

DOJ and NYPD Settle USERRA Class Action Lawsuit

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

1.1.1.7—USERRA applies to state and local governments

1.3.2.3—Pension credit for service time

1.4—USERRA enforcement

I am pleased to announce the settlement of an important lawsuit filed under the Uniformed Services Employment and Reemployment Rights Act (USERRA). As I explained in Law Review 1283¹ (August 2012), the United States Department of Justice (DOJ), through the United States Attorney for the Southern District of New York (USASDNY), sued the City of New York, the New York Police Department (NYPD), and the New York City Police Pension Fund (NYCPPF). The lawsuit was filed on August 2, 2012, in the United States District Court for the Southern District of New York.² The named plaintiffs are three retired NYPD officers, but this is a class action—the named plaintiffs represent all retired NYPD officers who performed military service that interrupted their NYPD careers on or after September 11, 2001.³

In this lawsuit, the USASDNY alleged, on behalf of the three named plaintiffs and the class that they represent, that the three defendants violated section 4318 of USERRA⁴ with respect to the computation of police department pension benefits.

To understand the issues in this lawsuit, let us consider the hypothetical but realistic Officer Francis Muldoon, Jr. of the NYPD. Muldoon joined the NYPD as a rookie in 1984 and retired 25 years later, in 2009. He was also a member of the Coast Guard Reserve, and his NYPD career was interrupted several times by periods of voluntary and involuntary military service, under title 10 and title 14 of the United States Code.

Muldoon met the eligibility criteria under USERRA in that he gave prior notice to the NYPD before each period and served honorably during each period of service.⁵ He did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to his employment relationship with the NYPD.⁶ After each period of uniformed service, Muldoon was timely in reporting back to work or applying for reemployment with the NYPD, and he did return to work after each period.

Because Muldoon met the USERRA eligibility criteria for each period of uniformed service, the City must treat him *as if he had been continuously employed* by the NYPD during each period of service, for purposes of determining his eligibility for the NYPD pension and determining the amount of his monthly pension check. See 38 U.S.C. 4318.

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 911 articles about 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, and we have already added another 88 in 2013.

² Part of New York City is located in the Eastern District of New York, but this lawsuit pertains to all NYPD officers and retirees, regardless of where within the City they serve or served.

³ Yes, there are some active NYPD officers and many NYPD retirees who interrupted their civilian careers to perform voluntary or involuntary military service prior to September 11, 2001, but reasons of practicality suggest that there is a limit on how far back we can apply these principles. September 11, 2001 is an appropriate date to use—it is the "date that will live in infamy" for our generation.

⁴ 38 U.S.C. 4318.

⁵ The effective date of USERRA (Public Law 103-353) is December 12, 1994. As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. Under the VRRA and the USERRA transition rules, Muldoon is entitled to NYPD pension credit for military service periods prior to the effective date of USERRA. Please see Law Review 12103 (October 2012).

⁶ In accordance with section 4312(c) of USERRA, 38 U.S.C. 4312, all involuntary service periods of some voluntary service periods are exempted from the computation of Muldoon's five-year limit. Please see Law Review 201 (August 2005) for a definitive discussion of what counts and what does not count in computing an individual's five-year limit.

For example, let us assume that Muldoon was away from work for military service for all of calendar year 2007—he was called to duty on January 2 and released on December 31. The NYPD needs to come up with a reasonable estimate of what Muldoon *would have earned* in 2007 if he had not been called to the colors.⁷ Under the City's pension formula for police officers, Muldoon's NYPD earnings or imputed earnings for 2007 will have a major impact on the computation of his NYPD pension, as of his retirement in 2009.

The problem is that the City calculated Muldoon's NYPD pension based on Muldoon's *base pay only* in 2007. The City did not calculate the overtime compensation and night shift differential compensation that Muldoon would have received, with reasonable certainty, if he had not been called to the colors. That number can be reasonably estimated, based on Muldoon's overtime compensation and night shift differential compensation in 2006 and 2008 and based on the overtime and differential compensation that other similarly situated NYPD officers received in 2007. Excluding this compensation from the computation of Muldoon's NYPD pension will mean that he is shortchanged each month for the rest of his life.

