other attorneys about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

<sup>2</sup> This citation refers to section 4318(a)(1)(B) of title 38 of the United States Code (U.S.C.). The U.S.C. has 49 titles (broad subject areas). All federal laws of continuing importance are incorporated in the appropriate title of the U.S.C.

<sup>3</sup> Section 8432b should be distinguished from section 8432(b) of title 5. Within a title of the U.S.C., the sections are numbered consecutively. Some titles are very crowded, and that has necessitated assigning numbers like 8432a and 8432b between section 8432 and section 8433. Section 8432(b) is subsection (b) of section 8432. Section 8432b is a separate section.

military<sup>4</sup> service and (2) is subsequently restored to or reemployed in a position which is subject to this chapter, pursuant to chapter 43 of title 38 [USERRA]." 5 U.S.C. 8432b(a).

As I explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary uniformed service. It is clear that you did this.
- b. You must have given the employer prior oral or written notice, unless giving such notice was precluded by military necessity or otherwise impossible or unreasonable. You gave such notice.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service relating to the employer relationship for which you seek reemployment. Because your most recent period of service was involuntary, it does not count toward your five-year limit. Please see Law Review 201.
- d. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. 38 U.S.C. 4304. You did not receive a disqualifying bad discharge.
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer. Because your period of service was more than 180 days, you had 90 days to apply for reemployment, after release from service. 38 U.S.C. 4312(e)(1)(D). It is clear that you applied for reemployment and returned to work well within that deadline.

**Q: I clearly met those five conditions, and I have returned to work at the federal agency. What am I entitled to under section 8432b?**

**A:** Under section 8432b(b), you are entitled to make make-up contributions to your TSP account. You may contribute up to the maximum amount that you *would have contributed*<sup>5</sup> if you had remained continuously employed by the federal agency during the period of time when you were away from work for service<sup>6</sup> reduced by any contributions that you did in fact make to your TSP account during such period of service.<sup>7</sup> If you make those make-up contributions, the federal agency employer is required to match your contributions, as if you had made them during the time when you were away from work for service. 5 U.S.C. 8432b(c).

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<sup>4</sup> It would be better if section 8432b used the word "uniformed" instead of "military." The word "military" is not used in USERRA and is not defined in section 8432b. The word "military" as ordinarily used refers to the armed forces, and our nation has five armed forces (Army, Navy, Marine Corps, Air Force, and Coast Guard). As is explained in Law Review 46 (June 2002), USERRA covers "service in the uniformed services" and for USERRA purposes the uniformed services are the five armed forces plus the commissioned corps of the Public Health Service (PHS). The commissioned corps of the National Oceanic & Atmospheric Administration (NOAA) is a "uniformed service" as defined by 10 U.S.C. 101(a)(5) but not as defined by USERRA. Please see Law Review 52 (September 2002).

<sup>5</sup> Under 5 U.S.C. 8432(a)(2), a federal employee who is participating in the TSP is permitted to contribute up to 100% of his or her federal salary to the TSP account. Even if you were only contributing a minimal amount to TSP before your military service, you can increase the amount now that you have returned to work following your period of service.

<sup>6</sup> "For purposes of any computation under this section, an employee shall, with respect to the period referred to in subsection (b)(2)(B) [the military service period], be considered to have been paid at the rate which would have been payable over such period had such employee remained continuously employed in the position which such employee last held before separating or entering leave-without-pay status to perform military service." 5 U.S.C. 8432b(e).

<sup>7</sup> Under 5 U.S.C. 6323, you are entitled to 15 workdays of paid military leave per fiscal year, and you can use this paid leave during a long-term period of military service. Perhaps during your months or years of military service you were paid this paid military leave, and perhaps you made TSP contributions out of that payment.

**Q: Now that I have returned to work following military service, how long do I have to make up the missed employee contributions to my TSP account?**

**A:** “The employing agency [your employer] may place a maximum limit on the period of time referred to in subparagraph (B) [the time within which you make up the missed contributions], which cannot be shorter than two times the period referred to in paragraph (2)(B) [the period that you were away from work for service] and not longer than four times such period.” 5 U.S.C. 8432b(b)(4)(B).

**Q: You said that section 8432b provides better rights to the returning service member in at least one particular. How is that?**

**A:** “The employing agency may be required to pay lost earnings on contributions made pursuant to subsection (c) and (d). Such earnings, if required, shall be calculated retroactively to the date the contribution would have been made had the employee not separated or entered leave without pay status to perform military service.” 5 U.S.C. 8432b(f)(1).

Let's take your situation as an example. You were away from work for military service from April 1, 2012 to March 31, 2013. During that one-year period, the stocks in your TSP account would have paid dividends and those stocks also likely would have appreciated in value, because the stock market as a whole rose substantially during that period. The TSP Executive Director will calculate what you lost, in earnings for your TSP account, because you were away from work from April 1, 2012 to March 31, 2013 and your employing agency will be required to pay that amount into your account.

Section 4318 of USERRA (38 U.S.C. 4318) governs the pension rights of employees returning to civilian jobs after military service, except that the TSP is excluded from USERRA and governed by 5 U.S.C. 8432b. In a private sector defined contribution pension plan, the employer is not required to compensate the returning veteran for the earnings that his or her pension account lost because of the period of military service. *See* 38 U.S.C. 4318(b)(1) (“earnings and forfeitures shall not be included”). In this important respect, section 8432b is better than USERRA.

