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**CSRS and USERRA**

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1.3.2.3—Pension credit for service time

**Q: I am a retired Army Reserve Colonel and a life member of ROA. I was born in January 1953. I turned 60 in January 2013 and started drawing my Army Reserve retired pay.**

**In May 1975, I received my college degree and simultaneously my commission as an Army Second Lieutenant, through the Army Reserve Officers Training Corps (ROTC). I served on active duty until May 1980, when I left active duty and affiliated with the Army Reserve. I served until May 2005, when I retired with 30 years of commissioned service. I was a "gray area retiree" until I turned 60 in January of this year.**

**When I left active duty in 1980, I took a federal civilian job for the Department of the Army. I have been a federal civilian since 1980, for several different departments and agencies. When I began my federal civilian career in 1980, I purchased federal civilian retirement credit for the five years (1975-80) that I had served on active duty.**

**In the 1980s, my Army Reserve service was limited to one weekend of inactive duty training (drills) per month and two weeks annual training per year. In September 1990, a month after Saddam Hussein's Iraq invaded and occupied Kuwait, I was called to active duty and deployed to Saudi Arabia. I participated in the protection of Saudi Arabia and the liberation of Kuwait. In July 1991, I was released from active duty and returned to my federal civilian job. In the late 1990s, my federal civilian career was interrupted twice for two tours of duty in the former Yugoslavia. In 2003, near the end of my military career, I was called to the colors one final time. I participated in the invasion of Iraq and the triumphant quick march into Baghdad. In January 2004, I was released from active duty and returned yet again to my federal civilian job.**

**I am not yet ready to retire from my federal civilian job, but I am starting to think about how much my monthly check will be. I have read with interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the "escalator principle." As I understand what you have written, I am entitled to be treated *as if I had been continuously employed* in my federal civilian job during each of the periods (drill weekends, annual training tours, and four involuntary call-ups) when I was away from work for military training and service. Is that correct?**

**A:** Yes.

As I explained in Law Review 104[1] and other articles, Congress enacted USERRA[2] in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA). The VRRA was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II.

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 891 articles 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. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

[2] Public Law 103-353, signed into law by President Clinton on October 13, 1994.

In its first case construing the VRRA,[3] the Supreme Court enunciated the "escalator principle" when it held: "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."

In 1977, the Supreme Court applied the escalator principle to pension benefits under a defined benefit plan.[4] Like CSRS, the Alabama Power Company's pension plan was a defined benefit plan, not a defined contribution plan. The distinction is important.

In a defined benefit plan, the employer is defining (guaranteeing) you a benefit. An established formula (considering factors such as your number of years of service with the employer and your highest or average compensation) will determine the amount of your monthly pension check in retirement. In a defined benefit plan, unlike a defined contribution plan, there is not an account for each individual employee participant. There should be a funding mechanism in place to pay for these benefits, but in a defined benefit plan the employer is responsible for paying more money in as necessary to pay the defined benefits.[5]

In a defined contribution plan, on the other hand, there is an individual account for each participant, whether working or retired. Employer contributions (and sometimes employee contributions as well) are put into the account, and the employer is defining or guaranteeing only what it will pay into the account, not what the ultimate benefit will be. In a defined contribution plan, the amount of money available for the employee in his or her retirement years depends upon how much money was put into the account along with how well the investments perform during the employee's lifetime.

Raymond E. Davis worked for the Alabama Power Company from Aug. 16, 1936, until June 1, 1971, when he retired. His long career with the company was interrupted by 30 months of World War II active duty, from March 1943 until September 1945, when he was honorably discharged at the end of the war.

On July 1, 1944, while Mr. Davis was on active duty, the company established a defined benefit pension plan that rewarded company service both before and after that date. When the company computed Mr. Davis' monthly pension entitlement upon his retirement in 1971, the company excluded the 30 months that he was away from work for military service. This exclusion cost Mr. Davis $18 per month in pension benefits.

