

## LAW REVIEW 13142

### October 2013

#### Texas Teacher Retirement System PDF Gets USERRA Wrong

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

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

##### 1.8—Relationship between USERRA and other laws/policies

**Q:** In May 1990, I graduated from college and was commissioned a Second Lieutenant in the Army, via the Reserve Officers Training Corps (ROTC). I served on active duty for five years and was released in May 1995, when I affiliated with the Army Reserve. In September 1995, I started my career as a public school teacher in Texas.

My teaching career has been interrupted several times by periods of voluntary and involuntary military service and training. I was called to active duty for a year, along with my Army Reserve Civil Affairs unit, in 1998-99, for service in the former Yugoslavia. I was called for a year in 2004-05, for service in Iraq. I served a four-year voluntary Active Guard and Reserve (AGR) tour, from September 2007 to September 2011. Of course, I have also done inactive duty training and annual training, when not on full-time active duty.

I am a member of ROA, and I have read with great interest your “Law Review” articles<sup>1</sup> about the Uniformed Services Employment and Reemployment Rights Act (USERRA). In Law Review 13138 (October 2013), you wrote that under USERRA a civilian employer is required to give civilian pension credit for military service time that interrupts a civilian career and that under some circumstances the amount of credit may exceed five years. That issue is of great interest to me because I have already been away from my teaching job for more than six years and I am not ready to retire from the Army Reserve or from my teaching job.

I checked out the Texas Teacher Retirement System (TXTRS) website at <http://www.trs.state.tx.us/> and I found a very recent PDF dated August 31, 2013, stating that TXTRS retirement credit for military service may not, under any circumstances, exceed five years. What gives?

**A:** The TXTRS PDF is wrong, but frankly I am not surprised. It has been more than 40 years since Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973. With each passing year, a greater and greater percentage of the people who are in charge of

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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 964 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. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 142 so far in 2013.

things (including TXTRS) have never served in the military, and no one in their families have served, and they have no close friends who are serving or have served. They are clueless about military matters—they know about as much about U.S. military personnel as they know about residents of Zaire.

Under section 4318 of USERRA, you are entitled to be treated (for pension and seniority purposes) *as if you had been continuously employed in the civilian job, during the time you were away from work for service, upon reemployment under USERRA*. As I explained in Law Review 1281 (August 2012), you are entitled to reemployment under USERRA if you meet five simple conditions:

- a. You left your civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. You gave the employer prior oral or written notice that you would be away from work for service.
- c. You have not 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. More on this below.
- d. You were released from the period of service without having received a disqualifying bad discharge enumerated in section 4304 of USERRA, 38 U.S.C. 4304.
- e. After release from the period of service, you were timely in reporting back to work or applying for reemployment. After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

It seems clear that you have met these conditions with respect to each of the periods when you have been away from your civilian teaching job for military service, including the four-year voluntary AGR tour from September 2007 to September 2011. Under section 4312(c) of USERRA, there is a four-year cumulative limit on the duration of the period or periods of service, but there are also nine exemptions from the five-year limit. Section 4312(c) is as follows:

**“(c)** Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person’s cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

- (1)** that is required, beyond five years, to complete an initial period of obligated service;
- (2)** during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
- (3)** performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the

Secretary concerned [the Service Secretary, like the Secretary of the Army], to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is—

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.”

38 U.S.C. 4312(c).

I invite your attention to Law Review 201 (August 2005) for a detailed description of USERRA's five-year limit—what counts and what does not count. Your two involuntary unit call-ups (1998-99 and 2004-05) are exempted from the computation of your five-year limit with respect to your employer relationship with the school district and TXTRS. 38 U.S.C. 4312(c)(4)(A). Your inactive duty training and annual training periods are also exempted. 38 U.S.C. 4312(c)(3). Your four-year voluntary AGR tour counts toward the limit, but you have not exceeded the limit. Because you meet the five USERRA conditions for each period of service, you are entitled to TXTRS pension credit for each of these periods, although the cumulative total of the periods exceeds six years.

Going forward, you need to be very careful about any additional *voluntary* active duty, because you have used four years of your five-year limit. You are protected under USERRA for all your periods of Army Reserve training duty (annual training and inactive duty training) and for any additional *involuntary* call-ups.

The TXTRS PDF also is misleading in that it addresses “purchasing” USERRA retirement credit for the periods when I have been away from work for service. You are not required to “purchase” anything. Under section 4318 of USERRA, you are entitled to be treated *as if you had been continuously employed in the civilian job* during each of the periods when you were away from work for service.

The TXTRS website shows that TXTRS is a contributory defined benefit plan (DBP), financed by contributions from employees (individual teachers) and employers (local school districts in Texas). The individual teacher contributes 6.4% of his or her school district salary to TXTRS, by means of a payroll deduction from each paycheck.<sup>2</sup> The school district contributes an additional 6% of the individual teacher's salary. These employer and employee contributions are invested in safe and diversified investments, and the money set aside plus the earnings will likely be sufficient to pay the promised retirement benefits.

Because this is a DBP (rather than a defined contribution plan), the State of Texas is responsible for coming up with more money if (for whatever reason) the funds set aside plus the earnings thereon are insufficient to pay promised benefits. Many state public employee pension systems are woefully overpromised and underfunded, but TXTRS is in reasonably good financial condition.

Under section 4318(b)(2) of USERRA, you are required to make up the *missed employee contributions* to TXTRS, for the period of time that you were away from work for military service. You are only required to pay that which *you would have paid* (6.4% of your salary), and you are entitled to three times the period of service, but not more than five years, to make up these missed employee contributions without having to pay interest.

When you returned to work in September 2011, after your 2007-11 AGR tour, your school district and TXTRS should have set up a payroll deduction for you to make up the missed contributions for the 2007-11 period, on top of your ongoing resumed TXTRS contributions. The payroll deductions should have been set up in such a way that make-up contributions would be paid in full by September 2016, five years after you returned to work following military service. Like your ongoing TXTRS contributions, these make-up contributions should have been set up to be paid on a pre-tax basis. If this was not done, you need to insist that it be done now, before there is any further delay.

Under section 4318(c) of USERRA, 38 U.S.C. 4318(c), your local school district was required to notify TXTRS promptly of your reemployment, after you returned to work in September 2011, and the school district was required to make up its missed employer contributions, under section 4318(b)(1), 38 U.S.C. 4318(b)(1). I suspect that the local school district and TXTRS are ignorant of these requirements, but ignorance of the law is no excuse. If the school district has not made these payments, it should be required to do so now.

**Q: I spoke to a lawyer at TXTRS, and he 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?**

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<sup>2</sup> This is a pre-tax contribution. The individual teacher pays federal income tax on the salary amount *after the TXTRS deduction has been made*. This treatment saves the teacher a significant amount on his or her federal income tax, and Texas does not have a state income tax.

**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.

**Q: What about my 1990-95 active duty period? How does USERRA apply to that period?**

**A:** USERRA applies to a period of military service that *interrupts* your relevant civilian job. USERRA does not apply to the active duty that you performed before you began your teaching career in 1995. Moreover, that five-year period does not count toward your USERRA five-year limit.

You may be entitled to TXTRS credit for the 1990-95 period *under Texas law*.