**Q: Where do I go for more information about the TSP and military service?**

**A: Contact:**

Mr. Greg Long  
Executive Director  
Thrift Savings Plan  
P.O. Box 385021  
Birmingham, AL 35238

877-968-3778

<https://www.tsp.gov/index.shtml>

For your reference, here is the entire text of 5 U.S.C. 8432b:

**5 USC § 8432B - CONTRIBUTIONS OF PERSONS WHO PERFORM MILITARY SERVICE**

**(a)** This section applies to any employee who—

**(1)** separates or enters leave-without-pay status in order to perform military service; and  
**(2)** is subsequently restored to or reemployed in a position which is subject to this chapter, pursuant to chapter 43 of title 38.

**(b)**

**(1)** Each employee to whom this section applies may contribute to the Thrift Savings Fund, in accordance with this subsection, an amount not to exceed the amount described in paragraph (2).

(2) The maximum amount which an employee may contribute under this subsection is equal to—  
(A) the contributions under section 8432(a) which would have been made, over the period beginning on date of separation or commencement of leave-without-pay status (as applicable) and ending on the day before the date of restoration or reemployment (as applicable); reduced by

(B) any contributions under section 8432(a) or 8440e actually made by such employee over the period described in subparagraph (A).

(3) Contributions under this subsection—

(A) shall be made at the same time and in the same manner as would any contributions under section 8432(a);

(B) shall be made over the period of time specified by the employee under paragraph (4)(B); and

(C) shall be in addition to any contributions then actually being made under section 8432(a).

(4) The Executive Director shall prescribe the time, form, and manner in which an employee may specify—

(A) the total amount such employee wishes to contribute under this subsection with respect to any particular period referred to in paragraph (2)(B); and

(B) the period of time over which the employee wishes to make contributions under this subsection.

The employing agency may place a maximum limit on the period of time referred to in subparagraph (B), which cannot be shorter than two times the period referred to in paragraph (2)(B) and not longer than four times such period.

(c)

(1) If an employee makes contributions under subsection (b), the employing agency shall make contributions to the Thrift Savings Fund on such employee's behalf—

(A) in the same manner as would be required under section 8432(c)(2) if the employee contributions were being made under section 8432(a); and

(B) disregarding any contributions then actually being made under section 8432(a) and any agency contributions relating thereto.

(2) An employee to whom this section applies is entitled to have contributed to the Thrift Savings Fund on such employee's behalf an amount equal to—

(A) the total contributions to which that individual would have been entitled under section 8432(c)(2), based on the amounts contributed by such individual under section 8440e (other than under subsection (d)(2) thereof) with respect to the period referred to in subsection (b)(2)(B), if those amounts had been contributed by such individual under section 8432(a); reduced by

(B) any contributions actually made on such employee's behalf under section 8432(c)(2) (including pursuant to an agreement under section 211(d) of title 37) with respect to the period referred to in subsection (b)(2)(B).

(d) An employee to whom this section applies is entitled to have contributed to the Thrift Savings Fund on such employee's behalf an amount equal to—

(1) 1 percent of such employee's basic pay (as determined under subsection (e)) for the period referred to in subsection (b)(2)(B); reduced by

(2) any contributions actually made on such employee's behalf under section 8432(c)(1) with respect to the period referred to in subsection (b)(2)(B).

(e) For purposes of any computation under this section, an employee shall, with respect to the period referred to in subsection (b)(2)(B), be considered to have been paid at the rate which would have been payable over such period had such employee remained continuously employed in the position which such employee last held before separating or entering leave-without-pay status to perform military service.

(f)

(1) The employing agency may be required to pay lost earnings on contributions made pursuant to subsections (c) and (d). Such earnings, if required, shall be calculated retroactively to the date the contribution would have been made had the employee not separated or entered leave without pay status to perform military service.

(2) Procedures for calculating and crediting the earnings payable pursuant to paragraph (1) shall be prescribed by the Executive Director.

(g) Amounts paid under subsection (c), (d), or (f) shall be paid—

(1) by the agency to which the employee is restored or in which such employee is reemployed;

(2) from the same source as would be the case under section 8432(e) with respect to sums required under section 8432(c); and

(3) within the time prescribed by the Executive Director.

**(h)**

**(1)** For purposes of section 8432(g), in the case of an employee to whom this section applies—  
**(A)** a separation from civilian service in order to perform the military service on which the employee's restoration or reemployment rights are based shall be disregarded; and  
**(B)** such employee shall be credited with a period of civilian service equal to the period referred to in subsection (b)(2)(B).

**(2)**  
**(A)** An employee to whom this section applies may elect, for purposes of section 8433(d), or paragraph (1) or (2) of section 8433(h), as the case may be, to have such employee's separation (described in subsection (a)(1)) treated as if it had never occurred.  
**(B)** An election under this paragraph shall be made within such period of time after restoration or reemployment (as the case may be) and otherwise in such manner as the Executive Director prescribes.  
**(i)** The Executive Director shall prescribe regulations to carry out this section.