Mr. Davis sued, claiming that he was entitled to pension credit for his military service time under the "escalator principle" enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The District Court ruled in his favor. *Davis v. Alabama Power Co.,* 383 F. Supp. 880 (N.D. Ala. 1974). The employer appealed, and the Court of Appeals affirmed the District Court's judgment in a brief *per curiam* decision. *Davis v. Alabama Power Co.,* 542 F.2d 650 (5th Cir. 1976).

The Supreme Court granted *certiorari* and affirmed, in a unanimous decision written by Justice Thurgood Marshall. The Court held that Mr. Davis was entitled to pension credit for the 30 months that he was away from work for military service, because the pension benefit met the two-pronged test as a perquisite of seniority. A pension benefit is intended to be a reward for length of service rather than a form of short-term compensation for services,

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[3] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946). This citation means that you can find the *Fishgold* case in Volume 328 of *United States Reports,* starting on page 275. Please see Law Review 803 (January 2008) for a detailed discussion of *Fishgold* and its implications.

[4] *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). Please see Law Review 915 (April 2009) for a detailed discussion of this case.

[5] In the private sector, defined benefit plans (which are rare today in the private sector) are insured by the Pension Benefit Guaranty Corporation (PBGC), which was established by the Employee Retirement Income Security Act (ERISA) and is administratively part of the United States Department of Labor. Defined benefit plans for employees of state and local governments are often woefully underfunded and their long-term solvency is a matter of great concern.

and it is reasonably certain that Mr. Davis would have received the 30 months of pension credit if his career with the company had not been interrupted by military service.

In *Alabama Power,* the Supreme Court declined to decide how (if at all) the escalator principle applies to defined contribution plans.[6] The application of the VRRA to defined contribution plans is still very much an open question, but section 4318 of USERRA (enacted in 1994) applies to both defined benefit plans and defined contribution plans, although somewhat less generously in the case of defined contribution plans.

USERRA was enacted on October 13, 1994, and it went into effect 60 days later (December 12, 1994). Under the VRRA (for periods of military training or service that ended prior to December 12, 1994) and under USERRA (for periods that ended on or after that date), you are entitled to be treated *as if you had been continuously employed in your federal civilian job* during each of the periods (short or long) that you were away from work, provided you meet the VRRA or USERRA (as applicable) eligibility criteria for reemployment after each of these periods.

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 the civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services (active duty, active duty for training, inactive duty training, initial active duty training, funeral honors duty, etc.).
b. You must have given prior oral or written notice to the civilian employer, unless giving such notice was precluded by military necessity or otherwise impossible or unreasonable.
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.[7]
d. You must have been released from the period of service without having received a disqualifying bad discharge, like a dishonorable discharge, a bad conduct discharge, or an other-than-honorable discharge.
e. You must have been timely in reporting back to work or applying for reemployment after release from the period of service.

Under the VRRA, the conditions were similar but not identical. Under that law, there was no prior notice requirement before leaving a civilian job for active duty, but the reservist or National Guard member was required to "request a leave of absence" for active duty for training or inactive duty training. Under the VRRA, there was a four-year limit on active duty, but active duty for training and inactive duty training did not count toward the limit. Your 1990-91 involuntary active duty for *Operation Desert Shield/Storm* did not count toward your four-year limit under the VRRA or your five-year limit under USERRA.

It seems clear that you have met the VRRA and USERRA requirements for all of the periods that you have been away from work for military training or service. As you prepare for your federal civil service retirement, you should ensure that your personnel record shows that you have *continuous federal service for retirement purposes* for the entire period since you began your federal civilian career in 1980. None of your drill weekends, annual training periods, or longer periods of military service have interrupted your continuous accumulation of federal civilian pension credit, under CSRS.

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[6] It is the custom of the Supreme Court and other courts to decide only those legal questions that must be decided to determine the outcome of the case.