On June 17, 2013, this lawsuit was settled, at least preliminarily. The two named signatories are the Honorable Preet Bharara⁸ and the Honorable Michael A. Cardozo.⁹ Assistant United States Attorney Tara M. LaMorte signed for Mr. Bharara and Assistant Corporation Counsel Keri M. McNally signed for Mr. Cardozo.

I am most pleased with the settlement. Active NYPD officers will receive proper credit for all periods of military service after the date that the settlement becomes final, and they will have the opportunity to request corrections for periods of military service between September 11, 2001 and the settlement date. NYPD retirees will receive corrected (higher) monthly pension checks going forward from the date that the settlement is finalized, and they will also receive back pay (with 3% interest) from the date of retirement to the date of settlement.

If you are a member of the certified class, you will receive notice of the settlement by mail. If you are uncertain as to whether New York City has your correct mailing address, this would be a good time to provide the correct address. If you are a current NYPD officer, there is nothing that you need to do to preserve your rights and you will not receive written notice.

When you receive the notice, you will have the opportunity to object to the settlement or to opt out of the class altogether. Unless you have a unique factual situation that I cannot presently envision, I cannot imagine why you would want to opt out or object.

If you believe that you are directly affected by this lawsuit, and if you have questions or concerns, you may call the USASDNY's Civil Rights Unit Complaint Line at (212) 637-0840 or e-mail the USASDNY at usany.userra@usdoj.gov. You may also call me at 800-809-9448, extension 730, or e-mail me at SWright@roa.org. I am available during regular business hours and until 10 pm Eastern on Mondays and Thursdays.¹⁰

As I explained in Law Review 12104 (October 2012), the United States Attorney for the Southern District of New York expanded his investigation to include employees of other New York City departments (other than the NYPD) who interrupted their civilian careers for military service. As part of this settlement agreement, New York City's Corporation Counsel and the NYPD and the NYCPPF have agreed to notify other New York City departments and pension funds of this lawsuit, the settlement, and the requirements of section 4318 of USERRA, and the settlement agreement provides a mechanism whereby each of the other New York City pension plans will come into compliance with USERRA. I am optimistic that other New York City employees and retirees will soon benefit from changes in policy and practice, to bring policies and practices into compliance with USERRA.

⁷ If Muldoon's imputed earnings for 2007 are not reasonably determinable, the calculation must be made based on Muldoon's NYPD earnings in calendar year 2006. See 38 U.S.C. 4318(b)(3)(B). Under the settlement agreement, the default number for imputed earnings will be the actual earnings for the 12-month period before the period of uniformed service. If Muldoon can show that his earnings for 2007 would have been greater than his actual earnings in 2006, he will have the opportunity to make that showing and get the additional benefit.

⁸ Mr. Bharara is the United States Attorney for the Southern District of New York, appointed by President Obama, with Senate confirmation.

⁹ Mr. Cardozo is the Corporation Counsel for the City of New York.

¹⁰ The point of the evening availability is to encourage Reserve and National Guard personnel to call me from the privacy of their own homes, outside their civilian work hours. If you are calling to complain about your employer and to seek advice and assistance in dealing with the employer, I strongly recommend that you *not* use the employer's telephone, computer, or time.

I congratulate the Honorable Preet Bharara, the United States Attorney for the Southern District of New York, and Assistant United States Attorneys Tara M. LaMorte and Arastu K. Chaudhury for bringing this lawsuit and achieving this settlement. I also congratulate the Veterans' Employment and Training Service of the United States Department of Labor for investigating this case and referring it to DOJ.¹¹

¹¹ The Honorable Keith Kelly is the new Assistant Secretary of Labor for Veterans' Employment and Training, appointed by President Obama with Senate confirmation.