

LAW REVIEW 13138

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USERRA Pension Credit for Military Service Beyond Five Years

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1.3.1.2—Character and duration of service

1.3.2.3—Pension credit for military service time

1.8—Relationship between USERRA and other laws/policies

Q: I am a Sergeant Major (E-9) in the Army National Guard. I recently joined ROA after you amended your constitution to expand membership eligibility to include noncommissioned officers.

For years, I have been reading your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).¹ Your very recent Law Review 13137 (October 2013) was especially helpful in understanding how USERRA applies to pension plan entitlements.

I began my career as a local police officer in October 1994, and my police officer career has been interrupted by several periods of involuntary and one term of voluntary active duty. I was called to active duty for one year, from June 1998 to June 1999, for service in the former Yugoslavia. I was called to active duty for two years, from March 2003 to March 2005, for service in Iraq. I served four years of voluntary Active Guard & Reserve (AGR) duty, from December 2008 to December 2012.

I think that I meet the USERRA eligibility criteria for reemployment after each of these three periods of service. In each case, I left my civilian job for service and gave prior written and oral notice to my civilian employer. I served honorably and was released from active duty without a disqualifying bad discharge from the Army. After each period, I applied for reemployment and returned to work within a week or two after leaving active duty.

I have been away from work for military service for a cumulative total of seven years, but I think that I am within the five-year limit under section 4312(c) of USERRA, 38 U.S.C. 4312(c). It is my understanding that my 1998-99 period (in former Yugoslavia) and my 2003-05 period (in Iraq) are exempt from the five-year limit, because those periods were involuntary. My

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 960 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. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 138 so far in 2013.

2008-12 voluntary AGR tour probably counts toward my five-year limit, but I still have one year of “head room” on my five-year limit because all my other periods of service have been exempt from the five-year limit.

I returned to work at the police department in December 2012, promptly after release from my AGR tour. I asked for USERRA pension credit for the four years of AGR duty, for purposes of the state pension plan for municipal police officers. The state pension office gave me only two years of credit for four years of service. The state office insists that there is an absolute maximum of five years of state pension credit that I can receive for military service. Is the state office correct?

A: No.

First, let me say that you are correct in your analysis of the five-year limit. Your 1998-99 period and your 2003-05 period do not count toward your five-year limit, because those periods were involuntary. *See 38 U.S.C. 4312(c)(4)(a).* At the end of your 2008-12 AGR tour, you had not exceeded your five-year limit with respect to your employer relationship with the police department.

Because you were entitled to reemployment in December 2012, and because you returned to work, you were entitled to be treated *as if you had been continuously employed* by the police department during the 2008-12 AGR tour. Section 4318 of USERRA applies *upon reemployment under this chapter* [USERRA]. There is no five-year limit on pension credit under section 4318.

As of this month (October 2013), you have 19 years of state pension credit for your police department employment, since you started your police career in October 1994. You are probably getting very close to eligibility for police department retirement.

Q: The lawyer at the state pension office insists that under state law there is an absolute maximum of five years of state pension credit for military service. What do you say about that?

A: The state law is irrelevant. You are entitled to this pension credit under USERRA, a federal law. Section 4302(b) of USERRA provides:

“(b)This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.”

38 U.S.C. 4302(b) (emphasis supplied).

Under Article VI, Clause 2 of the United States Constitution (commonly called the “Supremacy Clause”) a federal statute like USERRA supersedes a conflicting state statute or even a state

constitution. A state law cannot take away your right to state pension credit for military service under section 4318 of USERRA.

State officials in your part of the country sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.