

You Must Track Your Five Year Limit

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

1.3.1.2—Character and duration of service

Q: I am a Major in the Army Reserve and a life member of ROA. I am a nurse in the Army and also as my civilian profession. In early 2004, I took a job as a nurse for the United States Department of Veterans Affairs (VA). I had never worked for the Federal Government, as a civilian, prior to 2004.

In August 2008, I signed up for a three-year Active Guard and Reserve (AGR) tour in the Army. When that three-year period ran out in August 2011, I agreed to remain on active duty indefinitely. I informed the VA in August 2008, before I left my job for the AGR tour, and in August 2011 I informed the VA of my extension on active duty.

Before I agreed to remain on active duty past August 2011, I inquired of a VA attorney (or at least I thought that he was an attorney) about whether I could remain on active duty and still get my VA job back. I asked because I had heard something about there being a limit on the duration of active duty. He told me that there is a five-year limit, but the limit does not apply during wartime, so I could remain on active duty indefinitely and still get my job back at the VA. I relied on that advice when I decided to renew my AGR tour past August 2011.

Yesterday, I received a letter from the VA telling me that my five-year limit runs out on August 11, 2013, and that I must be off active duty by that date to have the right to reemployment at the VA. I contacted my Army personnel office and inquired about leaving active duty on an expedited basis. The personnel officer told me that the earliest I can possibly leave active duty would be sometime in November. Help!

A: At this point, there is nothing that you can do. I wish that you had contacted me months ago, when there was still time to get you off active duty before your five-year limit expired. I am writing this article as a word-to-the-wise for others in your situation.

As I explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA):

- a. You must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. You must have given the employer prior oral or written 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.
- d. You must have been released from the period of service without having received a disqualifying bad discharge.
- e. You must have made a timely application for reemployment, after release from the period of service.

As I explained in Law Review 201 and other articles, there are nine exemptions from the five-year limit—certain kinds of service do not count toward the limit. I have talked to Reserve service members who have been on active duty for ten years without going over the five-year limit, because of the exemptions. But voluntary AGR duty, as you have been performing since August 2008, is not exempt from the limit.

Even if we assume that you used none of the five-year limit between early 2004 (when you began your federal civilian career) and August 2008 (when you began your AGR tour), your five-year clock started running on August 12, 2008, and the alarm goes off on August 11, 2013. Since there is no way for you to be released from active duty by that date, there is no way for you to have reemployment rights with the VA. You must meet all five of the reemployment conditions, including the five-year limit, to have the right to reemployment.

Q: It is not fair! Back in August 2011 a VA lawyer (whose name I do not recall) told me that the five-year clock does not run during wartime, and that we are in wartime. I relied on that advice when I decided to stay on active duty past August 2011. The VA should be bound by what this lawyer told me on the telephone.

A: Even if you had the name, and even if you had this advice in writing, on VA stationery, it would not matter. Every day, federal employees and military personnel give out “bum scoop.” In two important cases, the Supreme Court has held that the Federal Government is *not bound by incorrect advice* given by federal employees or officials. See *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990);¹ *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). I discuss the implications of these two cases in Law Review 1223 (March 2012), Law Review 1104 (January 2011), and Law Review 1008 (January 2010).

I invite your attention to www.servicemembers-lawcenter.org. You will find 918 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, and we have added another 96 so far in 2013.

I am here answering telephone calls and e-mails during regular business hours and until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to encourage

¹ The citation means that you can find this case in Volume 496 of *United States Reports*, starting on page 414.

Reserve Component personnel to call me from the privacy of their own homes, not from their civilian jobs. I receive and respond to 800 or more inquiries per month.

About half of the inquiries are about USERRA, and the other half are about everything that you can think of that has something to do with the military and law. I am particularly well qualified to address USERRA inquiries, as I have been dealing with the federal reemployment statute for more than 30 years. Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. I developed the interest and expertise in this law during the decade that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted USERRA.

We are doing everything in our power, given our limited resources, to get out critical information about USERRA and other laws to Reserve Component members like you *at a time when you can act on the information*. We do not have the power to turn back the hands of time.