[7] Please see Law Review 201 for a detailed summary of the five-year limit, including what counts and what does not count. There are nine exemptions from the limit—kinds of service that do not count toward exhausting an individual's limit. Your many periods of active duty for training (annual training) and inactive duty training (drills) do not count toward your limit, and your three periods of involuntary active duty (two in the late 1990s in former Yugoslavia and one in 2003 in Iraq) are also excluded.

Because you purchased federal civilian retirement credit for your 1975-80 active duty period when you began your federal civilian career in 1980, you are also entitled to credit for that period of service, in determining your monthly pension benefit under CSRS. I invite your attention to the Office of Personnel Management (OPM) pamphlet titled "Military Service Credit under the Civil Service Retirement System." You can find that pamphlet on the Internet at http://www.opm.gov/retirement-services/publications-forms/pamphlets/ri83-2.pdf.

CSRS is something of an odd duck, in that it is a *contributory* defined benefit plan, meaning that individual employees as well as the employer contribute to the funding mechanism. When you returned to work after the four lengthy military service periods you should have been asked to make up missed CSRS payments. If you have not already made up the missed contributions, you will need to do so before you retire from federal service.[8]

**Q: The personnel officer at my federal agency told me that I cannot receive federal civilian retirement credit under CSRS for these periods of service because I am using those same periods of service to qualify me for my military retirement, which I started receiving when I turned 60 in January 2013. Is the personnel officer correct?**

**A:** No. The personnel officer is confusing *regular* military retirement (based on 20 years or more of full-time active duty) with *reserve component* military retirement under chapter 1223 of title 10 of the United States Code.

I invite your attention to page 1 of the OPM pamphlet titled "Military Service Credit under the Civil Service Retirement System": "[Y]ou cannot receive credit for any military service if you receive military retired pay *unless* you were awarded retired pay (a) on account of a service-connected disability either incurred in combat with an enemy of the United States or caused by an instrumentality of war and incurred in the line of duty during a period of war, or (b) *under the provisions of Chapter 67, Title 10, U.S.C. (pertaining to retirement from a reserve component of the Armed Forces).*"[9] (Emphasis supplied.)

I invite your attention to section 12736 of title 10, which provides:

"No period of service included wholly or partly in determining a person's right to or the amount of retired pay *under this chapter* [Chapter 1223 deals with 'retired pay for nonregular service'] may be excluded in determining his eligibility for any annuity, pension, or old-age benefit under any other law, *on account of civilian employment by the United States* or otherwise, or in determining the amount payable under that law, if that service is otherwise properly credited under it." 10 U.S.C. 12736 (emphasis supplied).

Regular military retirement (based on 20 years or more of full-time service) dates from the Civil War. The system of awarding retired pay at age 60[10] only dates back to 1948. Here at ROA headquarters, in the treasured Minuteman Memorial Building, we have the pen that President Harry S. Truman used to sign Public Law 80-810 on June 29, 1948. Creation of the reserve component retirement system is one of ROA's many great accomplishments on behalf of reserve component members, enlisted as well as officer.

Because of section 12736, you are clearly entitled to use the same periods of military service in qualifying for reserve component retirement (which you are already receiving since your 60th birthday) and CSRS retirement, which you will start receiving in just a few months or years.

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[8] There probably will be no need to make up contributions for your many periods of inactive duty training and annual training. Your inactive duty training (drill) periods were likely on weekends and did not affect your pay for those pay periods. You probably used paid military leave under 5 U.S.C. 6323 or perhaps annual leave for your annual training periods.

[9] Chapter 67 of title 10 was later renumbered as Chapter 1223. This is the chapter that provides for retirement benefits at age 60 for at least 20 "good years" of reserve component service.

[10] Reserve component members who have "contingency service" after January 28, 2008 can qualify to start receiving this reserve component retirement some months prior to their 60th birthdays under certain circumstances. Please see Law Review 1007 (January 2010).